No.

In the Supreme Court of the United States

DEPARTMENT OF THE ARMY, PETITIONER

v.

JOHN E. KIRKENDALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 15-day statutory time limit for filing an appeal with the Merit Systems Protection Board from a decision of the Secretary of Labor denying a complaint under the Veterans Employment Opportunities Act of 1998, 5 U.S.C. 3330a(d), is subject to equitable tolling.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Department of the Army, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-85a) is reported at 479 F.3d 830. The panel opinion of the court of appeals (App., *infra*, 89a-110a) is reported at 412 F.3d 1273. The opinions and orders of the Merit Systems Protection Board (App., *infra*, 111a-113a, 124a-129a) are reported at 97 M.S.P.R. 605 (Table) and 94 M.S.P.R. 70. The initial decisions of the administrative law judge (App., *infra*, 114a-123a, 130a-139a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2007. On May 24, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3330a of Title 5 of the United States Code is reproduced in the appendix to this petition (App., *infra*, 143a-146a).

STATEMENT

1. In order to facilitate the readjustment of veterans to civilian life, federal law has long provided preferences to certain veterans, including disabled veterans, seeking employment with the executive branch of the federal government. See, *e.g.*, 5 U.S.C. 2108(3)(C). Veterans who are "preference eligible" are awarded additional points in the process used to make hiring decisions. See, *e.g.*, 5 U.S.C. 3309(1). This case concerns the time limits for administrative appeals from the denial of claims alleging a violation of the veterans' preference laws.

To establish "a uniform redress mechanism for the enforcement of veterans' preference laws in both hiring and reductions-in-force decisions," S. Rep. No. 340, 105th Cong., 2d Sess. 15 (1998); accord H.R. Rep. No. 40, 105th Cong., 1st Sess., Pt. 1, at 9 (1997), Congress enacted the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a *et seq.* The VEOA provides that "[a] preference eligible [veteran] who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of La-

bor." 5 U.S.C. 3330a(a)(1). Such a complaint "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. 3330a(a)(2)(A). If the Secretary of Labor (Secretary) is unable to resolve the complaint within 60 days of its filing, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board (MSPB or Board). 5 U.S.C. 3330a(d)(1). In the language at issue here, the VEOA provides that "in no event may any such appeal be brought * * * before the 61st day after the date on which the complaint is filed; or * * * later than 15 days after the date on which the complainant receives written notification from the Secretary" that she was unable to resolve the complaint. *Ibid.*

2. Respondent is a disabled veteran who applied for the civilian position of Supervisory Equipment Specialist in the Aircraft Maintenance Division at the Army base at Fort Bragg, North Carolina. The Army treated respondent as "preference eligible," but found that he was ineligible for the position because his application lacked sufficient detail to allow the Army to determine whether he possessed sufficient experience for the particular job he sought. On January 5, 2000, the Army notified respondent of its decision. The Army chose another disabled veteran, who was also "preference eligible," to fill the position. App., *infra*, 2a-3a.

Respondent subsequently filed a complaint with the Secretary of Labor under the VEOA, alleging that the Army violated his preference rights. Although the record does not reflect exactly when respondent filed the complaint, it is undisputed that he filed it more than 60 days after the alleged violation. App., *infra*, 3a, 92a n.1. On November 29, 2001, the Secretary informed respondent that his complaint had been dismissed as untimely. *Id.* at 140a-141a. In the notice of dismissal, the Secre-

tary specifically informed respondent that he had "the right to take [his] claim to the [MSPB]," and that "that claim must be filed *within 15 days* of the date following the receipt of this notification." *Ibid.*

3. Nearly 200 days later, on June 13, 2002, respondent filed an appeal with the MSPB from the Secretary of Labor's denial of his VEOA complaint. An administrative judge dismissed the appeal. App., *infra*, 130a-139a. As a preliminary matter, the administrative judge noted that "[respondent] does not deny that his complaint to [the Secretary] was filed after the time limit set by statute." *Id.* at 133a. Because the Secretary had rejected respondent's complaint as untimely, the administrative judge concluded that the MSPB lacked jurisdiction over respondent's appeal. *Ibid.* In the alternative, the administrative judge noted that, even assuming that the MSPB had jurisdiction, "[respondent's] appeal was not filed with the Board until June 13, 2002, long after he received [the Secretary's] November 29, 2001 notification." *Id.* at 134a. The administrative judge concluded that, because "VEOA's 15-day deadline for filing an appeal cannot be waived," "an appeal filed beyond that deadline must be dismissed." *Ibid.*

4. The full Board denied review in relevant part. App., *infra*, 124a-129a. It reasoned that respondent's petition for review "d[id] not meet the criteria for review set forth at 5 C.F.R. § 1201.115." App., *infra*, 125a. That regulation provides for review by the full Board of initial decisions by administrative law judges where, *inter alia*, "[t]he decision of the judge is based on an erroneous interpretation of statute or regulation." 5 C.F.R. 1201.115(d)(2).

5. A divided panel of the court of appeals reversed and remanded. App., *infra*, 89a-110a. It held both that

the 60-day period established by 5 U.S.C. 3330a(a)(2)(A) for filing a VEOA complaint with the Secretary of Labor is subject to equitable tolling, and, as is relevant here, that the 15-day period established by 5 U.S.C. 3330a(d)(1) for filing an appeal with the MSPB is also subject to equitable tolling. App., *infra*, 89a-110a.

6. At the Department of the Army's request, the court of appeals granted rehearing en banc. App., *infra*, 86a-88a. Before the en banc court, the government argued that equitable tolling is not available for the 15-day appeal period established by Section 3330a(d)(1). Adopting the position of the panel, the en banc court of appeals reversed the Board and remanded, holding by a 7-6 majority that the 15-day appeal period is subject to equitable tolling. *Id.* at 1a-85a.

a. In an opinion written by Judge Mayer and joined in relevant part by Chief Judge Michel, Judges Newman, Schall, Gajarsa, and Linn, and Senior Judge Plager, the court of appeals explained that, in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "established the presumption that equitable tolling is available in suits against the government when permitted in analogous private litigation." App., *infra*, 6a. The court of appeals reasoned that, because equitable tolling is available on a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and respondent's VEOA claim was "sufficiently analogous" to a Title VII claim, equitable tolling is presumptively available on respondent's VEOA appeal. App., *infra*, 8a-9a.

The court of appeals then concluded that Congress had failed to "evince[] a clear intent to rebut that presumption." App., *infra*, 9a. The court rejected the government's argument that, by providing in Section

3330a(d)(1) that an appeal may "in no event" be brought outside the 15-day period, Congress manifested its intent to prohibit equitable tolling. *Id.* at 10a. While acknowledging that the phrase "in no event" is "certainly strong," the court reasoned that "the statute's technical language is little more than a neutral factor in our analysis." *Ibid.* The court concluded that the statutory language was "analogous to statutory language" providing simply that a claim "shall be filed," or would be "barred" if not filed, within the requisite period. *Id.* at 15a (citations omitted). "Because the 'in no event' language is of limited, if any, special importance," the court continued, "we firmly reject the government's contention that allowing equitable tolling here renders that language superfluous." *Ibid.*

In support of its conclusion that the time limit in Section 3330a(d)(1) is subject to equitable tolling, the court of appeals noted that "section 3330a is not detailed"; "section 3330a's fairly simple language is not technical"; "the timing provisions in section 3330a are not repeated"; "section 3330a does not contain explicit exceptions to the two filing deadlines"; and "the 15-day filing period under section 3330a(d)(1)(B) is extraordinarily short." App., *infra*, 16a-17a. The court further observed that the purpose of the VEOA—"to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right"—and the canon that "veterans' benefits statutes should be construed in the veteran's favor" supported the conclusion that equitable tolling is available. *Id.* at 18a, 22a.

The court of appeals also rejected the government's argument that the time limit in Section 3330a(d)(1) is jurisdictional, and, as a result, is mandatory and not

subject to equitable tolling. App., *infra*, 18a-21a. Relying on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), the court reasoned that statutes specifying periods for *review*, like statutes of limitations, were subject to a presumption in favor of equitable tolling. App., *infra*, 19a. The court of appeals further reasoned that, in subsequent decisions, this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Id.* at 19a-20a (internal quotation marks omitted) (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). The court of appeals discounted as "irrelevant" the fact that some periods for review, such as the 90-day period for filing petitions for certiorari in this Court in civil cases, are not subject to equitable tolling. *Id.* at 20a-21a.

b. Judge Gajarsa, joined by Judge Linn and Senior Judge Plager, concurred. App., *infra*, 28a-43a. Judge Gajarsa agreed with the majority that a VEOA claim was analogous to a Title VII claim, for which equitable tolling is available. *Id.* at 30a-31a. He also agreed that there was "no good reason to believe" that Congress would have wanted to prohibit equitable tolling. *Id.* at 34a (internal quotation marks and citation omitted). With regard to the statutory language, Judge Gajarsa reasoned that "Congress could have placed the words 'equitable tolling shall not apply' in the statute but did not do so." *Id.* at 40a. Judge Gajarsa added that the court of appeals' earlier decision in *Bailey* "compels us not to create a new exception applying a lighter or no presumption to time limits dealing with periods of review." *Id.* at 42a-43a.

c. Judge Moore, joined by Judges Lourie, Rader, Bryson, Dyk, and Prost, dissented in relevant part. App., *infra*, 43a-80a. At the outset, Judge Moore noted that "Congress set forth the 15-day deadline in unusually emphatic form." *Id.* at 46a. "If the 'in no event' language is not meant to foreclose tolling," she explained, "it would be entirely superfluous." *Id.* at 47a. "Short of saying 'equitable tolling shall not apply,'" she continued, "Congress could not have been clearer." *Ibid.* (footnote omitted). Judge Moore contended that the court's approach was "inconsistent with basic and fundamental tenets of statutory construction, which attempt to discern congressional intent by first looking to the language of the statute itself." *Id.* at 48a-49a.

Judge Moore next reasoned that "[r]eading the emphatic 'in no event' language as it is used in the context of the entire VEOA further evinces Congress's intent to preclude tolling." App., *infra*, 51a. She noted that, "[i]n all other parts of the VEOA, Congress used less emphatic language to establish time limits," *ibid.*, and that "[the VEOA's] time limits are detailed and sequential," *id.* at 52a. Judge Moore suggested that the purpose of the VEOA was to allow expeditious resolution of claims challenging an agency's hiring decision. *Id.* at 55a. According to Judge Moore, "[i]t is also significant that this statute is one specifying the time for filing an appeal." *Ibid.* She noted that, in the VEOA context, "[a]ppeals * * * are filed after the appellant has received notice regarding the specific time periods and location for appealing," and that respondent had received such notice in this case. *Id.* at 56a-57a.

Finally, Judge Moore reasoned that the 15-day deadline is, "in many ways, mandatory and jurisdictional in that [Section 3330a] is the sole statute providing the

Board's jurisdiction over VEOA claims." App., *infra*, 58a. In addition, she explained that, "[t]o the extent that *Bailey* is read as permitting equitable tolling even where a statute is decisively 'mandatory and jurisdictional[,]' it would seem inconsistent with Supreme Court precedent." *Id.* at 55a n.5 (citing *Stone* v. *INS*, 514 U.S. 386 (1995), and *Missouri* v. *Jenkins*, 495 U.S. 33 (1990)).

d. Judge Dyk also dissented separately. App., *infra*, 80a-85a. In his view, "the doctrine of equitable tolling and the accompanying presumption should not apply to appeal periods in either the judicial or the administrative context." *Id.* at 80a. He explained that "[t]he doctrine of equitable tolling is designed to militate the harsh results that would flow from the strict application of statutes of limitations," and that "[t]he fundamental error in today's decision lies in applying that doctrine to a statute providing a time for appeal." *Ibid.* According to Judge Dyk, that error "traces back to our * * * decision in *Bailey*." *Ibid.* While observing that this Court's intervening cases "have admittedly clouded the 'jurisdictional' nature of appeal periods," Judge Dyk contended that those cases "have not undermined the strictness of the rule for appellate time limits." *Id.* at 81a. He noted that "whether [appeal] provisions are jurisdictional [was] itself under review by [this] Court" in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), and that "*Bowles* appears also to present the question whether some form of equitable tolling is available with respect to appeal periods." App., *infra*, 81a-82a n.2. Judge Dyk also suggested that equitable tolling of periods for appellate review "creates a risk of making finality unattainable" and "is [not] necessary in the interests of fairness." *Id.* at 85a.

Judge Dyk also rejected the suggestion that "equitable tolling of appeal periods is necessary in the interests of fairness." App., *infra*, 85a. He explained that, "[u]nlike a potential litigant confronting a statute of limitations, an individual who appeals an adverse decision has already determined to commence a judicial or administrative proceeding and has demonstrated the ability to participate in the process." *Ibid.* Moreover, Judge Dyk continued, as was the case here, "[t]ypically * * * in administrative cases the losing party receives actual notice of the time for appeal." *Ibid.*[1]

REASONS FOR GRANTING THE PETITION

The 7-6 en banc majority of the Federal Circuit erred by holding that the 15-day statutory time limit for filing an appeal with the MSPB from a decision of the Secretary of Labor denying a complaint under the VEOA is subject to equitable tolling. As a preliminary matter, the court of appeals erred by treating the time limit as

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[1] At the same time that he filed his VEOA appeal, respondent also filed a complaint with the MSPB under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, alleging that he had been discriminated against on the basis of his military service. The administrative judge determined that respondent had failed to present any evidence demonstrating that his status was a substantial or motivating factor in the Army's ineligibility determination, and denied respondent's request for a hearing. App., *infra*, 114a-123a. The full Board denied review. *Id.* at 111a-113a. The initial court of appeals panel held that a veteran who has filed a USERRA complaint with the MSPB is entitled to a hearing as of right. *Id.* at 98a-100a. The en banc court of appeals granted rehearing on that issue, as well as the VEOA issue discussed above, and held by a 7-6 majority that a USERRA complainant is entitled to a hearing as of right. *Id.* at 23a-28a (plurality opinion); *id.* at 58a-62a (Moore, J., joined by Prost, J., concurring in the result in relevant part). Respondent's USERRA claim is not at issue in this petition.

non-jurisdictional. As this Court reaffirmed just weeks ago in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), a statutory time limit governing the transfer of a case from one tribunal to another is jurisdictional, and, as a result, is mandatory and not subject to equitable tolling. Because the en banc court did not have the benefit of the Court's decision in *Bowles* when it decided this case, the Court should vacate and remand for the court of appeals to reconsider its conclusion in light of *Bowles*.

Having erred by holding as a threshold matter that the time limit at issue is non-jurisdictional, the court of appeals further erred by holding that the time limit is subject to equitable tolling under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). The statute on its face rebuts any presumption in favor of equitable tolling, because it emphatically provides that a VEOA appeal "in no event" may be brought beyond the 15-day time limit. Congress need go no further in spelling out that a time period is fixed and not subject to equitable tolling. Because the Federal Circuit has exclusive jurisdiction over VEOA appeals, its holding in this case will have nationwide effect. Accordingly, if this Court does not vacate and remand in light of *Bowles*, it should grant plenary review and hold that equitable tolling is unavailable.

A. This Court's Intervening Decision In *Bowles* v. *Russell* Underscores That The Time Limit In Section 3330a(d)(1) Is Jurisdictional And Thus Not Subject To Equitable Tolling

The court of appeals rejected the government's argument that the 15-day statutory time limit for filing a VEOA appeal with the MSPB is jurisdictional and thus not subject to equitable tolling. See App., *infra*, 18a-21a. The court of appeals reached that conclusion, how-

ever, without the benefit of this Court's recent decision in *Bowles*, although Judge Dyk specifically noted that *Bowles* was pending at the time. *Id.* at 81a-82a. Because *Bowles* underscores that the time limit at issue is jurisdictional and clarifies the prior decisions from this Court on which the court of appeals relied in concluding to the contrary, it would be appropriate for this Court to vacate the court of appeals' judgment and remand for reconsideration in light of *Bowles*.

1. Three weeks ago, in *Bowles*, this Court held that a habeas petitioner's failure to file a notice of appeal within the 14-day reopening period specified by 28 U.S.C. 2107(c) (and Federal Rule of Appellate Procedure 4(a)(6)) deprived the court of appeals of jurisdiction. 127 S. Ct. at 2363-2366. The Court began by noting that it had "long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Id.* at 2363 (internal quotation marks and citation omitted); see *id.* at 2362 (stating that "[w]e have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature"). While acknowledging that "several of [the Court's] recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," the Court explained that "none of [those decisions] calls into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 2364.

The Court distinguished its decisions in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), on which the majority below relied, on the ground that those decisions did not involve *statutory* time limits. *Bowles*, 127 S. Ct. at 2364-2365. The Court likewise distinguished its deci-

sions in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004), on which the majority below also relied, on the grounds that they involved an employee-numerosity requirement (in the case of *Arbaugh*) and the availability of attorney's fees ancillary to an action as to which the court already had jurisdiction (in the case of *Scarborough*). 127 S. Ct. at 2365. The Court further noted that it had treated the 90-day period for filing petitions for certiorari in civil cases as jurisdictional. *Ibid.*

Applying that understanding, the Court held that, because the statutory 14-day time limit for taking an appeal on reopening was jurisdictional, it was mandatory and not subject to exception. *Bowles*, 127 S. Ct. at 2366-2367. The Court also rejected the habeas petitioner's reliance on the "unique circumstances" doctrine, on the ground that "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 2366. The Court noted that Congress could authorize courts to promulgate rules that excuse compliance with statutory time limits, but reiterated that, in the absence of such an authorization, courts "lack present authority to make the exception [the habeas petitioner] seeks." *Id.* at 2367.

2. *Bowles* underscores that the 15-day statutory time limit for filing a VEOA appeal with the MSPB is jurisdictional and thus not subject to equitable tolling. That time limit, like the time limit in *Bowles*, is set out in a statute enacted by Congress, not simply in a rule adopted by a court or tribunal. And the statute establishing that time limit, like the statute in *Bowles*, governs the transfer of a case from one tribunal to another—namely, from the Secretary of Labor to the MSPB—and thus defines the class of cases that the ap-

pellate tribunal is competent to hear.[2] Indeed, the statutory case for treating the time limit here as jurisdictional is if anything stronger than in *Bowles*, because the time limit is contained in the same statutory section that contains the general grant of jurisdiction to the MSPB over VEOA appeals. See 5 U.S.C. 3330a(d)(1); App., *infra*, 58a (Moore, J., dissenting) (noting that "[Section 3330a] is the sole statute providing the Board's jurisdiction over VEOA claims"); cf. *Cowan* v. *United States*, 710 F.2d 803, 805 (Fed. Cir. 1983) (noting that "[the MSPB's] jurisdiction is limited to those areas specifically granted by statute or regulation").

The time limit at issue in this case does concern the appeal of a case from one *administrative agency* to another, rather than from one *court* to another (or from an administrative agency to a court). But that does not render the reasoning of *Bowles* inapposite. To the contrary, administrative agencies are creatures of statute and Congress can constrain administrative agencies, no less than courts, by specifying the circumstances under which agencies have jurisdiction to hear cases, including when agencies are acting in the capacity of appellate tribunals. Cf. *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (stating, without distinguishing between courts and administrative agencies, that "time limits" in "statutory provisions specifying the timing of review * * * are, as we have often stated, mandatory and jurisdictional, and are not subject to equitable tolling") (internal quotation marks and citation omitted); *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2001) (observing that "[t]he emergent distinction * * * is between those deadlines that gov-

[2] As in the Article III context, notice of an appeal to the MSPB divests the Secretary of Labor of jurisdiction over the complaint. See 5 U.S.C. 3330a(d)(3).

ern the transition from one court (*or other tribunal*) to another, which are jurisdictional, and other deadlines, which are not") (emphasis added). Moreover, as both the majority and dissenting opinions in *Bowles* make clear, when Congress imposes a jurisdictional time limit on a tribunal, only Congress may create equitable exceptions to such a time limit. See *Bowles*, 127 S. Ct. at 2366 (noting that "this Court has no authority to create equitable exceptions to jurisdictional requirements"); *id.* at 2368 (Souter, J., dissenting) (noting that, "if a limit is taken to be jurisdictional, meritorious excuse [becomes] irrelevant (unless the statute so provides)").[3]

In reaching the conclusion that the time limit in Section 3330a(d)(1) is not jurisdictional, the court of appeals reasoned that this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" App., *infra*, 19a-20a (internal quotation marks omitted) (citing *Arbaugh*, *Eberhart*, *Scarborough*, and *Kontrick*). Although Judge Dyk noted in his dissent

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[3] Judge Dyk observed that *Bowen* v. *City of New York*, 476 U.S. 467 (1986), "is in some tension" with this Court's cases establishing that statutory time limits for appeals are jurisdictional and thus mandatory. App., *infra*, 81a n.1. In *Bowen*, the Court held in passing that the 60-day limit in 42 U.S.C. 405(g) for commencing a civil action in federal district court challenging an administrative determination as to Social Security benefits "is not jurisdictional." 476 U.S. at 478. As Judge Dyk explained, however, the *Bowen* Court found that 42 U.S.C. 405(g) constitutes a "statute of limitations" (and not a statute specifying a period for review). 476 U.S. at 478-479. The time limit at issue in this case, like the one in *Bowles*, is explicitly delineated as a time limit on "appeal[s]," 5 U.S.C. 3330a(d)(1), and *Bowen* is at a minimum distinguishable on that basis. Accordingly, *Bowen* does not support the court of appeals' decision holding that the time limit in Section 3330a(d)(1) is non-jurisdictional, and does not undermine the force of *Bowles* as applied to that time limit.

that *Bowles* was pending (and that the majority's reading of this Court's precedents was in any event wrong), see *id.* at 81a-82a & n.1, the court of appeals did not have the benefit of the Court's decision in *Bowles* at the time it issued its opinion—and *Bowles* makes clear that "none of [the cited decisions] calls into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 127 S. Ct. at 2364.[4] At a minimum, this Court should therefore vacate the court of appeals' judgment and remand so that the court of appeals can reconsider whether, in light of *Bowles*, the time limit in Section 3330a(d)(1) is jurisdictional, and, as a result, is mandatory and not subject to equitable tolling.

B. Even If The Time Limit In Section 3330a(d)(1) Were Non-Jurisdictional, It Would Not Be Subject To Equitable Tolling

The court of appeals further erred by holding that the statutory time limit at issue is subject to equitable tolling. That holding cannot be squared with this Court's decisions concerning the circumstances under which equitable tolling is available for non-jurisdictional time limits, much less with the unequivocal "in no event" command of Section 3330a(d)(1).

1. In *Irwin, supra*, this Court held that "the same rebuttable presumption of equitable tolling applicable to

[4] The court of appeals also relied on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), in which it held that the 120-day statutory time limit for filing an appeal to the Court of Appeals for Veterans Claims from the Board of Veterans' Appeals was subject to equitable tolling. *Id.* at 1368. This Court's decision in *Bowles*, however, bolsters Judge Moore's conclusion (in her dissenting opinion below) that *Bailey* is out of step with the Court's precedents. See App., *infra*, 55a n.5.

suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. The court of appeals held that such a presumption was applicable to the time limit in Section 3330a(d)(1) because "[respondent's] VEOA claim is sufficiently analogous to private actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*" App., *infra*, 8a-9a. Assuming that the *Irwin* presumption is applicable here, the court of appeals erred by holding that the presumption was not rebutted.[5]

As this Court has explained, the relevant inquiry under *Irwin* is whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). As with all questions of statutory interpretation, that inquiry naturally begins with the text of the statute, and, where equitable tolling would be "inconsistent with the text of the relevant statute," it is not permitted. *Young* v. *United States*, 535 U.S. 43, 49 (2002) (quoting *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)). Thus, as this Court has emphasized, where a statute "sets forth its time limitations in unusually emphatic form," equitable tolling is not warranted. *Brockamp*, 519 U.S. at 350.

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[5] Although a "precise private analogue" is not required in order to invoke the *Irwin* presumption, *Scarborough*, 541 U.S. at 422, the court of appeals also erred by holding that an administrative appeal under the VEOA was sufficiently analogous to a civil action under Title VII, for which equitable tolling is available, to trigger the *Irwin* presumption. Unlike USERRA (which contains no time limit on administrative complaints to the MSPB), the VEOA does not directly prohibit *discrimination* against veterans, but instead merely provides a mechanism for enforcement of veterans' *preference* rights.

Section 3330a(d)(1) contains such "unusually emphatic" language. Rather than providing merely that a VEOA appeal must be filed within 15 days (or that a VEOA appeal shall be barred unless it is filed within 15 days), see *Irwin*, 498 U.S. at 94-95 (discussing statutes worded in that manner), Section 3330a(d)(1) provides that a VEOA appeal "in no event * * * may * * * be brought * * * later than 15 days" after the claimant receives written notice from the Secretary of Labor. As Judge Moore noted in her dissenting opinion, "[s]hort of saying 'equitable tolling shall not apply,' Congress could not have been clearer." App., *infra*, 47a. A reading of Section 3330a(d)(1) that permitted equitable tolling would render the "in no event" language effectively superfluous—in contravention of the fundamental canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992).

Moreover, in other federal statutes establishing filing deadlines, the phrase "in no event" has consistently been strictly construed. Several major statutes provide that an action must be brought within a specified limitations period and "in no event" may be brought outside a longer period of repose. See, *e.g.*, 15 U.S.C. 77m (Securities Act of 1933); 15 U.S.C. 78i(e) (Securities Exchange Act of 1934); 31 U.S.C. 3731 (False Claims Act). In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), this Court held that neither the one-year limitations period nor the three-year repose period of the Securities Act of 1933 was subject to equitable tolling. *Id.* at 363. That statute provides, in relevant part, that "[i]n no event shall any * * * action be brought * * * more than three years after the security

was bona fide offered to the public." 15 U.S.C. 77m. The Court reasoned that "the purpose of the 3-year limitation is clearly to serve as a cutoff." *Lampf*, 501 U.S. at 363. Lower courts construing similarly worded statutes have reached the same result. See, *e.g.*, *Cook* v. *Deltona Corp.*, 753 F.2d 1552, 1562 (11th Cir. 1985); *Aldrich* v. *McCulloch Props., Inc.*, 627 F.2d 1036, 1042-1043 (10th Cir. 1980).

2. In reading Section 3330a(d)(1) to permit equitable tolling, the court of appeals relied heavily on this Court's decisions in *Brockamp* and *Beggerly*. See App., *infra*, 12a-14a, 16a-17a. In each of those cases, however, the Court was construing statutes that, at least by their express terms, did not emphatically preclude equitable tolling. In *Brockamp*, the statute at issue stated that a "[c]laim for * * * refund * * * of any tax * * * shall be filed by the taxpayer" within a specified time period (and repeated that time limit on several occasions). 26 U.S.C. 6511(a). In *Beggerly*, the statute provided that a quiet title action "shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(g). Notwithstanding that unremarkable statutory language, the Court held in each instance that other factors compelled the conclusion that, despite *Irwin*, the time limits at issue were not subject to equitable tolling. See *Brockamp*, 519 U.S. at 350-354; *Beggerly*, 524 U.S. at 48-49.

In this case, the court of appeals dismissed "the statute's technical language" as "little more than a neutral factor in our analysis," App., *infra*, 10a, and instead held that Section 3330a(d)(1)'s more emphatic "in no event" language was insufficient, in the absence of at least some of the other factors cited in *Brockamp* and *Beggerly*, to overcome the *Irwin* presumption in favor of equitable

tolling. As Judge Gajarsa conceded in his concurring opinion, however, that approach comes perilously close to requiring Congress to state in the text of the statute that "equitable tolling shall not apply" in order to preclude tolling, *id.* at 40a—a "magic words" requirement that no time limit currently contained in the United States Code would satisfy. There is no basis in this Court's cases for such an approach, which would be at odds with the fact that "the time limits imposed by Congress in a suit against the government involve a waiver of sovereign immunity." *Irwin*, 498 U.S. at 96.

The court of appeals compounded its error by misapplying some of the factors cited in *Brockamp* and *Beggerly* in analyzing the time limit in Section 3330a(d)(1). The court first asserted that "section 3330a is not detailed," App., *infra*, 16a, and that "section 3330a's fairly simple language is not technical." *Id.* at 17a. That language, however, is no less technical than the relevant language of the statutes at issue in *Brockamp* and *Beggerly*, and it appears in the context of a complex and detailed regime for the processing of VEOA claims. The court next asserted that "section 3330a does not contain explicit exceptions to the two filing deadlines." *Ibid.* The fact that Congress specified that a VEOA appeal "in no event * * * may * * * be brought" outside the 15-day limit, however, makes clear that Congress intended that there be *no* exceptions to that limit, and did not intend to permit an "unmentioned, open-ended, 'equitable' exception[] into the statute that it wrote." *Brockamp*, 519 U.S. at 352. Finally, the court asserted that "the 15-day filing period under section 3330a(d)(1)(B) is extraordinarily short." App., *infra*, 17a. But the brevity of a filing period is not sufficient to overcome a textual declaration that it shall "in no event" be extended, and,

in any event, as Judge Dyk explained, the time limit applies to a class of individuals who have "already determined to commence * * * administrative proceedings and [have] demonstrated the ability to participate in the process." *Id.* at 85a.

In addition, to the extent that the court of appeals considered extratextual factors in concluding that the *Irwin* presumption had not been overcome, it erred by failing to recognize that Section 3330a(d)(1) establishes a time limit for appellate review, rather than a time limit for the initiation of a claim. As Judge Dyk noted in dissent, whereas "statutes of limitations merely govern the time when a case is first filed," "equitable tolling of appeal periods creates a risk of making finality unattainable." App., *infra*, 84a. Accordingly, to the extent that lower courts (like the court below) have held that appellate time limits are non-jurisdictional, they have generally held (unlike the court below) that such time limits are mandatory and not subject to equitable tolling. See *id.* at 82a-83a (citing cases). Thus, while it is unquestionably true, as the majority opinion noted, that "[t]he purpose of the VEOA is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right," *id.* at 18a, it does not follow that Congress would have intended to permit tolling of the period for *appealing* a decision on a VEOA claim, even assuming that it did intend to permit tolling of the period for *filing* a VEOA claim in the first place (despite the undoubted need for prompt resolution of grievances relating to federal employment). Nor would such a rule be inequitable where, as here, the VEOA claimant was provided with notice of the period

for appeal when his initial complaint was dismissed. See *id.* at 140a-141a.[6]

3. Finally, having already relied on the VEOA's purpose of assisting veterans in concluding that the time limit in Section 3330a(d)(1) is subject to equitable tolling, the court of appeals reasoned that "the canon that veterans' benefits statutes should be construed in the veteran's favor" supported that conclusion. App., *infra*, 22a. Because the text of Section 3330a(d)(1) unambiguously forecloses equitable tolling, however, that canon is unavailing. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (concluding that application of that canon would "distort the language of [the] provisions [at issue]"). Moreover, as Judge Dyk explained, "interests of fairness" do not support the equitable-tolling argument advanced by respondent here. App., *infra*, 85a.

C. The Question Presented Is Important And Warrants Review

The question whether the 15-day statutory time limit for filing a VEOA appeal with the MSPB is subject to equitable tolling is a recurring one of threshold importance to the administration of the VEOA's remedial

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[6] Prior to the court of appeals' decision in this case, the MSPB had taken the position that the 15-day time limit in Section 3330a(d)(1) is mandatory. See *Williams* v. *Department of the Navy*, 94 M.S.P.R. 400, 410 (2003), aff'd, 89 Fed. Appx. 714 (Fed. Cir. 2004); 65 Fed. Reg. 5411 (2000). Although the court of appeals did not address whether the MSPB's interpretation of the statute was entitled to deference, the fact that the MSPB has consistently taken the position that equitable tolling is not available bolsters the conclusion that follows from the statute's plain text. Cf. *Krizman* v. *MSPB*, 77 F.3d 434, 439-440 (Fed. Cir. 1996) (deferring to MSPB's determination that a Postal Service employee failed to establish "good cause" for the untimely filing of his appeal).

scheme. Because the Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions in VEOA cases, see 28 U.S.C. 1295(a)(9), no circuit conflict will arise on the availability of equitable tolling under Section 3330a(d)(1), and the Federal Circuit's holding that equitable tolling is available will have nationwide effect. The MSPB has already begun reopening VEOA appeals previously dismissed as untimely in order to determine whether equitable tolling is warranted. See *Hayes* v. *Department of the Army*, 2007 M.S.P.B. No. 157 (June 13, 2007); *Seward* v. *Department of Veterans Affairs*, 2007 M.S.P.B. No. 152 (June 12, 2007).

More broadly, the en banc Federal Circuit's decision, which employs an unduly broad methodology for determining whether equitable tolling is available, could have pernicious effects in the interpretation of other filing deadlines within the Federal Circuit's exclusive purview. See, *e.g.*, 5 U.S.C. 1214(a)(3) (period for appeal to the MSPB under the Whistleblower Protection Act); 29 U.S.C. 255 (limitations period for bringing a claim in the Court of Federal Claims under the Fair Labor Standards Act); 41 U.S.C. 609(a)(3) (same under the Contract Disputes Act). The Federal Circuit's extensive reliance in this case on its earlier decision in *Bailey* amply demonstrates that mistaken rulings about equitable tolling are not easily cabined to the specific statutory scheme that spawned the erroneous rule. Accordingly, if this Court does not vacate and remand for *Bowles*, it should grant plenary review to clarify the proper application of the *Irwin* presumption and decide whether the

time limit in Section 3330a(d)(1) is subject to equitable tolling.[7]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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[7] In *John R. Sand & Gravel Co.* v. *United States*, cert. granted, No. 06-1164 (May 29, 2007), the Court is considering whether the six-year limitations period established by 28 U.S.C. 2501 is jurisdictional (and thus must be considered by a court even if it is not raised by the parties). It would be unnecessary to hold the petition in this case pending the disposition of *John R. Sand & Gravel*, because that case does not present any question concerning the applicability (or application) of the presumption in favor of equitable tolling.