No. 09- 091036 FEB 24 2010

IN THE

Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

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

Section 7266(a) of Title 38, U.S.C., establishes a 120-day time limit for a veteran to seek judicial review of a final agency decision denying the veteran's claim for disability benefits. Before the decision below, the Federal Circuit in two en banc decisions held that Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling under this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In the divided en banc decision below, however, the Federal Circuit held that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin* and rendered Section 7266(a) jurisdictional and not subject to equitable tolling.

The question presented is whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.

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OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 589 F.3d 1201. Pet. App. 1a-73a. The opinion of the Court of Appeals for Veterans Claims ("Veterans Court") dismissing the case for lack of jurisdiction is reported at 22 Vet. App. 217. Pet. App. 74a-92a. The final agency decision issued by the Board of Veterans' Appeals ("Board") denying the claim for disability benefits is unreported. *Id.* at 103a-17a.

JURISDICTION

The court of appeals entered judgment on December 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7266(a) of Title 38, U.S.C., establishes the time limit for a veteran to commence an action in the Veterans Court challenging a denial of disability benefits by the Board:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT

While our military fights simultaneous wars in Iraq and Afghanistan, the United States successfully urged the Federal Circuit to hold that Congress forbade this Nation's veterans in *all* cases from obtaining equitable tolling of the time limit to seek judicial review of a final agency decision denying disability benefits. As the dissenting judges aptly observed, the decision below "creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a. The dissent was right to call this outcome "indefensible" and a "heavy blow" that "will prove calamitous for many severely disabled veterans." *Id.* at 68a, 70a, 71a.

In casting aside two en banc decisions that for over a decade governed the ability of thousands of veterans to obtain judicial review of disability benefit denials, the majority reasoned that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), with respect to time limits for seeking judicial review of agency action. Pet. App. 33a-34a. Because the Federal Circuit has exclusive jurisdiction to decide the issue, no circuit conflict on the question presented is possible and the decision below will have immediate nationwide effect on one of the country's largest and most important public benefit programs. This Court's review is clearly warranted to determine whether *Irwin* or *Bowles* governs the time limit for filing suit to challenge an agency decision denying veterans benefits.

I. Statutory Framework

a. *Administrative Process.* A veteran seeking benefits for a service-connected disability begins the administrative process by filing an application at one of over fifty regional offices of the Department of Veterans Affairs ("VA"). 38 U.S.C. § 5101(a). Throughout the administrative process, the Secretary of Veterans Affairs ("Secretary") has a statutory "duty to assist" the veteran in developing his or her claim. *Id.* § 5103A(a). The VA regional office must notify the veteran "on a timely basis" whether the Secretary will provide disability benefits. *Id.* § 5104(a); *see Shinseki v. Sanders*, 129 S. Ct. 1696, 1700-01 (2009).

The initial decision of the VA regional office is "subject to one review on appeal to the Secretary." 38 U.S.C. § 7104(a). "Final decisions of such appeals shall be made" by the Board, *id.* § 7101(a), an administrative body within the VA that is accountable to the Secretary. *Id.* § 7101(c). Proceedings before the Board are "ex parte in nature and nonadversarial." 38 C.F.R. § 20.700(c); *accord Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings."). The Secretary thus does not appear before the Board. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 310-11 (1985) ("no Government official appears in opposition" at the VA regional office and Board).

b. *Judicial Review.* In 1988, Congress enacted the Veterans' Judicial Review Act, which for the first time provided for judicial review of final agency decisions denying disability benefits to veterans. Pub. L. No. 100-

687, 102 Stat. 4105 (Nov. 18, 1988) (codified as amended in scattered sections of 38 U.S.C.). The Act's primary purpose was to ensure that veterans, in return for their service to the country, receive all the disability benefits to which they are entitled. S. Rep. No. 100-418, at 29, 31 (1988); H.R. Rep. No. 100-963, at 13, 26 (1988).

The Act permits a veteran to challenge a final agency decision denying benefits by bringing suit in the Veterans Court, an Article I legislative court. 38 U.S.C. § 7251. The Veterans Court

> shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Id. § 7252(a).

Section 7266(a) establishes a 120-day time limit for a veteran to commence suit against the Secretary in the Veterans Court:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Id. § 7266(a).

c. *Appellate Review.* A veteran may appeal a Veterans Court decision to the Federal Circuit "by filing a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* § 7292(a). The Federal Circuit has exclusive jurisdiction to review Veterans Court decisions. *Id.* § 7292(c).

II. Proceedings Below

a. Petitioner David L. Henderson joined the military in 1950, the year the United States entered the Korean conflict. Pet. App. 3a. He was discharged while on active duty in 1952 after being diagnosed with paranoid schizophrenia "for which he has established service connection and currently has a 100% disability rating." *Id.*

In August 2001, Henderson, unrepresented by counsel, applied to a VA regional office for special monthly compensation for in-home care related to his service-connected mental health disability. After the VA regional office denied Henderson's claim, he sought review *pro se* in the Board. On August 30, 2004, the Board issued the final decision of the Secretary denying Henderson's claim for benefits. *Id.*

b. On January 12, 2005, 135 days after the Board mailed its decision, Henderson commenced a *pro se* action against the Secretary in the Veterans Court. *Id.* The Veterans Court ordered Henderson to show cause why his case should not be dismissed for failure to comply with the 120-day time limit under Section 7266(a).

Id. at 4a. Henderson asked the Veterans Court to excuse his late filing because it resulted from the very disability for which he sought benefits—his paranoid schizophrenia which rendered him incapable of rational thought. *Id.*

At that time, the Federal Circuit had held in two en banc decisions that Section 7266(a) constituted a 120-day "statute of limitations" subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *accord Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). In those cases, the court of appeals determined that the government failed to overcome the presumption of *Irwin*, 498 U.S. at 95-96, that statutes of limitations for suits against the government are subject to equitable tolling. *Jaquay*, 304 F.3d at 1286-89; *Bailey*, 160 F.3d at 1365-68. The Federal Circuit also had held that a veteran's mental illness may provide a basis for equitable tolling of the 120-day time limit. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

On March 14, 2006, the Veterans Court in a single-judge order dismissed Henderson's *pro se* case. The court found that Henderson's "mental illness and medical impairments rendered him incapable of rational thought or deliberate decision making and unable to handle his own affairs or function in society." Pet. App. 101a. The court nonetheless refused to equitably toll the 120-day time limit on the ground that Henderson did not show that his medical condition directly caused the delay. *Id.* On October 31, 2006, the Veterans Court granted Henderson's motion for reconsideration, revoked the single-judge order, assigned the matter to

a panel for decision, and pro bono counsel entered an appearance to represent Henderson. *Id.* at 97a.

More than six months later, while the case was pending before the Veterans Court panel, this Court in *Bowles*, 551 U.S. at 208-09, held that the time limits in Federal Rule of Appellate Procedure 4 and 28 U.S.C. § 2107(a) are "jurisdictional." On August 3, 2007, the Veterans Court directed Henderson and the Secretary to submit supplemental memoranda addressing *Bowles*'s "effect, if any . . . on the line of cases currently allowing for equitable tolling of the time limitations prescribed for filing an appeal under 38 U.S.C. § 7266(a)." Pet. App. 94a.

In July 2008, a divided panel of the Veterans Court dismissed Henderson's case for lack of jurisdiction. *Id.* at 74a-83a. The majority concluded that under *Bowles*, Section 7266(a)'s 120-day time limit is a jurisdictional deadline and thus not subject to equitable tolling. *Id.* at 76a-82a. Judge Schoelen dissented, arguing that *Bowles* did not cast doubt on the Federal Circuit's en banc decisions in *Bailey* and *Jaquay*. *Id.* at 84a-92a.

c. Following argument before a panel of the Federal Circuit, the court of appeals *sua sponte* ordered rehearing en banc "to determine whether, in light of *Bowles*, [the court of appeals] should overrule *Bailey* and *Jaquay*." *Id.* at 2a.[1] On December 17, 2009, a divided court answered that question in the

1. Five veterans groups filed *amicus* briefs in support of Henderson. *See Henderson v. Shinseki*, 589 F.3d 1201, 1202 (2009).

affirmative, overturned *Bailey* and *Jaquay*, and affirmed the dismissal of Henderson's Veterans Court action for lack of jurisdiction. *Id.* at 1a-73a.

i. The majority set out its understanding of the governing legal framework: "In *Bowles*, the Supreme Court 'ma[d]e clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.'" *Id.* at 25a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that "Section 7266(a) is a notice of appeal, or time of review, provision in a civil case." *Id.* The majority thus held that, "in line with *Bowles*, . . . because [Section] 7266(a) is a time of review provision, it is jurisdictional and . . . because Congress has not so provided, the statute is not subject to equitable tolling." *Id.*

The majority acknowledged "that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court." *Id.* at 26a. It nonetheless concluded that the 120-day time limit for instituting suit was not a statute of limitations because proceedings before the Veterans Court share "characteristics of appellate review." *Id.* at 27a. The majority pointed to Section 7266(a)'s title, "Notice of Appeal," and the fact that the veteran files a "notice of appeal" to obtain "review" of the agency's denial of benefits. *Id.* at 26a-27a (quoting 38 U.S.C. § 7266(a)). The majority also reasoned that the Veterans Court "*review*[*s*]" the Board's decision; applies a clearly-erroneous standard to the facts; is restricted to the record before the agency; considers the rule of prejudicial error; and can only reverse, modify, or affirm the agency's decision. *Id.* (quoting 38 U.S.C. § 7252(a)).

Based on the above considerations, the majority declined to apply the presumption of *Irwin* that time limits for suing the government are subject to equitable tolling. The majority reasoned that *Bowles* had reversed *Irwin*'s presumption with respect to suits involving judicial review of agency action:

> The critical point is that, whereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, *see* 160 F.3d at 1365-66, in *Bowles* the Court reached the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides, *see* 551 U.S. at 212-13.

Pet. App. 33a-34a.

ii. Judge Dyk, joined by Judges Gajarsa and Moore, concurred, writing separately to express the view that "the rigid deadline of the existing statute can and does lead to unfairness . . . particularly . . . in the many cases where the veteran is not represented by counsel during the process at the Veterans Administration and/or is suffering from a mental disability." *Id.* at 44a. Judge Dyk observed that "these circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline." *Id.*

iii. Judge Mayer, joined by Chief Judge Michel and Judge Newman, filed a vigorous dissent. *Id.* at 46a-73a.

The dissent explained that "the majority's eradication of equitable tolling creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 46a. In other words, "the veteran who incurs the most devastating service-connected injury . . . will be both 'out of luck and out of court,' since failure to comply with the 120-day deadline prescribed in 38 U.S.C. § 7266(a) means that he forfeits all right to judicial review of his claim." Pet. App. 46a-47a.

The dissent explained that the majority erred in departing from the Federal Circuit's long-settled view that Section 7266(a) is a statute of limitations subject to equitable tolling. *Id.* at 47a-48a. The dissent reasoned that the prior cases were dictated by *Bowen v. City of New York*, 476 U.S. 467 (1986), which unanimously held that the deadline for seeking judicial review of an agency denial of social security benefits was a limitations period, and by *Irwin*, 498 U.S. at 95-97, which held that the time limit for challenging an adverse decision by the Equal Employment Opportunity Commission (EEOC) was a limitations period. Pet. App. 52a-53a.

The dissent also criticized the majority for relying on *Bowles*, which the dissent described as a "flimsy foundation" "for casting aside [the court's] long-established equitable tolling jurisprudence." *Id.* at 47a-48a. Finally, the dissent explained that the plain language and legislative history of Section 7266(a) show that Congress did not intend to create a jurisdictional bar immune from the doctrine of equitable tolling. *Id.* at 58a-61a, 66a-68a.

REASONS FOR GRANTING THE PETITION

Whether the Veterans Court is foreclosed under any circumstances from tolling the time limit for filing suit against the Secretary to challenge a disability benefit denial is a recurring issue that is important to the administration of the veterans disability benefits program. Because many veterans, like petitioner, have a disability that prevents them from meeting the statutory time limit for bringing suit, the Federal Circuit's decision frequently will bar veterans from obtaining even one level of judicial review. Indeed, the Veterans Court already has dismissed over two hundred cases brought by veterans based on this case.

Beyond the critical importance to disabled veterans nationwide, the Federal Circuit manifestly erred in holding that the time limit in Section 7266(a) limits the *jurisdiction* of the Veterans Court. The statutory text, structure, and purpose all compel the conclusion that Section 7266(a)'s time limit constitutes a statute of limitations for bringing suit against the government. Under the default rule of *Irwin*, the 120-day time limit is subject to equitable tolling.

This Court's unanimous decision in *Bowen*, 476 U.S. 467, confirms the court of appeals' fundamental error. *Bowen* holds that the statutory time limit governing appeal of an agency denial of social security disability benefits is subject to equitable tolling. The social security disability benefits scheme is identical in all relevant respects to the scheme for veterans disability benefits. There is no reasoned basis to permit equitable tolling for social security claimants but bar equitable

tolling for *veterans* who similarly seek review of an agency denial of disability benefits.

The majority's dispositive reliance on *Bowles* is flawed at every turn: a veteran's commencement of a suit to challenge an adverse final agency decision is markedly unlike the court-to-court appeal at issue in *Bowles*. *Bowles* does not mention *Irwin* or *Bowen*, much less cast doubt on the continuing validity of those precedents. The Federal Circuit's serious misreading of *Bowles* calls out for correction by this Court.

A. The Question Presented Is Recurring and Important

This case presents a recurring and important issue with far-reaching implications for a nationwide program that provides benefits to millions of disabled veterans. Allowed to stand, it will result in the denial of benefits to countless veterans who have meritorious disability claims.

1. Because the Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court, 38 U.S.C. § 7292(c), no circuit conflict can arise on the issue of whether equitable tolling is available under Section 7266(a). The decision below has nationwide effect and, if uncorrected by this Court, will bar many veterans from obtaining judicial review of benefit denials.

Congress and the Executive Branch have recognized the Nation's core commitment to caring for disabled veterans.[2] And this Court traditionally grants review in cases involving important questions related to the administration of the VA program. *See, e.g.*, *Sanders*, 129 S. Ct. at 1704 (reviewing prejudicial error standard applied in Veterans Court cases); *Brown v. Gardner*, 513 U.S. 115, 116 (1994) (reviewing VA regulation requiring proof by claimant that VA's negligent treatment caused disability).

2. The question presented in this case has a direct and immediate impact on the ability of disabled veterans to obtain disability benefits. There are 23 million

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2. Legislation providing relief to disabled veterans

> has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence.

H.R. Rep. No. 100-963, at 9 (1988) (citation omitted); *see Brown*, 513 U.S. at 309. The President also recently remarked at Arlington National Cemetery in honor of Veterans Day: "To all our wounded warriors, and to the families who laid a loved one to rest. America will not let you down. We will take care of our own." Remarks by the President at Arlington National Cemetery (Nov. 11, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-veterans-day-arlington-national-cemetery (last visited Feb. 16, 2010).

veterans in the United States and Puerto Rico,[3] and the VA currently provides disability benefits to almost 4 million veterans and their dependents.[4] In 2009 alone, the VA received more than 1 million applications for such benefits.[5] Each year, veterans file thousands of Veterans Court cases challenging the VA's denial of benefits.[6] Most veterans who file suit against the Secretary in Veterans Court—between 53 and 70 percent annually since 2000—do so *pro se*. *See* Veterans Ct. Rept., *supra* n.6, at 1.

In the overwhelming majority of Veterans Court cases, the veteran prevails. Since 2001, veterans on average have prevailed at least in part in *80 percent* of the cases decided on the merits. *Id.*[7] That dramatic statistic demonstrates that Veterans Court review is critical to ensuring, as Congress intended, that veterans receive the benefits to

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3. U.S. Dep't of Veterans Affairs, *FY 2011 Budget Submission, Vol. 1: Summary Vol.* at 1E-1 (2010), *available at* http://www4.va.gov/budget/docs/summary/Fy2011_Volume_1-Summary_Volume.pdf.

4. U.S. Dep't of Veterans Affairs, *FY 2009 Performance and Accountability Report, Executive Summary* (2009), *available at* http://www4.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf.

5. *Id.*

6. Court of Appeals for Veterans Claims, *Annual Reports* (2000-2009) ("Veterans Ct. Rept."), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf.

7. In 2001, veterans prevailed in whole or in part in 96 percent of Veterans Court cases decided on the merits; in 2002, 72 percent; in 2003, 91 percent; in 2004, 84 percent; in 2005, 73 percent; in 2006, 76 percent; in 2007, 64 percent; in 2008, 79 percent; and in 2009, 81 percent. Veterans Ct. Rept., *supra* n.6, at 1.

which they are entitled. Further, many of the remands are on joint motion of the parties,[8] including where the government concedes administrative error.[9] Along the same vein, the Veterans Court awards the veteran attorneys fees *more than 50 percent of the time* because the government's position was not "substantially justified" (28 U.S.C. § 2412(d)(1)(A)). Veterans Ct. Rept., *supra* n.6, at 1. By abolishing equitable tolling, the decision below denies veterans review of an erroneous decision, even where the Secretary would otherwise concede error and would be required to pay attorneys fees.

The practical import of the decision below, then, is that the courthouse doors will be shut to untold numbers of veterans with otherwise meritorious benefits claims if they miss the time limit even by one day through no fault of their own. This is particularly the case for veterans like Henderson suffering "the most devastating service-connected injur[ies]," who often are "the least able to comply with rigidly enforced filing deadlines." Pet. App. 46a (Mayer, J., dissenting). Indeed, a Westlaw search reveals that since August 14, 2008, when the Veterans Court first held that *Bowles* required the elimination of equitable tolling under Section 7266(a), that court has

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8. *See Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans' Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 89-90 (2006) (statement of Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29716.pdf.

9. *See, e.g., Howard v. Shinseki*, No. 08-3606E, 2010 WL 318531, at *2 (Vet. App. Jan. 28, 2010); *Bartlett v. Nicholson*, 21 Vet. App. 415, 2006 WL 3200849, at *2 (Sept. 8, 2006); *Zuberi v. Nicholson*, 19 Vet. App. 541, 546-47 (2006).

dismissed at least 226 cases as untimely. Even in the short time since the Federal Circuit's decision on December 17, 2009, the Veterans Court has dismissed at least 31 cases as untimely.

3. The import of this case is further highlighted by the United States's position in an analogous case involving veterans' claims. The United States urged this Court to grant review of the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007). *Kirkendall* held that equitable tolling is available under the statutory time limit to file a veterans-preference claim with the Merit Systems Protection Board (MSPB) under the Veterans Employment Opportunities Act of 1998 (VEOA). *Id.* at 833. The government requested that the Court grant, vacate, and remand in light of *Bowles* or, in the alternative, grant plenary review. Petition for a Writ of Certiorari, *Dep't of the Army v. Kirkendall*, 552 U.S. 948 (2007) (No. 07-19).

The government argued that the case warranted this Court's review because (1) the question at issue "is a recurring one of threshold importance to the administration of the VEOA's remedial scheme"; and (2) based on the Federal Circuit's exclusive jurisdiction, "no circuit conflict will arise on the availability of equitable tolling . . . and the Federal Circuit's holding that equitable tolling is available will have nationwide effect." *Id.* at 22-23. The government also observed that the decision had already affected the administration of the statutory scheme. *Id.* at 23. Each of these reasons applies with greater force here.

Although the Court denied review in *Kirkendall*, 552 U.S. at 948, that case was significantly less worthy of review for several reasons. The Federal Circuit's decision in *Kirkendall* was in line with the pro-claimant VA scheme and recognized that the time limit for seeking MSPB review is *not* jurisdictional but rather *is* subject to equitable tolling. 479 F.3d at 842. Further, there was no opportunity for this Court to review the Federal Circuit's reading of *Bowles* because *Kirkendall* was decided before *Bowles*. Counsel for the veteran also argued that *Kirkendall* was an interlocutory decision that involved a relatively small number of veterans whose requests for review occupied an insignificant portion of the MSPB's docket. *See* Brief in Opposition at 18, 19-20, *Kirkendall*, 552 U.S. 948 (No. 07-19).

By contrast, the Federal Circuit in this case effected a drastic change in the *status quo* by holding that *Bowles required* the reversal of two prior en banc decisions. Here, the decision is final and involves a benefits program that affects an exponentially larger group of veterans. Further, because *Kirkendall* relied on *Bailey*, one of the decisions overruled in this case, the court of appeals likely will extend *Bowles* to the VEOA context, such that veterans whose severe disabilities prevent a timely filing will be denied review of both disability benefits and employment preferences. Accordingly, if the government viewed *Kirkendall* as worthy of this Court's review, *a fortiori*, the question presented in this case warrants review. Any change of heart by the government now would be a heads-I-win-tails-you-lose slap in the face to the disabled veterans who suffer injuries while serving this Nation.

B. The Federal Circuit's Decision Is Wrong

This Court has long recognized the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Thus, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18; *see Sanders*, 129 S. Ct. at 1707 ("[W]e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

The pro-veteran canon of construction applies with full force to Section 7266(a). "The basic purpose of [the Veterans' Judicial Review Act] is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29. "The [Act] is designed to serve that purpose by providing such claimants with an opportunity for judicial review of final decisions of the Board of Veterans' Appeals (BVA) denying claims for benefits." *Id.*; *see id.* at 31 ("This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law."); H.R. Rep. No. 100-963, at 13 (expressing congressional intent "to maintain a beneficial non-adversarial system of veterans benefits" and "to resolve all issues by giving the claimant the benefit of any reasonable doubt").

With the pro-veteran canon and statutory purpose in mind, Section 7266(a) cannot be read to impose a jurisdictional deadline. Rather, the provision constitutes a 120-day statute of limitations for a veteran to bring suit against the United States. As such, the limitations period may be equitably tolled under the presumptive rule of *Irwin*, 498 U.S. at 95-96.

1. Section 7266(a) is a statute of limitations for bringing suit against the Secretary for veterans benefits

Section 7266(a) provides:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Four features of the statute confirm that Section 7266(a) is a statute of limitations. *First*, Section 7266(a) establishes the time limit for a veteran to *commence* a civil action against the Secretary. A time limit for bringing a court action in the first instance is naturally viewed as a statute of limitations. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case"). As the Federal Circuit explained in *Jaquay*, "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in trial court, is the

first action taken by a veteran in a court of law." 304 F.3d at 1286. Even the majority below recognized that Henderson's "appeal to the Veterans Court represented the first time he could appear before a court." Pet. App. 26a. By contrast, "[i]n the veterans' adjudicatory system, an appeal from the Veterans Court to [the Federal Circuit] is the procedural equivalent of an appeal from a district court to a court of appeals." *Id.* at 51a (Mayer, J., dissenting).

Second, the text of Section 7266(a) limits the action a *veteran* must take to file suit. The text does not express any limit on the jurisdiction or power of the Veterans Court. 38 U.S.C. § 7266(a) ("a person . . . shall file"). Absent any text reflecting a restriction on the court's jurisdiction, the pro-veteran canon of construction alone requires interpreting the provision as establishing a limitations period. *See Kirkendall*, 479 F.3d at 843 ("Even if this were a close case . . . the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [a statutory time limit] is subject to equitable tolling.").

Third, the statutory structure reflects that Congress did not intend the 120-day time limit to operate as a restriction on the jurisdiction of the Veterans Court. Section 7266(a) does not appear in the subchapter that establishes and confines the Veterans Court's jurisdiction. Title 38, chapter 72 of the United States Code establishes the Veterans Court. Subchapter I, entitled "Organization and Jurisdiction," includes the jurisdictional prerequisites for filing in Veterans Court. In particular, Section 7252, entitled "Jurisdiction; finality of decisions," states that the Veterans Court has

"exclusive jurisdiction to review decisions of the [Board]." 38 U.S.C. § 7252(a).

By contrast, Congress placed Section 7266(a) in the subchapter describing "Procedure" for the Veterans Court. That subchapter contains provisions on "Rules of practice and procedure," *id.* § 7264, and other housekeeping matters. *E.g.*, *id.* §§ 7261-7269. The placement of Section 7266(a) in the subchapter dealing with "procedure" is consistent with the Federal Circuit's pre-*Bowles* precedent that the 120-day time limit is a "statute of limitations." *Jaquay*, 304 F.3d at 1288-89; *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (describing "statutes of limitations" as among the "procedural requirements for triggering the right to an adjudication").

Fourth, Congress's purpose in enacting the provision was to ensure that veterans could obtain judicial review of benefit denials. S. Rep. No. 100-418 at 29, 31; H.R. Rep. No. 100-963 at 13, 26. The decision below defeats that purpose. Indeed, an inflexible jurisdictional bar to initial court review—one that denies veterans with meritorious claims any opportunity to be heard in any court—would be a uniquely anti-veteran provision within an otherwise pro-veteran statutory scheme. The Federal Circuit's interpretation would prevent *all* veterans in *all* cases from obtaining equitable tolling of the 120-day time limit, regardless of circumstances. Pet. App. 33a-34a. For instance, the court's rule would apply even where, as here, the condition preventing a veteran from filing within 120 days is the same disability for which the veteran seeks benefits, *id.*, or even where the VA affirmatively

misleads the veterans as to the filing deadline, *Bailey*, 160 F.3d at 1361-62. Congress could not have intended those results.

2. The court of appeals' decision conflicts with *Bowen* and *Irwin*

a. In *Bowen*, 476 U.S. at 478-81, this Court unanimously held that equitable tolling is available under the statutory time limit for seeking judicial review of a final agency decision denying a claim for social security disability benefits. That statute, 42 U.S.C. 405(g), is in all material respects identical to Section 7266(a):

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a *review* of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added). Section 405(g) by its plain terms is "a time of review provision." Pet. App. 25a. The majority's holding that "because [Section] 7266(a) is a time of review provision, it is jurisdictional," *id.*, directly conflicts with *Bowen*'s holding that a time of review provision for agency action denying disability benefits is *not* jurisdictional.

Moreover, Section 405(g), like Section 7266(a), addresses the action a claimant must take and is not framed as a limit on the reviewing court's jurisdiction. Both time limits, moreover, appear in statutory provisions addressed to "procedure" rather than to the court's jurisdiction. 42 U.S.C. § 405 (entitled, "Evidence, procedure, and certification for payments"); 38 U.S.C. § 7266 (appearing in subchapter of statutory scheme governing Veterans Court entitled "Procedure.").[10]

The government in *Bowen* argued, as in this case, that equitable tolling was unavailable because Section 405(g) "sets the bounds of the [reviewing court's] jurisdiction." *Bowen*, 476 U.S. at 478. This Court rejected that argument, holding that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Id.* The Court explained that equitable tolling was "consistent with Congress' intent in enacting [the] particular statutory scheme" for providing social security disability benefits to eligible claimants. *Id.* at 479. The Court also reasoned that "Congress designed [the statutory scheme for social security disability benefits] to be 'unusually protective' of claimants." *Id.* at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). The same is true here.

There is no basis to conclude that the time limit for seeking judicial review of an agency denial of social security benefits is a limitations period, but that the time

10. After holding that Section 405(g) is a statute of limitations, *Bowen* observed that the Secretary's ability to extend the limit was consistent with congressional intent to permit equitable tolling. 476 U.S. at 476, 480.

limit for seeking judicial review of an agency denial of veterans benefits is jurisdictional. Congress, rather, created the Veterans Court to provide judicial review to *eliminate* "unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies." S. Rep. No. 100-418 at 31.

The social security and veterans' disability benefits programs share a "marked similarity." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). Both programs involve claims for federal disability benefits, and both administrative processes are non-adversarial and pro-claimant. *Compare Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings") *with Sims v. Apfel*, 530 U.S. 103, 107 (2000) ("[T]he SSA 'conduct[s] the administrative review process in an informal, nonadversary manner.'" (citations omitted)). Indeed, the government itself recently relied on the similarity between the two schemes in arguing to this Court that "[t]here is no reason to apply a different rule" for veterans and social security disability claimants. Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209) (rule of prejudicial error).[11]

11. The veterans' scheme is nothing like the adversarial immigration scheme at issue in *Stone v. INS*, 514 U.S. 386 (1995), a decision cited by the majority. Pet. App. 14a, 26a. *Stone* stated that the time limit for an undocumented alien to challenge a civil deportation order in a circuit court of appeals was jurisdictional. 514 U.S. at 405-06. A veteran, however, does not challenge the agency's decision in the court of appeals but does

(Cont'd)

b. The majority's decision is also inconsistent with *Irwin*, 498 U.S. at 95-96, which held that a veteran, following the EEOC's denial of a discrimination claim, may be excused under the doctrine of equitable tolling from the "statutory time limit" for suing the VA. In holding that the deadline was a statute of limitations subject to equitable tolling, the Court expressly relied on *Bowen*. *Irwin*, 498 U.S. at 94. The statutory schemes in *Irwin*, in *Bowen*, and here are functionally parallel. The statutory provision in each instance specifies the time limit for filing an initial claim in court and therefore acts as a restriction on an individual's claim, not on the jurisdiction of the court. Furthermore, *Irwin* held that statutes of limitations in suits against the government are presumptively subject to equitable tolling. *Id.* at 95-96. The Federal Circuit's rule in this case turns that presumption on its head by imposing a uniquely anti-veteran rule that would require Congress expressly to authorize courts to apply equitable tolling when veterans bring suit against the United States. Pet. App. 29a-30a; *cf. id.* at 44a-45a (Dyk, J., concurring) (expressing view that it was Congress's responsibility to amend the statute).

It would be highly incongruous to excuse veterans under equitable circumstances from the time requirements for bringing employment actions under

(Cont'd)

so in the Veterans Court, whose decision is then subject to further review by the court of appeals. Moreover, this case, like the social security context, involves denial of a benefit. It is implausible that Congress intended to treat a disabled veteran seeking a benefit like an undocumented alien facing deportation. Pet. App. 53a-54a (Mayer, J., dissenting).

Title VII against the Secretary, *Irwin*, 498 U.S. at 95-96, yet hold them to an unyielding deadline for initiating suit under a statutory scheme created with pro-veteran intentions. This Court's review is warranted to correct the Federal Circuit's subversion of Congress's intent.

3. *Bowles* is inapposite

Bowles held that the time limits in Federal Rule of Appellate Procedure ("Rule") 4 and 28 U.S.C. § 2107(a) for a litigant to appeal a federal district court judgment to a circuit court of appeals are "jurisdictional" and thus not subject to extension based on equitable circumstances. *Bowles*, 551 U.S. at 209. The Federal Circuit held that *Bowles* announced a *per se* rule that any "appellate" deadline in any civil case is jurisdictional when it stated that "[t]oday we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 33a-34a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that because the veteran brings a civil suit by filing a "notice of appeal" in the Veterans Court, which "reviews" agency action, Section 7266(a) is a "time of review" provision that under *Bowles* is jurisdictional. *Id.* at 25a. The majority likewise agreed with the government that Section 7266(a) "is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court or tribunal ends and that of the appellate court begins." *Id.* at 23a-24a.

a. The majority wrenched the quoted passage from *Bowles* out of context and woodenly extended the passage to the veterans context as if it were a statute. But this Court does not "parse the text" of its opinions

"as though that were itself the governing statute." *Comm'r v. Bollinger*, 485 U.S. 340, 349 (1988); *see Nevada v. Hicks*, 533 U.S. 353, 372 (2001). Not surprisingly, the majority's logic breaks down at each level of the analysis, because there is a world of difference between an appeal from a district court to a circuit court of appeals, and an *initial suit* against the government in the *pro-veteran* context.

First, the Board acting for the Secretary is not a lower court or even a court at all. To the contrary, the entire administrative claims process, including at the Board, is non-adversarial. *Walters*, 473 U.S. at 309-12; 38 C.F.R. § 20.700(c). By contrast, district court proceedings are adversarial. Pet. App. 72a-73a (Mayer, J., dissenting) ("So while Bowles, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.").

This Court has specifically "warned against reflexively 'assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.'" *Sims*, 530 U.S. at 110 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940)); *accord id.* ("'[I]t is well settled that there are wide differences between administrative agencies and courts.'" (quoting *Shepard v. NLRB*, 459 U.S. 344, 351 (1983)). Yet the majority reflexively treated the Board within the agency as a lower "tribunal" whose "jurisdiction" is divested when a case is "transfer[red]" to the Veterans Court. Pet. App. 23a-24a, 37a. The Board is functionally identical to the Appeals Council (or an ALJ) that makes a final decision denying social security benefits, *Sims*, 530 U.S. at 105, and the EEOC that makes a final

decision rejecting a federal employee's discrimination claim, 29 C.F.R. §§ 1614.405, 1614.407(c). In all of those instances the litigant's suit simply takes the matter out of an agency; the suit does not transform the agency into a lower court.

Second, a veteran who initiates suit in the Veterans Court appears for the first time in court against the Secretary—the first adversarial proceeding in the veteran's pursuit of benefits. The Veterans Court thus operates more like the district court in *Bowen* and *Irwin* than the circuit court of appeals at issue in *Bowles*. Pet. App. 54a-55a (Mayer, J., dissenting). Indeed, the notice to challenge the Board's decision under Section 7266(a) is filed *in the Veterans Court*, 38 U.S.C. § 7266(a), reflecting that the notice operates as a complaint. *Compare* Rule 4(a)(1)(A) (to challenge a district court decision, the notice of appeal is filed in the district court).

The Veterans Court's 80 percent combined reversal and remand rate for Board's decisions (p. 14, *supra*) further illustrates that the Veterans Court does not function like a circuit court of appeals. The combined reversal and remand rate of the circuit courts for district court decisions is typically between 12 percent and 16 percent.[12] And by equating an initial request for judicial review of agency action with a traditional circuit court appeal, the majority's decision creates another anomaly: although Section 7252(a) creates a cause of action for judicial review of a final agency decision denying

12. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, at table B-5 (2000-2008), *available at* http://www.uscourts.gov/judbususc/judbus.html.

disability benefits, the decision below leaves no room for any statute of limitations for that claim. *Bowen* held that Section 405(g)'s time limit for seeking judicial review of the denial of social security benefits is not jurisdictional and therefore refutes the court of appeals' holding that *Bowles* renders all "time of review" provisions jurisdictional. Pet. App. 25a.

Third, the majority's opinion erroneously elevates form over substance by placing talismanic significance on the word "appeal" in the text and title of Section 7266(a). A veteran appeals the Board's decision not in a jurisdictional sense, but in the sense of challenging the Secretary's decision in court. That situation is no different than when a social security claimant appeals the Commissioner's disability benefits denial by filing suit in district court. *See, e.g.*, *Torres v. Barnhart*, 417 F.3d 276, 283 (2d Cir. 2005) (an "appeal of Commissioner's final decision must be filed within 60 days"); *Snyder v. Barnhart*, 212 F. Supp. 2d 172, 174 (W.D.N.Y. 2002) ("This is an action brought pursuant to 42 U.S.C. § 405(g) in appeal of the [Commissioner's] final decision."). This Court likewise has used the term "appeal" as meaning a challenge. *Heckler*, 467 U.S. at 107 ("[I]f the claimant is dissatisfied with the decision of the ALJ, he may take an *appeal* to the Appeals council of [HHS]." (emphasis added)).

Congress's use of the term "appeal" in other provisions of the statute confirms its non-jurisdictional meaning. Congress repeatedly employed the terms "appeal," "appellate review," and "appellant" in the layman's sense to refer to a veteran's non-adversarial

request for review within the agency. *See, e.g.*, 38 U.S.C. §§ 7104(a) (Board hears "appeals" of regional office decisions); 7105(a) ("appellate review" is initiated before Board); 7106 ("right of review of appeal" before Board); 7107(d)(1) (veteran is "appellant" before Board even though Secretary does not appear); 7108 (referring to "an application for review on appeal" before Board). Similarly, the name of the Board of Veterans' Appeals likely conveys that the Board decides challenges to initial agency denials of disability benefits.

Because Congress established the administrative benefits process to be pro-veteran and non-adversarial, and expected veterans to navigate the process without legal representation, *Sanders*, 129 S. Ct. at 1707, it strains credulity to conclude that Congress intended the word "appeal" in this context to have the formal jurisdictional significance as in 28 U.S.C. § 2107(a) and Rule 4.

The Federal Circuit finally erred in relying on the "characteristics of appellate review" in Veterans Court proceedings. Pet. App. 27a. The majority pointed to the deferential standard of review applied by the Veterans Court. *Id.* at 27a-28a. That standard, however, merely reflects Congress's desire that the court defer to the agency in certain circumstances. It does not mean that Congress intended the 120-day time limit to be jurisdictional. Indeed, the same standard of judicial review applies in the social security context. 42 U.S.C. § 405(g) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner . . . The findings of the Commissioner . . .

as to any fact, if supported by substantial evidence, shall be conclusive"); *see also* Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (setting forth social security rule of prejudicial error).

b. There is also an important textual distinction between Section 7266(a) and Section 2107(a). Section 7266(a) directs *the veteran* to take action and does not purport to limit the Veterans Court's power at all. By contrast, Section 2107(a)'s text limits the circuit court of appeals' power. 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment . . . of a civil nature before a circuit court of appeals for review" unless a notice of appeal is filed within 30 days). Moreover, unlike Section 7266(a), Section 2107(c) specifies the precise amount of time a court may extend the filing deadline. *Bowles*, 551 U.S. at 213 ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'").

c. *Bowles* is also inapposite because the Court relied on the "longstanding treatment"—dating to the mid-nineteenth century—of time limits for a traditional appeal from a district court as "jurisdictional" in nature. *Bowles*, 551 U.S. at 209-10 (citations omitted). There is no comparable tradition for statutory time limits on seeking judicial review of non-adversarial administrative decisions that are the product of a uniquely pro-claimant statutory scheme. To the contrary, for more than two decades this Court has held that such time limits are non-jurisdictional and subject to equitable tolling. *Bowen*, 476 U.S. at 478. And for over a decade, the Federal Circuit agreed. *Jaquay*, 304 F.3d at 1285-89; *Bailey*, 160 F.3d at 1364-68.

d. Finally, unlike *Bowles*, application of equitable tolling of the 120-day time limit under Section 7266(a) by an Article I court does not implicate any of the separation of powers concerns implicit in the federal courts' interpretation of statutes establishing their own jurisdiction. *See Bowles*, 551 U.S. at 212-13 (stating that the Court's decision "follows naturally" from the principle that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"). Because Congress established the Veterans Court as an Article I court, there is no risk of an Article III court overstepping *its own* bounds by allowing equity to increase the cases that the Veterans Court can hear. To the contrary, depriving the Veterans Court of the power to apply equitable tolling utterly defeats Congress's pro-veteran intent in creating the Veterans Court in the first place.

* * *

The decision below drastically alters the rights of veterans to obtain judicial review of agency decisions denying benefits. "Eliminating equitable tolling deprives deserving veterans of the leniency they are due and makes a mockery of the pro-claimants adjudicatory scheme Congress intended to create." Pet. App. 73a (Mayer, J., dissenting). The doctrine of equitable tolling is particularly necessary in this context because veterans typically appear *pro se* and their disabilities may prevent a timely request for review. Only this Court can consider whether the court of appeals erroneously read this Court's decision in *Bowles* to overrule *Irwin*'s application to a veteran's suit to challenge an agency denial of disability benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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