

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DORETHA H. HENDERSON, AUTHORIZED   :

4   REPRESENTATIVE OF DAVID L.         :

5   HENDERSON, DECEASED,               :

6                   Petitioner                 :       No. 09-1036

7                   v.                                 :

8   ERIC K. SHINSEKI, SECRETARY OF       :

9   VETERANS AFFAIRS                         :

10  - - - - - x

11                                 Washington, D.C.

12                                 Monday, December 6, 2010

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14                   The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:03 a.m.

17 APPEARANCES:

18 LISA S. BLATT, ESQ., Washington, D.C.; on behalf of

19         Petitioner.

20 ERIC D. MILLER, ESQ., Assistant to the Solicitor

21         General, Department of Justice, Washington, D.C.; on

22         behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 09-1036, Henderson v.  
5 Shinseki.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE PETITIONER

9 MS. BLATT: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 The Federal circuit's decision in this case  
12 forecloses judicial review when the very disability for  
13 which a veteran seeks benefits prevents the veteran from  
14 filing a timely appeal with the Veterans Court. That  
15 decision is wrong, and for three reasons the court of  
16 appeals erred in holding that the deadline at issue in  
17 this case is jurisdictional.

18 First, the statute contains no clear  
19 indication that the deadline is jurisdictional. Rather,  
20 the text and structure points away from a jurisdictional  
21 reading.

22 Second, the deadline that applies to  
23 disabled and largely uncounseled veterans seeking their  
24 first day in court is not the type of deadline that  
25 Congress would be expected to rank as jurisdictional.

1                   And third, a jurisdictional reading would  
2   render some of the most disabled of veterans the least  
3   likely to obtain benefits and would treat veterans worse  
4   off than almost all litigants in our federal system.

5                   JUSTICE GINSBURG: Ms. Blatt, you do have a  
6   substantial hurdle to contend with in this Court's  
7   decision in Bowles v. Russell, which seemed to say if  
8   you have a time limit and it's statutory, it is  
9   mandatory and jurisdictional.

10                  So here, we have a time limit set by  
11   statute, not by rule, and why doesn't -- why isn't that  
12   dispositive?

13                  MS. BLATT: Because neither this Court's  
14   decision in Bowles nor any other decision by this Court  
15   holds that this type of an appeal from a pro-claimant  
16   and non-adversarial proceeding to a court of first  
17   review clearly speaks in jurisdictional terms,  
18   notwithstanding the lack of a jurisdictional label.

19                  JUSTICE SCALIA: Gee, I thought Bowles was a  
20   nice, clear case. I mean, you could always find some  
21   distinction in the next case, and I thought the object  
22   of Bowles was to say if it's a limit on appeal, it's  
23   jurisdictional. That would -- and that's, I gather,  
24   what the Federal circuit took it to mean. And I would  
25   have done that if I was down there, probably.

1           MS. BLATT: I can understand why maybe the  
2 Federal circuit did it, because of the one statement  
3 that the Court, I think, took out of context. But this  
4 Court's decision in Bowles didn't purport to extend to  
5 any statute, no matter what the statute said or what the  
6 context it arose in, and the most closely analogous  
7 context of an appeal of agency action to a court of  
8 first review is a Social Security context.

9           And even if you don't think that that  
10 context is directly on point, then the historical  
11 backdrop at most would be inconclusive, and that hardly  
12 would rise to the type of --

13           JUSTICE SCALIA: Doesn't the Social Security  
14 context -- it doesn't speak of an appeal, does it? It  
15 talks of a civil action.

16           MS. BLATT: That's right. I mean, it --

17           JUSTICE SCALIA: I mean, you're right that  
18 there is -- you know, there is a parallel in what's  
19 going on, but the statute does not call it an appeal.  
20 It calls it bringing a civil action to challenge the  
21 decision.

22           MS. BLATT: Right, and there is nothing  
23 inherently jurisdictional about the word "appeal." And  
24 Justice Scalia, if Congress that passed this statute  
25 wanted to pick up on the jurisdictional rule under 28

1 U.S.C. 2107, presumably it would have written a statute  
2 that looks something like that statute with the safety  
3 valves.

4 Of course, when a -- all litigants, civil  
5 litigants who are appealing a district court judgment to  
6 a Court of Appeals, they have a jurisdictional deadline,  
7 but the district court can extend it for good cause or  
8 excusable neglect or when the party lacks notice of an  
9 adverse judgment or, importantly, the Federal rules of  
10 appellate procedure. Here's a situation when a litigant  
11 timely files his appeal, but does so in the wrong form.

12 In this statute Congress knew how to  
13 incorporate the jurisdictional rule of Bowles. It did  
14 so in a separate provision of the statute in 7292(a).  
15 It said when a litigant wants to go from the Veterans  
16 Court and appeal that decision to the Federal circuit,  
17 the litigant has to follow the time and the manner  
18 prescribed for appealing district court judgments to  
19 Court of Appeals.

20 JUSTICE GINSBURG: And that is  
21 jurisdictional, 7292?

22 MS. BLATT: Yes. Yes. And interestingly,  
23 it also goes on to say if you want to appeal to this  
24 Court, you have to apply for certiorari. So Congress --

25 JUSTICE SOTOMAYOR: Counsel -- I'm sorry.

1 JUSTICE SCALIA: Go ahead.

2 JUSTICE SOTOMAYOR: I'm not sure why  
3 Congress would have actually known the difference that  
4 we established in Bowles, because when it passed this  
5 statute, it was before Bowles, wasn't it?

6 MS. BLATT: Yes.

7 JUSTICE SOTOMAYOR: So what to read of its  
8 knowledge of Bowles, whether it meant jurisdiction or  
9 not, is a bit of a fiction, isn't it?

10 MS. BLATT: No. I think what's important is  
11 that Bowles is relying on a series of decisions that had  
12 nothing to do with the word "notice of appeal," of  
13 course, because they were dealing with cases involving  
14 writs of error and petitions for a writ of certiorari.  
15 It was all in the context of court-to-court appeals.  
16 Bowles doesn't even mention agency appeal of agency  
17 action to a court of first review.

18 JUSTICE SOTOMAYOR: So what's the rule?  
19 Justice Scalia said those seem to establish a sensible,  
20 clear rule, which is if Congress uses the word "notice  
21 of appeal," it intends a jurisdictional restriction.  
22 That appears to be the rule that Justice Scalia  
23 articulated.

24 What would be your rule or test now to  
25 determine Congress's purpose? What -- what of our cases

1 would you point to that establishes different --

2 MS. BLATT: The rule of Reed Elsevier, which  
3 was a unanimous decision which says -- and it was  
4 written by the same author of Bowles -- that all the  
5 decisions are consistent. You require a clear statement  
6 of jurisdictional intent, and in Bowles, this Court had  
7 read the type of limitation that was at issue in Bowles  
8 as to clearly speak in jurisdictional terms,  
9 notwithstanding a label. Here, you have --

10 JUSTICE SOTOMAYOR: I'm not sure what that  
11 distinction is. I'm sorry.

12 MS. BLATT: You had a century --

13 JUSTICE SOTOMAYOR: What we wrote on was the  
14 word "notice of appeal" in Bowles, within a historical  
15 context.

16 MS. BLATT: I don't think this Court said  
17 the word "notice." Notice of appeal is not  
18 jurisdictional in the criminal context and Congress used  
19 the word "appeal" throughout this particular statute in  
20 a non-jurisdictional meaning in all the proceedings that  
21 go in the agency. It used the term "appellant" and  
22 "review on appeal." It's actually called the board of  
23 veterans appeal, substantive appeal. None of those  
24 words have "jurisdictional."

25 And if Congress was just thinking of the



1 word "notice of appeal," it -- I mean, the term has a  
2 non-jurisdictional meaning in the criminal context, but  
3 if you just look at this statute, which says -- it's  
4 directed just at the litigant's obligation to file his  
5 appeal within a certain timeline, and there's actually a  
6 completely separate statute that speaks to the power of  
7 the court, the Veterans Court, 7252(a), and that makes  
8 no reference to the 120-day deadline.

9 And I think in terms of the context,  
10 let's -- this is exactly the type of deadline that  
11 Congress would be expected to be subject to equitable  
12 tolling. Let me just give you the three reasons --

13 JUSTICE ALITO: You would have us make a  
14 statute-by-statute determination as to what we think  
15 Congress intended whenever it uses the term "notice of  
16 appeal." And perhaps that's not a big problem, if there  
17 are not a lot of other statutes like this one that use  
18 the term "notice of appeal" and with respect to which it  
19 is not settled whether it is jurisdictional.

20 Do you have any sense of how many others  
21 there might be?

22 MS. BLATT: Yeah. I think I found four that  
23 used the term "notice of appeal," and it was in  
24 connection with the district court, and they weren't  
25 even reported cases. They were very esoteric

1 situations, like an order from the Department of  
2 Agriculture. I mean, maybe the government has  
3 different.

4                   What you mostly see is the Hobbs Act  
5 context, where you are talking about either an organic  
6 statute or 28 U.S.C. 2344, which is just a simple  
7 petition for review. That doesn't even use the word  
8 "notice of appeal." So this case is not going to  
9 dictate a whole lot, except for the veterans context,  
10 where not only do you have the standard lack of  
11 indication that this is not a jurisdictional, but you  
12 have the unique features in that Congress established  
13 this Court to open the door to veterans seeking  
14 disability benefits, and it would just conflict with  
15 that purpose to, at the same time, shut the door when  
16 the veteran's disability prevents him from getting to  
17 the courthouse.

18                   JUSTICE SCALIA: Although that -- although  
19 that would happen when he appeals from the -- from the  
20 veterans' appeals court, right?

21                   MS. BLATT: Yes, but that points out the  
22 irony: He's in better off shape if he appeals to the  
23 court of appeals, because there, there's -- at least  
24 there's important exceptions.

25                   The government's position assumes that no

1 matter what the circumstances were -- and remember, a  
2 lot of these cases, the veteran is actually timely  
3 filing his appeal; he mistakenly files in the Veterans  
4 Administration rather than the Veterans Court -- and the  
5 government assumes that these uncounseled veterans are  
6 simply out of time and out of luck with no exception.

7 JUSTICE GINSBURG: How much time does 7292  
8 give to go from Veterans Court to the Federal circuit?

9 MS. BLATT: It says you have to follow the  
10 exact time and procedure that is set forth in the  
11 process for appealing a United States District Court  
12 decision to the United States courts of appeals, so it  
13 is the procedures under 28 U.S.C. 2107.

14 JUSTICE SCALIA: But this one to get to the  
15 Veterans Court is 120 days, which is a lot of time. Do  
16 you know of any other time limit that is that long?

17 MS. BLATT: Well, sure. I mean, the statute  
18 of limitations in Zipes, which is 180 days to file a  
19 charge with the EEOC. But in the veterans context --

20 JUSTICE SCALIA: No, for appeal. For  
21 appeal. Do you know of any other appeal statute --

22 MS. BLATT: Yes, the veteran's context.  
23 This is a blink of an eye in the veteran's context. The  
24 veteran is given an entire year -- not 120 days, a  
25 year -- after an initial decision comes down from a

1 regional office to decide whether to appeal to the  
2 boards of veterans' appeals.

3 And you have to keep in mind that this is  
4 the type of extra time we are talking about. An extra  
5 30 to 60 days would be an extremely poor and unlikely  
6 means for Congress to address the type of situation  
7 where equitable tolling might be needed, which is either  
8 because the secretary has held onto the notice of appeal  
9 until after the 120 days and then tells the veteran, or  
10 the veteran has some devastating mental illness and has  
11 difficulty with processing deadlines and dealing with  
12 concepts.

13 JUSTICE SCALIA: Well, the latter I can  
14 understand, but I don't have a whole lot of sympathy  
15 for -- I mean, when he loses below he gets a notice that  
16 says specifically he has to file an appeal with this  
17 Court, doesn't it? Doesn't it say that?

18 MS. BLATT: Yes, and it says --

19 JUSTICE SCALIA: So he sends it -- he sends  
20 it to the VA instead of to this Court?

21 MS. BLATT: Well, it is a -- you can look it  
22 up --

23 JUSTICE SCALIA: Would equitable tolling  
24 even cover that situation? It would seem to me -- I'd  
25 say it told you where to file; you simply didn't follow

1 the instructions.

2 MS. BLATT: Not only has the Federal circuit  
3 ruled en banc that it does, but this Court's decision in  
4 Irwin and in United States v. Young specifically  
5 recognized that a classic equitable tolling situation is  
6 when there is no prejudice to the other side and the  
7 litigant files in the wrong forum.

8 And you have to keep in mind, there is a  
9 Federal rule of appellate procedure on point. Rule 4(d)  
10 says when a litigant mistakenly files his notice of  
11 appeal in the court of appeals, that is presumed to be  
12 correctly filed in the district court. And whatever you  
13 think about what your -- what an average-type person  
14 might see when they see a two page single-spaced form  
15 with a lot of legalese, this form is difficult for a  
16 lawyer to read, and to expect -- the vast majority of  
17 the claimants reading this form are uncounseled and I  
18 urge you to read the form. It doesn't just say: You  
19 have 120 days to appeal. It goes on and on and on  
20 telling --

21 JUSTICE SCALIA: Is that --

22 MS. BLATT: It's cited in the Government's  
23 brief. It's got the VA form, and I had to look it up  
24 just by punching it in on the Internet.

25 But whatever you think about the clarity of

1 someone -- of your statute that might be able to  
2 understand it, time and time again, veterans file in the  
3 wrong forum. And it's not always just the veterans'  
4 fault. Sometimes the secretary is giving the veteran  
5 misleading advice. We cite cases in our brief, and so  
6 do the amici, where the Veterans' Administration is  
7 giving the veteran just misleading advice.

8 JUSTICE GINSBURG: Ms. Blatt, you are  
9 making -- you said that the closest comparison is in the  
10 Social Security, because there's disability benefits in  
11 both cases. Apart from one is commenced by a complaint  
12 of -- in the district court, the other, notice of  
13 appeal, is there any difference in the brand of rebuke  
14 that is -- as I understand, the Social Security review,  
15 although it is by the district court, is also on the  
16 administrative record.

17 MS. BLATT: Well, it's purely appellate, and  
18 district courts always say when they get these things:  
19 This is an appeal of the Social Security decision.

20 But I think the three reasons that I'm  
21 trying to get on why this is precisely the type of  
22 deadline that Congress would not rank as jurisdictional  
23 and would want to be subject to equitable tolling are  
24 the -- pretty much the reasons that apply even more so  
25 in the veterans' context.

1                   And that is the first: This is an extremely  
2    favored class of litigants. These are veterans who have  
3    fought for their country and who are seeking  
4    service-connected disability benefits.

5                   This is also the veterans' first opportunity  
6    to get to a court, which is true in the Social Security  
7    system. And importantly, the vast majority of veterans  
8    go to the court without counsel. The numbers are over  
9    50 to 70 percent. And that was true in the Social  
10   Security system.

11                  I don't think that --

12                  CHIEF JUSTICE ROBERTS: I appreciate all  
13    those points, but counting -- cutting, perhaps, the  
14    other way is that it's not a real adversarial system  
15    before you get to that stage. It's a collaborative  
16    effort, the Veterans' Administration and the -- the  
17    individual.

18                  MS. BLATT: That's right.

19                  CHIEF JUSTICE ROBERTS: Which seems to me  
20    may counterbalance a little bit the fact that the  
21    veterans are uncounseled.

22                  MS. BLATT: Well, I mean, up until 2006 they  
23    were actually barred from having lawyers.

24                  But this is the same thing as the Social  
25    Security context, which is what this Court relied on

1 unanimously in Bowen, in holding that it is not  
2 jurisdictional, and it is also what this Court relied on  
3 in Zipes, is that you wouldn't expect Congress to enact  
4 an inflexible, harsh, no exceptions whatsoever  
5 jurisdictional deadline when Congress presumably knew  
6 that the vast majority of people who would be navigating  
7 this system, coming out of this extremely informal  
8 adversarial system where the secretary had a duty to  
9 actually assist the veteran and then hitting what is  
10 then an adversarial system, and you would think that you  
11 would want equitable tolling.

12 JUSTICE SCALIA: They don't navigate it  
13 entirely on the system. I mean, isn't there usually  
14 assistance from a nongovernmental organization such as  
15 the American Legion or --

16 MS. BLATT: Yes, in the Veterans'  
17 Administration, not in Veterans' Court. So 50 to 70  
18 percent.

19 JUSTICE SCALIA: That's right.

20 Do they drop them like a hot potato once the  
21 VA portion is over? They don't counsel about how to  
22 file an appeal?

23 MS. BLATT: That's correct, but I wouldn't  
24 say they drop them like a hot potato. These are people  
25 who are sitting in the VA and they -- remember, like in



1    this case, it's three years later -- they don't even get  
2    notice of the final decision, which is just sent to the  
3    veteran. They don't have any kind of lawyer  
4    relationship.

5                   It's like someone at one of the VA offices  
6    says: Let me help you, tell you what to do, and then  
7    that's it. So no, they don't practice in Veterans'  
8    Court. They don't say, you know, Here's my card, let's  
9    keep in touch. And it might be three to four years  
10   later that a notice is sent to the veteran.

11                  JUSTICE SCALIA: And you think normally he  
12   is not assisted -- he is not assisted by one of these  
13   people?

14                  MS. BLATT: Well, I know that. The  
15   Veterans' Court's statistics says it's 70 percent. Pro  
16   se. No lawyer. And --

17                  JUSTICE SCALIA: I'm not talking about a  
18   lawyer. I'm talking about advice from somebody that's  
19   in the American Legion.

20                  MS. BLATT: They are still not lawyers, but  
21   the veterans' assisted organizations who filed in this  
22   case are telling you they don't participate in Veterans'  
23   Court. That's not what they do. They are set up in the  
24   VA system. So --

25                  CHIEF JUSTICE ROBERTS: I think -- unless I

1 am missing the point of my colleague's question, it's  
2 two different issues.

3 Of course they don't participate in the  
4 court. They are not lawyers. But it's not clear to me  
5 why they wouldn't participate at least in the process of  
6 saying, you've got to file your notice and here's where  
7 you file it. Are you saying they don't do that?

8 MS. BLATT: They by and large don't do that,  
9 and the veterans' organizations that filed an amicus  
10 brief say they also make the same mistake. They were  
11 not lawyers and they often file the wrong forum, too.  
12 But again --

13 CHIEF JUSTICE ROBERTS: They do it regularly  
14 and they -- every now and then they file it in the wrong  
15 place?

16 MS. BLATT: Yes. I mean, half the cases  
17 that we end up talking --

18 CHIEF JUSTICE ROBERTS: I don't see how that  
19 works. You've got somebody there and he has been  
20 telling them where to file it and file it and file it,  
21 and all of a sudden he tells him to file it someplace  
22 else?

23 MS. BLATT: Again, as far as I am aware,  
24 they don't counsel veterans after they make their final  
25 decision.

1 JUSTICE GINSBURG: Earlier you said that  
2 they wouldn't even know.

3 MS. BLATT: Right.

4 JUSTICE GINSBURG: So they don't get notice,  
5 only the veterans?

6 MS. BLATT: Right. They wouldn't get  
7 notice. It would be -- someone would have to have some  
8 sort of relationship and call that person. But in this  
9 case -- I mean, I can tell you there was no -- the  
10 veteran just had his wife and there was no one else  
11 involved in the process other than his doctors. But --

12 JUSTICE ALITO: What happens if the veteran  
13 doesn't get notice?

14 MS. BLATT: Well, he's out of luck,  
15 according to the Government. That's just tough.

16 But again, thinking about -- and remember  
17 that not only is there a clear statement rule in types  
18 of jurisdictions, but we have an equally strong canon  
19 that veterans' statutes have to be construed liberally  
20 in the --

21 CHIEF JUSTICE ROBERTS: What clear statement  
22 rule are you talking about?

23 MS. BLATT: Just the rule of Reed Elsevier  
24 and Arbaugh, that unless a statute clearly speaks in  
25 jurisdictional terms --

1 CHIEF JUSTICE ROBERTS: Yes, I remember  
2 that. I remember that. I thought that that was a  
3 prospective bright-line rule. It's kind of hard to  
4 apply a new bright-line rule retrospectively. I  
5 understood what we said in those cases to be: Look,  
6 Congress, we are tired of trying to sort out this  
7 ambiguity. From now on, if you want it to be treated as  
8 jurisdictional, tell us it's jurisdictional.

9 It makes sense prospectively, but it doesn't  
10 make sense to do that to statutes that were passed before  
11 we announced our bright-line preference.

12 MS. BLATT: Well, it doesn't sense to say in  
13 1988 Congress was trying to map onto some preexisting  
14 structure that didn't exist. Bowles didn't exist.

15 CHIEF JUSTICE ROBERTS: No. I understand  
16 changing the subject, but in my question, you invoke the  
17 bright-line rule of Arbaugh that the statute should say  
18 "jurisdictional." And I'm just saying that only makes  
19 sense prospectively.

20 MS. BLATT: I can see your point. I don't  
21 think that that's what Arbaugh intended. I think it  
22 said that when you have a statutory requirement and when  
23 it doesn't speak to the jurisdiction of the court, there  
24 is no reason to think that it should restrict the  
25 jurisdiction of the court. This doesn't say anything

1 about the court's power.

2 JUSTICE GINSBURG: You have -- in Bowles  
3 itself it was from the district court to a court of  
4 appeals, and then we have from the court of appeals to  
5 this Court, and those two provisions were cited in  
6 Bowles, 2107. And what is the provision for --

7 MS. BLATT: 2101(c).

8 JUSTICE GINSBURG: 2101. Those, as far as I  
9 remember, were the only provisions that were cited.

10 MS. BLATT: Well, and the predecessors  
11 called writ of error. Right, they were -- I mean, this  
12 couldn't be further from it. Congress, when it passed  
13 this statute, said: You have 120 days to file your  
14 appeal, and then in a whole -- didn't say anything about  
15 the jurisdiction. And a separate version said: Here's  
16 the jurisdiction, and we will incorporate some  
17 procedural requirements, but we're not even going to  
18 mention the 120-day deadline. And then it goes to great  
19 pains to say: 2107 will apply when you appeal from the  
20 Veterans' Court to the Federal circuit, and you will  
21 have to apply for certiorari.

22 But to think about what the Government's  
23 position is, is that, notwithstanding that criminal  
24 defendants and Social Security claimants do not face  
25 jurisdictional deadlines, all the civil litigants in our

1 system who do face jurisdictional deadlines can get an  
2 extension for good cause, excusable neglect when they  
3 don't have notice of an adverse judgment, and the  
4 situation is cured when they actually timely file but  
5 they mistakenly file with the wrong court.

6 JUSTICE SCALIA: So whenever we have time  
7 limits in the future that do not contain any explicit  
8 provision for waiver of failure to meet those time  
9 limits, you are asking us to find that all of those are  
10 non-jurisdictional?

11 MS. BLATT: Well, all statute of limitations  
12 are not jurisdictional. So there is no question --

13 JUSTICE SCALIA: Well, is it a filing  
14 requirement? It's -- it's --

15 MS. BLATT: Well --

16 JUSTICE SCALIA: It's an appeal. It's a  
17 requirement for appeal.

18 Whenever there is an appeal deadline that  
19 does not have an exception for -- you know, you -- you  
20 can get it extended for 10 days or what-not -- whenever  
21 there is no exception, you want us to hold it's not  
22 jurisdictional?

23 MS. BLATT: No, of course not. Like I just  
24 said, I don't know of any that even come up, except  
25 for -- I think I found four that say "notice of appeal."

1 All these types of cases that you see are  
2 dealing with a petition for review of agency action,  
3 a la the Hobbs Act context. So what I'm asking you to  
4 hold is that when you have a -- this particular statute,  
5 which the text and structure certainly say it's not  
6 jurisdictional, it is exactly the -- it is not the type  
7 of deadline you would expect it, and it would undermine  
8 all of the purposes that Congress set up this court,  
9 which was to ensure they have their day in court, they  
10 get the benefits they are entitled to, and importantly,  
11 to cure the perception that veterans were be -- not  
12 being treated the way all other claimants seeking  
13 Federal benefits were.

14 This would completely counter that purpose,  
15 to say: Here's a court; we have built it for you, but  
16 if you can't get up the courthouse steps, that's too  
17 bad. If your very disability prevents you from filing  
18 or you have been abused by the VA -- the VA bureaucracy,  
19 you were out of luck and out of court.

20 JUSTICE SCALIA: Although you are willing  
21 to -- to have that happen when there is an appeal  
22 from -- from the first appeal, right?

23 MS. BLATT: And here's why, Justice Scalia.  
24 The veteran has had a day in court. Once he is out of  
25 the Veterans' Court, he is like every -- or she is like

1 every other litigant in our Federal system, which -- the  
2 deadline applies to the government; the deadline applies  
3 to the party -- to any party. That's 2107, which  
4 applies to all civil litigants equally. They have had  
5 their day in court, and if it's in the Hobbs Act  
6 context, usually they have had some sort of adversarial  
7 court-like proceeding in the administrative agency.

8 But no decision -- and again, keep in mind  
9 there were three decisions in the Social Security  
10 context -- no decision has ever said: Pro-claimant,  
11 non-adversary appeal to a court of first review is  
12 jurisdictional. So Congress was acting against that  
13 backdrop. And --

14 JUSTICE GINSBURG: And that was -- that was  
15 the Federal Circuit's position until Bowles, right?  
16 This was an en banc decision and it overruled two prior  
17 cases.

18 MS. BLATT: Right. And they did go back and  
19 forth, so there was a period of 6 years that they held  
20 it was jurisdictional, and then a period of 11 years,  
21 the last 11 years, where it has been non-jurisdictional  
22 and there has been equitable tolling.

23 JUSTICE ALITO: If the veteran is so  
24 profoundly disabled that the veteran can't file the  
25 notice of appeal within 120 days after the notice of the



1 decision, at what point after the 120-day period would  
2 the right to file a notice of appeal be cut off? Would  
3 this go on potentially indefinitely?

4 MS. BLATT: No. I mean, in adopting  
5 equitable tolling by the Federal Circuit for mental  
6 disabilities -- that case is Barrett v. Principi on  
7 page 9 of our brief -- it goes through how all the  
8 sister circuits have dealt with the issue of mental  
9 disability in Title VII, in the Social Security system,  
10 and -- and how you would deal with that.

11 But let's take this case, because it's a  
12 good example. The doctor said he was -- he's paranoid  
13 schizophrenic, so he is having periods, and to quote the  
14 doctor that was submitted to the Veterans' Court, he had  
15 episodes of what was basically called psychomotor  
16 retardation and total inability to function, and other  
17 times he was just simply disorganized, had difficulty  
18 with recall and memoir.

19 So he wrote a handwritten note within  
20 15 days saying: I have been on and off; and he was  
21 obviously -- he is extremely heavily medicated.

22 If I could reserve the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 Mr. Miller.

25 ORAL ARGUMENT OF ERIC D. MILLER

1 ON BEHALF OF THE RESPONDENT

2 MR. MILLER: Mr. Chief Justice, and may it  
3 please the Court:

4 In Bowles v. Russell, this Court reaffirmed  
5 its longstanding treatment of statutory time limits for  
6 the taking of appeals as jurisdictional. Section  
7 7266(a) imposes a 120-day time limit on the taking of an  
8 appeal to the Veterans' Court, and under the rule  
9 reaffirmed in Bowles, that time limit is a limit on the  
10 court's jurisdiction, and the judgment of the court of  
11 appeals should be therefore be affirmed.

12 JUSTICE SOTOMAYOR: So it's only --

13 CHIEF JUSTICE ROBERTS: Of course --

14 JUSTICE SOTOMAYOR: I'm sorry.

15 CHIEF JUSTICE ROBERTS: Of course, in Bowles  
16 it was from an Article III court to another Article III  
17 court. Here, although we are dealing with an Article I  
18 court, there are characteristics of what you might call  
19 internal agency review. The court is specialized with  
20 respect to veterans' affairs, and there are particular  
21 standards for review that you don't find when you are  
22 talking about between the district court and the court  
23 of appeals.

24 MR. MILLER: Well, I --

25 CHIEF JUSTICE ROBERTS: I guess it's

1 related -- just to get everything out on the table, it's  
2 related to the same point that I thought was significant  
3 in Bowles: That you are dealing with a time limitation  
4 that lawyers had long recognized as being, you know, a  
5 drop-dead date.

6 MR. MILLER: That -- that is true. But what  
7 Bowles emphasized was not just the historical treatment  
8 of the particular time limit in section 2107, but the  
9 historical treatment of statutory time limits for  
10 appeals in general, which is why the Court cited not  
11 only 2107 cases but --

12 JUSTICE GINSBURG: It didn't mention --  
13 Bowles didn't mention anything like an appeal from an  
14 agency where the district court is -- is sitting,  
15 essentially, as an appellate court.

16 But Bowles really was dealing with  
17 court-to-court, because it mentioned 2107 and 2101, and  
18 I don't recall that it mentioned any -- anything other  
19 than court-to-court situations.

20 MR. MILLER: You are -- your are correct  
21 that Bowles was focused on court-to-court appeals, but  
22 of course, in Stone v. INS, which involved a deadline  
23 for petitioning of review for the final decision of the  
24 Board of Immigration Appeals, the Court held that that  
25 time limit was jurisdictional. So I think that the same

1 principle applies to appeals from agencies --

2 JUSTICE GINSBURG: Except that -- that one  
3 is an adversarial proceeding, immigration proceeding,  
4 and the veteran is supposed to be claimant-friendly.

5 But I think that the -- the -- Bowles is --  
6 is a challenge for Ms. Blatt. So for you, it is a  
7 Social Security context, because it seems to me the  
8 quality of review is the same; that is, what the  
9 district court does in a Social Security disability case  
10 is the same thing that the Veterans' Court does in a  
11 veterans' disability case.

12 MR. MILLER: It -- it is true that  
13 functionally, the review that takes place under section  
14 405(g) has a lot of appeal-like features; but what --  
15 and so in that sense, Bowen was like a hybrid case,  
16 because you have something that looks a little bit like  
17 an appeal, but it takes place in a district court and in  
18 a court of original jurisdiction; and most importantly,  
19 Congress referred to it as a civil action that is  
20 commenced by the party who is filing the complaint.

21 JUSTICE GINSBURG: But isn't it -- it is an  
22 appellant review, isn't it? I mean, the district court  
23 goes on the record before the agency.

24 MR. MILLER: The -- the review is very much  
25 like -- functionally like what would happen in the court

1 of appeals, but Congress chose to call it commencing a  
2 civil action. And you commence it by filing a  
3 complaint, which is quite different from the notice of  
4 appeal here. On the notice of appeal, there is a form  
5 for doing it, or if you don't use the form, all it takes  
6 is one sentence.

7 JUSTICE BREYER: Are we supposed to still  
8 pay some attention to what we think Congress would have  
9 intended?

10 MR. MILLER: Certainly.

11 JUSTICE BREYER: All right. And if the  
12 answer is "certainly," how likely do you think it is  
13 that Congress would have intended its statutes, in an  
14 ordinary case where two big businesses are suing each  
15 other and they have already had a day in court and now  
16 one of them wants to appeal and Congress writes in, if  
17 you miss the deadline, you can have it extended through  
18 excusable neglect, and you can even have it extended  
19 much later if nobody got a notice. That's with two big  
20 businesses.

21 But if you have someone who served his  
22 country and was wounded and has post-traumatic stress  
23 syndrome or schizophrenia, to that person, you say --  
24 who has never had a day in court: "If you don't meet  
25 the deadline, you're out, no matter how excusable it

1 is."

2 How -- who in Congress would have likely  
3 thought such a thing?

4 MR. MILLER: Well -- I think in evaluating  
5 what Congress thought in 1988, one factor that is  
6 significant is that this is taking place -- the  
7 Veterans' Judicial Review Act -- against a backdrop of  
8 decades of no judicial review whatsoever of veterans --  
9 of VA administrative decisions.

10 And so Petitioner's position is that  
11 essentially, Congress, in one fell swoop, went from no  
12 review whatsoever to what would be the most forgiving  
13 appeal deadline in the entire United States Code.  
14 And --

15 CHIEF JUSTICE ROBERTS: And it made some  
16 sense. When you look at the statistics, when you get  
17 into this court, the veterans almost always win, right?

18 MR. MILLER: When you look at decisions on  
19 the merits as opposed to agreed-upon remands, the  
20 veterans win in most cases.

21 JUSTICE BREYER: What is the relevance of  
22 that, if the veterans win? I mean, perhaps they are  
23 entitled to win. Is the idea that you would cut off  
24 their right to appeal because you are afraid they'd win?

25 MR. MILLER: Of course not.

1 CHIEF JUSTICE ROBERTS: My point was the  
2 exact opposite: That if you -- they almost always win,  
3 you assume that Congress wouldn't want to cut them off,  
4 because it's -- if only 1 percent of the veterans  
5 appealing win, you might understand an absolute rule,  
6 because they're not -- as -- statistically, we are not  
7 losing much.

8 But if, as I understand to be the case,  
9 about 80 percent of them win, you might cut them a  
10 little slack on appealing because it is a very  
11 significant part of the -- the process.

12 MR. MILLER: First, I would say I think the  
13 reversal rate is not necessarily out of line with what  
14 you find in other agency review contexts, but --

15 CHIEF JUSTICE ROBERTS: What is the reversal  
16 rate?

17 MR. MILLER: I think of cases that are  
18 decided on the merits, about a quarter are reversed and  
19 remanded and about 34 percent are affirmed in part and  
20 reversed in part.

21 CHIEF JUSTICE ROBERTS: Any idea what the  
22 normal rule is from district court to court of appeals?

23 MR. MILLER: I -- I don't know the  
24 percentage there, but I think in considering that rate,  
25 it's significant that the great majority of claimants

1 who file claims in the regional office are given relief  
2 there.

3 So only about 4 percent of cases are even  
4 appealed all the way from the regional office to the  
5 board, and only another 9 percent to the Veterans'  
6 Court, so -- because the board gives relief in most  
7 cases before it. So --

8 JUSTICE SCALIA: Mr. Miller, do you really  
9 think Congress thought about this? Do you think the  
10 members of Congress who voted for this bill thought  
11 about this -- this rather narrow point, about whether if  
12 you file too late it's jurisdictional?

13 MR. MILLER: There is no indication that  
14 they did.

15 JUSTICE SCALIA: So don't we pretty much  
16 have to go on what they wrote?

17 MR. MILLER: Yes. And when -- when they  
18 wrote a notice of appeal provision -- and it is clear  
19 from the text as well as from the history that it is, in  
20 fact, an appeal -- that was a considered decision.

21 JUSTICE SCALIA: I bet you a dollar to a  
22 donut that -- that nobody thought about this narrow --  
23 narrow issue. So it -- it ought to be a question of --  
24 of what this language ought to be taken to mean. What's  
25 its fairest reading?



1                   Now, I'm not sure that means you win, but --  
2   but surely that's the issue, not -- not what, whether --  
3   whether Congress could have been so mean. They didn't  
4   think of this.

5                   MR. MILLER: Right. And -- and in looking  
6   at --

7                   JUSTICE BREYER: What do you mean, "right"?  
8   I thought within -- first of all, a donut costs a  
9   dollar, so I don't see much appeal there.

10                  (Laughter.)

11                  JUSTICE BREYER: But -- but don't we,  
12   throughout the statute books, try to work out from  
13   context, language, and objective purpose what a  
14   reasonable member of Congress would have intended,  
15   whether they thought about it or whether they did think  
16   about it, which would require X-rays into the brain that  
17   have not yet been invented?

18                  MR. MILLER: What -- what this Court has  
19   held, in Bowles on the one hand and Irwin on the other,  
20   is that statutory notice of appeal deadlines are  
21   presumptively jurisdictional and statutes of limitation  
22   are presumptively not.

23                  JUSTICE SOTOMAYOR: But that's court to  
24   court. Do you have any case, at the time or before the  
25   statute was passed, that ever held that a statutory

1 deadline from an agency to a court appeal was  
2 jurisdictional in the sense of Bowles?

3 MR. MILLER: Stone v. INS, which was  
4 after --

5 JUSTICE SOTOMAYOR: Well, after --

6 MR. MILLER: But -- but in the courts of  
7 appeals, there was a long history of cases under the  
8 Hobbs Act, cases under more specialized statutes, the  
9 Communications Act, the Federal Power Act, the  
10 environmental statutes --

11 JUSTICE SOTOMAYOR: But those have different  
12 language. They have barred language rather than filing  
13 language. Most of the --

14 MR. MILLER: No, ma'am. In fact, the Hobbs  
15 Act says a party aggrieved by the order may seek review  
16 by filing a petition for review. It doesn't say  
17 anything about, "and a claim shall be barred if you  
18 don't."

19 JUSTICE BREYER: Bowles itself made -- made  
20 a major point, which I thought was relevant. Though I  
21 didn't join it, I thought it was relevant. And that is:  
22 We look at the statute, if you are looking at statute,  
23 and notice that there are exceptions written into it.  
24 And the fact that there are exceptions written into it  
25 lends some support to the notion that we, as a court,

1     should not read other exceptions into it that weren't  
2     mentioned. That's something the Court seemed to  
3     emphasize.

4                     And here, when I looked at this statute, I  
5     noticed there are no exceptions written into it. And  
6     therefore, following Bowles rather than rejecting  
7     Bowles, it would seem that Bowles would support the  
8     reading of this statute to allow courts to read into it,  
9     because they don't mention anything themselves.

10                    MR. MILLER: I would say two things about  
11     that. The first is that there are many statutes,  
12     including the Hobbs Act, the immigration statute, that  
13     have no provision for exceptions. This Court's  
14     certiorari deadline can be extended by a justice, but  
15     there is no provision for a good cause exception. The  
16     extension provision that was specifically at issue in  
17     section 2107 in Bowles hadn't -- wasn't even enacted  
18     until 1991. And even with an extension, I'm not aware  
19     of any other provision that gives you as much as 120  
20     days that you have here.

21                    JUSTICE BREYER: That's the main thing.  
22     Leaving that out for a second, if you -- if you thought  
23     there can't be a rule that governs all of the thousands  
24     of different, or many different statutes, you should  
25     look at the context.

1                   So sometimes you will see that Congress,  
2   given the context, probably did want to give the court  
3   some leeway to make exceptions -- where, for example, it  
4   is no fault of the litigant -- and in other instances,  
5   they didn't.

6                   Now you have listed -- and Bowles, I  
7   thought, left that open. But -- but if it does leave it  
8   open, and I'm looking to those factors. You have  
9   mentioned one: That this is a long period of time,  
10  120 days. You are right about that.

11                  Is there anything else?

12                  MR. MILLER: Well, I -- I guess I would take  
13  issue with the premise of what the presumption is that  
14  Bowles set up.

15                  Bowles established a presumption that notice  
16  of appeal deadlines in statutes are jurisdictional,  
17  unless there is something in the text or in the history  
18  as --

19                  JUSTICE BREYER: And what they found, one  
20  thing in the text, was that there were exceptions  
21  written in. That cuts against you.

22                  One thing cuts for you; that's the length of  
23  time. Is there anything else that cuts for you? I just  
24  want to be sure I have all of the factors that you are  
25  weighing.

1                   MR. MILLER: I mean, what we are emphasizing  
2   is that this is an appeal deadline, and in Bowles,  
3   although it is true there were exceptions there, that  
4   was not something that the Court emphasized in its  
5   reasoning. The Court's -- the rationale behind Bowles  
6   is that there is a presumption that appeal deadlines are  
7   jurisdictional. And whatever one thinks --

8                   JUSTICE ALITO: What happens if the -- if  
9   the notice of decision is mistakenly mailed to the wrong  
10  address, comes back undeliverable, and no further notice  
11  is sent? Your -- your position is, once the 120 days  
12  expires, the veteran is out of luck?

13                  MR. MILLER: No, Your Honor, because in that  
14  case, the 120 days wouldn't start running because  
15  section 7266(a) says have you to file within 120 days  
16  after the date on which notice of the decision is mailed  
17  pursuant to section 7104(e), and section 7104(e), in  
18  turn, requires that notice be mailed to the address of  
19  record for the claimant, and also, incidentally,  
20  requires that if the claimant has an authorized  
21  representative in proceedings before the court, that the  
22  notice also be mailed to the representative.

23                  JUSTICE ALITO: All right. But what if it's  
24  just lost in the mail? What if it is sent to the right  
25  address, but it's lost in the mail or not received by

1 the veteran? What is the veteran supposed to do? Call  
2 every -- every week to see whether a decision has been  
3 issued?

4 MR. MILLER: I think Congress, in writing  
5 the statute, assumes that the mail can be relied upon in  
6 the ordinary course to be delivered, and so it made  
7 provision for the case in which the mail -- the mailing  
8 is not made.

9 JUSTICE SCALIA: You -- you say that a copy  
10 of the notice is also sent to the representative, the  
11 American Legion or whoever, who has been representing  
12 the veteran?

13 MR. MILLER: Section 7104(e)(2) says that if  
14 the claimant has a representative, a copy is mailed.

15 JUSTICE KENNEDY: In what percentage of the  
16 cases is there a representative?

17 MR. MILLER: I think it's about 80 percent.

18 CHIEF JUSTICE ROBERTS: No --

19 MR. MILLER: 80 percent, Your Honor.

20 CHIEF JUSTICE ROBERTS: I sense some  
21 confusion here, given what you and your friend have  
22 said. What do you mean when you say "counseled"? I  
23 mean, if you have somebody from the American Legion that  
24 is telling this person, Here is what you need to do,  
25 does he get a notice, or are you talking about the

1 situation where somebody comes in and says, I'm -- well,  
2 I'm this person's lawyer, or I'm representing him in  
3 some other way?

4 MR. MILLER: There -- there is a procedure  
5 for official accreditation of representatives --

6 CHIEF JUSTICE ROBERT: Right.

7 MR. MILLER: -- from organizations like the  
8 American Legion, and if that person is registered as the  
9 claimant's representative in the proceeding before the  
10 board, then they would get a copy of the notice under  
11 7104.

12 JUSTICE KENNEDY: And you say -- you say  
13 that 80 percent of the time there is a registered --

14 MR. MILLER: Yes, that's --

15 JUSTICE KENNEDY: -- advocate or counsel?

16 MR. MILLER: Yes. I think, as I was --

17 JUSTICE GINSBURG: What happened in this  
18 case? Was there -- was there a registered  
19 representative?

20 MR. MILLER: I'm -- I'm not sure whether  
21 there was. I -- I don't believe so.

22 JUSTICE GINSBURG: You made a point earlier  
23 that, well, the Social Security, there are many  
24 resemblances, but one is founded by complaint and the  
25 other by notice of appeal. It could be that Congress,

1   having been so kind to veterans, thought: Why should we  
2   burden this pro se, or at least lawyerless, veteran with  
3   writing out a complaint? The notice of appeal is just a  
4   simple one-line document.

5                   So could that explain why Congress said you  
6   begin with a notice of appeal instead of a formal  
7   complaint?

8                   MR. MILLER: I think that may well be what  
9   Congress had in mind. But nonetheless, the -- the rule  
10   established in this Court's cases is that when a notice  
11   of appeal deadlines -- and -- and I think the point just  
12   illustrates that this is, in fact, a notice of appeal  
13   deadline -- notice of appeal deadlines are different  
14   from statutes of limitations. And whatever one thinks  
15   of the original theoretical underpinnings of that  
16   distinction, it's a distinction that is firmly engrained  
17   in the law, and this --

18                  JUSTICE SCALIA: Did Congress -- let's  
19   assume we -- we come out with a decision against the  
20   veteran. Could Congress change the rule retroactively,  
21   including for this poor fellow.

22                  MR. MILLER: It could if it chose to do so,  
23   yes.

24                  JUSTICE SCALIA: And that wouldn't be  
25   contrary to any of our decisions because the Government



1 is the defendant and is essentially waiving its  
2 sovereign immunity? Would that be the case?

3 MR. MILLER: If Congress --

4 JUSTICE SCALIA: I mean, there will have  
5 been a final decision in this case, right?

6 MR. MILLER: Yes.

7 JUSTICE SCALIA: So can Congress say, you  
8 know, go back and do it over again and give it to this  
9 guy?

10 MR. MILLER: I believe that, since what's at  
11 stake is -- I think ultimately the question would be  
12 whether the Government issues a monetary award to him.  
13 And Congress certainly has the power to simply direct  
14 that money be paid to this claimant, so for sure, I  
15 think it could direct that his case be reopened.

16 JUSTICE GINSBURG: But there is no  
17 determination on the merits whether this claimant should  
18 prevail?

19 MR. MILLER: No.

20 JUSTICE GINSBURG: That hasn't been aired  
21 because the Veterans' Court said it had no jurisdiction  
22 and the Federal circuit said that's right. So we don't  
23 know if this is good or bad claim.

24 MR. MILLER: Right.

25 JUSTICE GINSBURG: Congress could just award

1 money because there has to be an adjudication.

2 MR. MILLER: Congress would have the  
3 constitutional power to just award money.

4 I had understood Justice Scalia's question  
5 to be whether --

6 JUSTICE GINSBURG: Justice Scalia just asked  
7 you: Could this be -- if Congress decided that this was  
8 a harsh result, could it be made retroactive, but for  
9 Congress to say, well, just what is it going to rely on  
10 to say whether it gives compensation or not? I mean,  
11 the Government's position was he wasn't entitled to  
12 compensation for home care, which is what he was  
13 receiving.

14 MR. MILLER: Right. The question I was  
15 trying to address was whether Congress could amend the  
16 statute so as to retroactively reopen Petitioner's  
17 claim. And my answer was yes, it could do that, if it  
18 were to choose to do so.

19 Now, the VA, of course, has submitted a  
20 proposal to Congress for an extension of the period I'm  
21 showing of good cause up to 120 days. The VA's proposal  
22 would not apply retroactively, but Congress in its  
23 discretion could choose.

24 JUSTICE GINSBURG: On the length of time,  
25 which is, you said, 120 days -- that's a long time, but

1     isn't it on cert?  It's 90 days plus 60, right?  So it's  
2     even more?

3                   MR. MILLER:  Right.  Although if you --  
4     somebody who misses the 90 days, my understanding of the  
5     operation of this Court's rule 13 is that the clerk will  
6     not accept your filing, a petition filed on day 91.

7                   JUSTICE GINSBURG:  But the total number of  
8     days would exceed 120, assuming the application is  
9     made --

10                  MR. MILLER:  Right.  Although --

11                  JUSTICE GINSBURG:  Application to extend  
12     this time.

13                  MR. MILLER:  Although of course filing a  
14     cert petition is a much greater undertaking than filing  
15     a notice of appeal.  You have to -- it is much more than  
16     a simple one-line document.

17                  JUSTICE BREYER:  What is supposed to  
18     happen -- and I've probably seen this on page 16 of the  
19     Federal circuit bar's amicus brief.  They list about 30  
20     or 40 cases where the veteran perhaps was not  
21     represented, and maybe had some stress syndrome,  
22     whatever it is.  He just filed the paper in the wrong  
23     court or the wrong agency, and that agency didn't get  
24     around to returning it to him in time so he could have  
25     met this deadline.

1                   What, in your opinion, is supposed to happen  
2   in those circumstances? Just say, too bad, you are out  
3   of luck; here we are, you got the wrong address; no  
4   recovery?

5                   MR. MILLER: I think it's significant that  
6   Congress did address the question of mailing of notices  
7   of appeal. In 1994, it amended section 7266 and added a  
8   subsection (c), which unfortunately is not reproduced in  
9   the briefs, but the effect of that is to give the  
10   benefit of a mailbox tool: That a petition is deemed  
11   filed on the day it is mailed, but only "if the notice  
12   is properly addressed to the court." So --

13                  JUSTICE BREYER: All these cases, actually,  
14   that they have raised in the brief, the veteran does get  
15   his appeal.

16                  MR. MILLER: No. In those cases, the notice  
17   would not have been properly addressed to the court. It  
18   would have been --

19                  JUSTICE BREYER: So they could do it again.

20                  MR. MILLER: And certainly --

21                  JUSTICE BREYER: That's good.

22                  MR. MILLER: And certainly one would hope  
23   that the VA ideally would get those notices, figure out  
24   what they are, and send them to the court. The problem  
25   that the VA encounters is that it receives a tremendous

1 volume of mail, which is not generally opened by  
2 attorneys, and it's often not clear when it gets  
3 something in the mail that just says, I don't like the  
4 decision in my case, whether that's a notice of appeal  
5 to the court or a motion for reconsideration or a motion  
6 to file.

7 JUSTICE BREYER: These people in footnote 3,  
8 did they get their appeal or didn't they?

9 MR. MILLER: They did not.

10 JUSTICE BREYER: They did not? Okay.  
11 There's a problem.

12 MR. MILLER: And we -- we do not deny, and  
13 in fact, it's true by definition that to say that there  
14 is no equitable tolling is to say that the rule would be  
15 cases in which the result is not equitable. But I think  
16 if you were to look at just the cases like the ones Your  
17 Honor has identified, some of the others in the  
18 Petitioner brief and amicus brief, if you could identify  
19 with no transaction costs what those cases are, and were  
20 to ask as a policy matter, should the late filing be  
21 excused in those cases, I think just about everyone  
22 would say yes.

23 JUSTICE BREYER: So if we are in a void and  
24 the language doesn't have the exceptions -- and I think  
25 you can distinguish it from these other cases, and you

1 have older cases that says unless Congress is clear,  
2 read it as non-jurisdictional, and nobody could say it  
3 was inequitable -- or rather to the contrary, nobody  
4 could say it was equitable to follow your position here,  
5 why isn't there a simple remedy? We take the opposite  
6 position?

7 MR. MILLER: Well, I think there are two  
8 answers to that. The first is in whatever you think of,  
9 the rule in Bowles -- and we obviously believe that it  
10 was correctly decided, but understand that not everyone  
11 takes that view --

12 JUSTICE BREYER: Except that for purposes of  
13 this, it governs. I'm just looking at the parts of it  
14 that did, in fact, make clear a special nature of the  
15 particular provision at issue in that case.

16 MR. MILLER: But the question of whether a  
17 particular time limit is or is not jurisdictional would  
18 seem to be a quintessential example of the sort of issue  
19 where it is more important that the law be settled than  
20 that it be settled any particular way.

21 And the great virtue of the rule in Bowles  
22 is that it provides clear guidance that appeal deadlines  
23 are going to be presumed to be jurisdictional, and if  
24 Congress doesn't want them to be --

25 JUSTICE GINSBURG: That's really the only

1     thing that counsels your result, because in Reed you  
2     took -- the Government took the position that a  
3     statutory provision is non-jurisdictional if it does not  
4     speak in jurisdictional terms and doesn't address the  
5     power of the court. I understand that was the  
6     Government's position in Reed.

7                     Today you are saying that the only thing  
8     that counsels your result is the fact that Congress used  
9     the words "notice of appeal." Is that correct?

10                    MR. MILLER: Our position is consistent with  
11     what we said in Reed, because Reed, of course, did not  
12     involve a time limit. Reed involved a requirement that  
13     copyrights be registered before an infringement action  
14     was brought. And what the Court said in Reed is that  
15     the presence or absence of a jurisdictional label on the  
16     statute does not determinative. What matters is whether  
17     the type of limitation that the statute imposes is one  
18     that's properly ranked as jurisdictional, absent a  
19     label --

20                    JUSTICE GINSBURG: Is there any statute on  
21     the time to appeal -- has any statute been held, quote,  
22     "jurisdictional" when there is no safety valve of any  
23     kind written into it; that is, on 2107, that extensions  
24     are possible? Is there a "jurisdictional" statute that  
25     says 121 days or whatever, and that's it? No extension,

1 no matter what the circumstances are?

2 MR. MILLER: Yes. The Immigration and  
3 Nationality Act at issue in Stone has no provisions for  
4 extensions. The Hobbs Act has no provisions for  
5 extensions. And many of the various agency-specific  
6 statutes that I mentioned earlier don't have any  
7 provisions for extensions. And although this Court  
8 hasn't ruled on them, Petitioner hasn't identified any  
9 decision from any court of appeals holding that any of  
10 those statutes is not jurisdictional.

11 So there really is, as recognized in Bowles,  
12 a uniform rule regarding time limits for the taking of  
13 appeals and proceedings like appeals, writs of  
14 certiorari, and petitions --

15 JUSTICE SCALIA: What other acts do you  
16 think would be swept up into a rule that we adopted  
17 here, that not all limitations on appeal time are  
18 jurisdictional? The Hobbs Act cases; what else?

19 MR. MILLER: The -- which ones would be  
20 swept up, I suppose, would depend on what the Court were  
21 to say in distinguishing this case. But there is the  
22 Hobbs Act; the --

23 JUSTICE SCALIA: Well, I'm sure we would say  
24 these are veterans, and I'm sure there are other  
25 categories of sympathetic people who might come under



1 the Hobbs Act.

2 MR. MILLER: There -- there might well be,  
3 and I think that's why one of the virtues of the rule in  
4 Bowles is that it provides clear guidance to Congress.  
5 And in that respect it's much preferable to a rule that  
6 statutes of -- or statutes --

7 JUSTICE SCALIA: But you haven't answered my  
8 question.

9 MR. MILLER: Oh --

10 JUSTICE SCALIA: The Hobbs Act --

11 MR. MILLER: Well, the Hobbs Act, the  
12 Federal Power Act, the Communications Act, various EPA  
13 orders are reviewed under their specific -- each statute  
14 has its own review procedure.

15 JUSTICE BREYER: All these agency matters  
16 are matters where there has never been judicial input.  
17 This is review of an agency action. The agency takes an  
18 action. No judge has looked at this. And the first  
19 time that you look at the rulemaking by the agency under  
20 the Hobbs Act, I guess, is when you go file it in the --  
21 in the court.

22 So if a -- if a ruling against you here were  
23 to encompass a ruling under most review of agency  
24 action, would that be such a terribly unworkable thing?

25 MR. MILLER: Well, I -- I suppose the Court

1     could come up with a rule.  Whether that would prove to  
2     be workable, I -- I don't know.  But I think -- I guess  
3     what I would say about that is that given that there is  
4     an inherent arbitrariness to any filing deadline and,  
5     therefore, there is to some degree an inevitable  
6     arbitrariness in any system of exceptions to the filing  
7     deadline, I'm not --

8                 JUSTICE GINSBURG:  Why wouldn't it be a  
9     bright, clear line if we said:  Court to court, Bowles  
10    controls; agency to court, Bowles does not control?  
11    That would be a clear line.

12                MR. MILLER:  It would be clear, but it would  
13    be contrary to Stone.  It would be contrary to decades  
14    of uniform holdings from courts of appeals under all the  
15    other statutes.

16                JUSTICE KENNEDY:  Stone was somewhat mixed,  
17    though.  It was a motion for reconsideration of the  
18    agency, whether or not that told the time to go to the  
19    court; am I correct?

20                MR. MILLER:  That -- that's right, Your  
21    Honor.

22                JUSTICE KENNEDY:  That's sort of a hybrid  
23    problem in the context of Justice Ginsburg's dichotomy.

24                MR. MILLER:  But -- I mean, you are right  
25    that that was the issue in Bowles, but -- excuse me, in

1 Stone, but the reason that that mattered in Stone was  
2 because the Court held that the timely filing of a  
3 petition for review and compliance with the statute was  
4 a prerequisite to the exercise of jurisdiction by the  
5 court of appeals.

6 JUSTICE BREYER: What was the other case  
7 that you said decades of -- what is an example of a  
8 case where a person, for an incredible, equitable strong  
9 reason, such as the wind blew his paper -- I don't know,  
10 some tremendously equitable, strong reason he wants  
11 review of an agency action --

12 JUSTICE SCALIA: The dog ate it, maybe.

13 JUSTICE BREYER: Yes. Right. The dog ate  
14 the court, and the -- the -- there is a case which says  
15 there is no extension of a -- of a deadline to file for  
16 review of an agency action, no matter how equitable your  
17 case. Which is our -- which is the Supreme Court case  
18 that holds that? I -- I am not familiar with it.

19 MR. MILLER: I don't know one in the  
20 specific context of agency actions, but of course  
21 Bowles --

22 JUSTICE BREYER: Well, I'm only talking  
23 about agency actions, judicial review of agency action.

24 MR. MILLER: If -- if the time limit is  
25 jurisdictional as the --

1 JUSTICE BREYER: Well, I know the rule, but  
2 I'm just saying --

3 MR. MILLER: There is no authority --

4 JUSTICE BREYER: I know the rule. I'm  
5 saying: What's the case? Stone; I understand you can  
6 make a cases with Stone. Is there another?

7 MR. MILLER: I -- I don't know of any from  
8 this Court, but of course in the courts of appeals  
9 Petitioner hasn't identified any in which an exception  
10 was made.

11 And then I would point out that Bowles -- in  
12 Bowles, the petitioner had a very sympathetic equitable  
13 claim, in that he had done what the district court had  
14 told him to do and filed on the schedule given to him by  
15 the district court, and the court held -- nonetheless  
16 held that because the time limit was jurisdictional,  
17 there was no authority to create an exception to it.

18 If there are no further questions, I ask  
19 that the judgment be affirmed.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 Ms. Blatt, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF LISA S. BLATT

23 ON BEHALF OF THE PETITIONER

24 MS. BLATT: Thank you, Mr. Chief Justice.

25 Let me just point out on the Hobbs Act, the

1 actual statute says the jurisdiction is invoked by  
2 filing a timely petition for review. So there is an  
3 express jurisdictional hook. And I think Justice Scalia  
4 points out an interesting fact on -- I think it's safe  
5 to say in 1988, Congress wasn't sitting down thinking:  
6 This is deadline jurisdictional; we're subject to  
7 equitable tolling.

8           What we had is a period where veterans were  
9 not given judicial review. We had World War II and the  
10 Vietnam conflict and the Korean conflict, which made it  
11 just untenable that veterans were not being treated on  
12 par with other claimants seeking disability benefits.  
13 And the sponsor of the bill points out, since Social  
14 Security disability benefits get judicial review, how  
15 can we not treat our nation's veterans the same?

16           Now --

17           CHIEF JUSTICE ROBERTS: Counsel, I want to  
18 clear up this represent -- represented business.

19           MS. BLATT: Sure.

20           CHIEF JUSTICE ROBERTS: I understood you to  
21 say in the -- your opening that represented -- most of  
22 these people are not represented, and they're -- to the  
23 extent the American Legion participates, they don't get  
24 notice of the order that triggers the 120 days.

25           Now, I understood Mr. Miller to tell us that

1 80 percent of the people have registered representatives  
2 and they do get notice.

3 MS. BLATT: Right. I think you correctly  
4 understand that we have a different understanding of  
5 reality. So my understanding is that representation  
6 is -- like the -- Mr. Henderson's wife at one point  
7 tried to become his authorized representative. There is  
8 no question he had somebody helping him, a veteran's  
9 service organization process.

10 CHIEF JUSTICE ROBERTS: Right.

11 MS. BLATT: This can take up to 4 or 5 years  
12 to get notice. My --

13 CHIEF JUSTICE ROBERTS: Was that person  
14 helping him registered as a representative?

15 MS. BLATT: No, not that I know of. But  
16 this is not --

17 CHIEF JUSTICE ROBERTS: Well, is that the  
18 exception, then? I mean, Mr. Miller tells us that 80  
19 percent of the people do have registered  
20 representatives.

21 MS. BLATT: Right. I understand, and I am  
22 just telling you had that my understanding from -- not  
23 just the amici briefs, that they do not have anything to  
24 deal with court, is that the veterans organizations  
25 don't have notice. They are the ones that are filing in

1     this case telling you this decision will be disastrous  
2     for them. But even if they do, they are uncounseled.  
3     They are not lawyers.

4                 JUSTICE KENNEDY: But it won't be disastrous  
5     if they can ask to be registered.

6                 MS. BLATT: I agree. But these are -- the  
7     veterans' services -- like in this case, where he lives  
8     in North Carolina, there's only, like, 50 VA regional  
9     offices. So his representative may be 100, 200 miles  
10    away, and there is not that kind of connection. But if  
11    the case comes --

12                CHIEF JUSTICE ROBERTS: It doesn't matter  
13    how far away they are if he gets notice.

14                MS. BLATT: I understand, and I'm just -- my  
15    understanding is that they -- either they don't get  
16    notice, and even if they have notice, they have -- feel  
17    no obligation, because they are not in a representative  
18    capacity at that point, that they would process his  
19    appeal or advise him.

20                JUSTICE SCALIA: Well, why give them notice?  
21    I mean, isn't the very giving of -- of notice --

22                MS. BLATT: Right. And I --

23                JUSTICE SCALIA: -- an indication that they  
24    are expected to do something?

25                MS. BLATT: And I understand the government

1 representing that there is notice, and I am telling you  
2 that is not my understanding; that when he said  
3 authorized representative, I don't think that that meant  
4 veterans service organizations. I may be wrong. It  
5 sounds like we have a different understanding.

6 But if I can get back on to what is really  
7 before this Court, is that when there's no indication,  
8 all we have is the three words -- "notice of appeal" --  
9 when we know that those three words are  
10 non-jurisdictional in the criminal context. There is  
11 nothing jurisdictional about the words "notice of  
12 appeal." It accurately describes that an appeal is  
13 going on. It doesn't say anything about whether the  
14 deadline is jurisdiction.

15 And the question is: Was Congress thinking  
16 about the type of people who appeal district courts to  
17 courts of appeals? Yes, they were, but they made  
18 separate provisions for that. Or were they thinking  
19 about the Hobbs Act, which deals with licensing of the  
20 nuclear power plants and orders by the FCC, and has an  
21 express statement in the text that it is jurisdictional?

22 I doubt that -- I think it is safe to say  
23 that Congress was not thinking about any of those  
24 contexts. They were trying to give veterans their day  
25 in court. And this decision would say no matter what



1 the circumstances were, they are deprived.

2 Now there was some discussion on the 120-day  
3 deadline. I think another thing that is very safe to  
4 say is that time is not of the essence in the veterans  
5 system. It never has been. 120 days is a blink of an  
6 eye. It is true that Social Security are given 60 days  
7 and other appellants are given 30.

8 JUSTICE KENNEDY: Are you helped or hurt in  
9 making that argument when this is not de novo review? I  
10 think you are helped. If it's not de novo review that  
11 helps --

12 MS. BLATT: Yes, there is no prejudice.  
13 They don't even -- the government doesn't even contest  
14 these because it has to be based on the record before,  
15 and all we are talking about is an extra 30 days or  
16 60 days.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

19 (Whereupon, at 11:04 a.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

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