No. 13-813

In the Supreme Court of the United States

LARRY G. TYRUES, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to challenge in the United States Court of Appeals for Veterans Claims a prior, final decision of the Board of Veterans' Appeals from which petitioner had failed to take a timely appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations and rule: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 732 F.3d 1351. A prior opinion of the court of appeals (Pet. App. 58-67) is reported at 631 F.3d 1380. The relevant opinions of the United States Court of Appeals for Veterans Claims are reported at 26 Vet. App. 31 (Pet. App. 45-56), 23 Vet. App. 166 (Pet. App. 68-145), and 20 Vet. App. 231. The relevant decisions of the Board of Veterans' Appeals (Pet. App. 146-177) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2013. The petition for a writ of certiorari was filed on January 7, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 7103(a) of Title 38, United States Code, provides as follows:

> The decision of the Board [of Veterans' Appeals] determining a matter under section 7102 of this title is final unless the Chairman orders reconsideration of the decision in accordance with subsection (b). Such an order may be made on the Chairman's initiative or upon motion of the claimant.

38 U.S.C. 7103(a).

Section 7266(a) of Title 38, United States Code, provides as follows:

> 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.

38 U.S.C. 7266(a).

Section 20.1100 of Title 38, Code of Federal Regulations, provides as follows:

> **Finality of decisions of the Board.**
>
> (a) *General.* All decisions of the Board will be stamped with the date of mailing on the face of the decision. Unless the Chairman of the Board orders reconsideration, and with the exception of matters listed in paragraph (b) of this section, all Board decisions are final on the date stamped on the face of the decision. With the exception of matters listed in paragraph (b) of this section, the decision rendered

by the reconsideration Panel in an appeal in which the Chairman has ordered reconsideration is final.

(b) *Exceptions*. Final Board decisions are not subject to review except as provided in 38 U.S.C. 1975 and 1984 and 38 U.S.C. chapters 37 and 72. A remand is in the nature of a preliminary order and does not constitute a final decision of the Board.

38 C.F.R. 20.1100.

STATEMENT

This case involves the 120-day filing deadline for appealing a final decision of the Board of Veterans' Appeals (Board) under 38 U.S.C. 7266(a). In April 2004, petitioner sought to appeal a September 1998 Board decision denying his claim for veterans' disability benefits under 38 U.S.C. 1110. The United States Court of Appeals for Veterans Claims (Veterans Court) dismissed the appeal as untimely, and the court of appeals affirmed.

1. A veteran seeking benefits for a service-connected disability must file a claim for compensation at one of the regional offices of the Department of Veterans Affairs (VA). 38 U.S.C. 5101(a). An adverse decision by the regional office is subject to appellate review by the Board, whose decisions constitute the final determinations of the Secretary of Veterans Affairs (Secretary). 38 U.S.C. 7104(a).

A Board decision must include "a written statement of the Board's findings and conclusions" and "an order granting appropriate relief or denying relief." 38 U.S.C. 7104(d). The Board may also remand issues back to the regional office for further consideration. See 38 U.S.C. 5109B (requiring expedited considera-

tion of issues on remand); 38 C.F.R. 19.7, 19.9, 19.38, 20.1100 (discussing Board remands).

Absent an order granting reconsideration, a "decision of the Board determining a matter" that has been appealed from a regional office "is final." 38 U.S.C. 7103(a). The only "exception" to the finality of such decisions concerns "matters" remanded to the regional office. 38 C.F.R. 20.1100(a) and (b). Any remand of such matters "is in the nature of a preliminary order and does not constitute a final decision of the Board." 38 C.F.R. 20.1100(b).

Congress has authorized veterans to seek review of final Board decisions in the Veterans Court. "In order to obtain review by the [Veterans Court] of a final decision of the Board," a veteran "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." 38 U.S.C. 7266(a). Congress has not created any mechanism for appealing the Board's determination to remand all or part of a case.

2. Petitioner served on active duty in the United States Army, including service in the Persian Gulf War. Pet. App. 3. In March 1995, petitioner filed a claim with VA for disability benefits for a lung disorder under 38 U.S.C. 1110. Pet. App. 3. Section 1110 authorizes compensation for any "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty" during wartime. 38 U.S.C. 1110. In July 1995, a VA regional office denied petitioner's Section 1110 claim, and petitioner appealed to the Board. Pet. App. 164.

In December 1996, following a Board hearing officer's suggestion that his lung disability and other symptoms might warrant a claim for disability due to "Persian Gulf Syndrome," petitioner sought benefits under 38 U.S.C. 1117 based on presumptive service-connected disability. Pet. App. 3-4, 59. The version of Section 1117 that was applicable in 1996 authorized compensation for Persian Gulf veterans who suffer from a chronic disability not attributable to any known clinical diagnosis. Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 106(a)(1), 108 Stat. 4650-4651. In April 1998, the VA regional office denied petitioner relief under Section 1117 and confirmed that his original request for benefits under Section 1110 "remain[ed] denied." Pet. App. 72. Petitioner subsequently appealed the Section 1117 ruling to the Board. *Id.* at 164.

3. In September 1998, the Board issued a decision addressing petitioner's requests for benefits under Sections 1110 and 1117. In a portion of the decision labeled "Order," the Board denied petitioner's request for a direct service-connected lung disability under Section 1110. Pet. App. 4, 165. In a separate portion of the decision labeled "Remand," the Board remanded petitioner's request for benefits under Section 1117 to the VA regional office for further factual findings. *Id.* at 4, 172-177.

Together with its decision, the Board mailed petitioner a "Notice of Appellate Rights." Pet. App. 4, 177. The notice explained that, under 38 U.S.C. 7266, "a decision of the [Board] granting less than the complete benefit, or benefits, sought on appeal is appealable to the [Veterans Court] within 120 days." Pet. App. 4, 177. The notice further explained that "[a]p-

pellate rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand * * * does not constitute a decision of the Board on the merits of your appeal." *Ibid.*

The Board also attached a separate notice of appellate rights. That notice stated that the Board's decision "is the final decision for all issues addressed in the 'Order' section of the decision." Pet. App. 5. That separate notice also made clear that, unlike those issues addressed in the "Order" portion of the decision, petitioner "cannot appeal an issue remanded to the local VA office because a remand is not a final decision." *Ibid.* Rather, the notice explained, "[*t*]*he advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the 'Order.'*" *Ibid.* The notice stated that any notice of appeal was required to be filed within 120 days. *Ibid.*

Petitioner did not appeal any aspect of the Board's decision within the 120-day period. Pet. App. 5.

4. In April 2004, based on the factual record assembled on remand, the Board denied petitioner's request for benefits under Section 1117 for undiagnosed illness resulting from service in the Persian Gulf War. Pet. App. 5, 146-149, 162.[1]

Petitioner appealed to the Veterans Court, seeking review not only of the Board's April 2004 decision denying benefits under Section 1117, but also of the

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[1] The current version of 38 U.S.C. 1117(a)(1), which was applicable in 2004, authorizes VA to pay compensation to a Persian Gulf veteran with a "qualifying chronic disability," as defined in 38 U.S.C. 1117(a)(2), that became manifest during active-duty service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of ten percent or more during a presumptive period prescribed by the Secretary.

Board's September 1998 decision denying benefits under Section 1110. In 2005, the Veterans Court affirmed as to the Section 1117 issue. Pet. App. 6. The court held that it lacked jurisdiction to consider petitioner's request for benefits under Section 1110, however, because petitioner had failed to file a timely appeal from the Board's September 1998 decision denying that request. *Ibid.*

Petitioner sought review in the court of appeals. On the government's motion, the court issued a per curiam order, vacating the Veterans Court's decision and remanding for reconsideration in light of two intervening decisions concerning the finality of Board decisions. Pet. App. 6, 61.

In 2009, the Veterans Court, sitting en banc, held that it lacked jurisdiction to review the Board's 1998 decision denying relief under Section 1110. Pet. App. 68-145. The court explained that "the September 1998 Board decision was final concerning the issue of [S]ection 1110 compensation for direct service connection for a lung disability." *Id.* at 102. The court concluded that, "[b]ecause [petitioner] did not file [a notice of appeal] within 120 days after VA mailed notice of the Board's final September 1998 decision, the Court lacks jurisdiction to review the September 1998 Board decision." *Ibid.* (citing 38 U.S.C. 7266(a)).[2]

The Veterans Court further held that the Board's definitive rejection of petitioner's request for benefits under Section 1110 was not rendered non-final by the

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[2] On the merits of petitioner's request for benefits under Section 1117, the Veterans Court held that the Board had not adequately explained its reasons for rejecting certain medical evidence, and it remanded the issue to the agency for further proceedings. Pet. App. 108-110.

Board's contemporaneous remand for further consideration of petitioner's claimed entitlement under Section 1117. See Pet. App. 76-103 & n.6. The court explained that, under the informal, non-adversarial administrative scheme governing veterans' benefits, "there is no requirement that a veteran's various claims for relief be simultaneously filed and adjudicated, either upon initial review or on appeal." *Id.* at 89 (quoting *Elkins* v. *Gober*, 229 F.3d 1369, 1375 (Fed. Cir. 2000)). The court noted that the Board's 1998 decision had specifically denied relief under Section 1110, and that the decision therefore constituted a complete decision of the Board on that issue for purposes of 38 U.S.C. 7104(d)(2), which provides that each decision of the Board shall include "an order granting appropriate relief or denying relief." Pet. App. 81.

The Veterans Court also observed that petitioner had been notified, at the time of the 1998 decision, that he had the right to appeal the Board's denial of benefits under Section 1110. Pet. App. 99-101. The court noted that petitioner had "not raise[d] any argument that challenges * * * the sufficiency of the notice of appellate rights." *Id.* at 100-101. The court accordingly held that it lacked jurisdiction to review the Board's 1998 decision. *Id.* at 102-103.[3]

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[3] Judge Kasold concurred (Pet. App. 111-117), emphasizing that the Veterans Court "historically has considered * * * a Board decision denying benefits for a disability based on one particular theory, while another theory is still being developed below, to be final for purposes of appeal." *Id.* at 111. Judge Hagel concurred in the result but dissented from aspects of the majority's reasoning. *Id.* at 117-131. Judge Lance, joined by Judge Schoelen, dissented from the court's conclusion that it lacked jurisdiction to review the 1998 Board decision. *Id.* at 131-145.

5. In a decision issued in February 2011, the court of appeals affirmed. Pet. App. 58-67. The court rejected petitioner's argument that an immediate appeal to the Veterans Court should be optional when the Board definitively rejects one asserted ground for claiming benefits but remands for further consideration of another. *Id.* at 63-64. The court explained that the governing statute "plainly forewarns" that, "[i]n order to obtain review," an appeal must be filed within 120 days after a "final decision" of the Board. *Id.* at 66 (quoting 38 U.S.C. 7266(a)). The court concluded that "all final decisions, even those appearing as part of a mixed decision, must be appealed within 120 days from the date of mailing of notice of the decision." *Ibid.* In reaching that conclusion, the court of appeals expressed the understanding that Section 7266(a)'s 120-day time limit for filing a notice of appeal is "jurisdictional." *Id.* at 62.

6. Shortly after the court of appeals issued its February 2011 ruling, this Court decided *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011). *Henderson*, like this case, involved the application of 38 U.S.C. 7266(a), the statute that governs appeals to the Veterans Court. The Court in *Henderson* held that, although the 120-day time limit set forth in Section 7266(a) is "an important procedural rule," it "does not have jurisdictional attributes." 131 S. Ct. at 1206.

Petitioner filed a petition for certiorari. In October 2011, this Court granted the petition, vacated the court of appeals' judgment, and remanded for further consideration (GVR) in light of *Henderson*. Pet. App. 57. On remand, the court of appeals vacated the Veterans Court's 2009 judgment and remanded to allow that court to determine whether the non-jurisdictional

character of Section 7266(a)'s 120-day deadline would alter the result in this case. *Id.* at 6.

7. In August 2012, the en banc Veterans Court again held that the Board's 1998 decision was final as to petitioner's request for benefits under Section 1110, and that petitioner's 2004 appeal of that final decision was untimely under Section 7266(a). Pet. App. 45-51 (plurality opinion); *id.* at 51-52 (Hagel, J., concurring in result under Section 7266(a)). The plurality explained that the "non-jurisdictional nature" of the 120-day rule did not affect its analysis of Section 7266(a)'s application to this case. *Id.* at 51. The plurality acknowledged that the 120-day deadline is subject to the doctrine of equitable tolling, but it explained that petitioner had not invoked equitable tolling here. *Id.* at 48-50.[4]

8. In October 2013, the court of appeals again affirmed. Pet. App. 1-44. The court explained that "a decision definitively denying certain benefits" under Section 1110 is a "final" decision for purposes of Section 7266(a)'s 120-day deadline, "despite the simultaneous remand of issues concerning receipt of benefits on other statutory grounds, where immediate judicial review will not disrupt the orderly process of adjudication." *Id.* at 9 (internal quotation marks omitted). The court further observed that, under existing precedent, the Veterans Court has the right "to dismiss the appeal on the ground that immediate review would disrupt orderly adjudication, as where the denial portion [of the Board order at issue] is inextricably inter-

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[4] Judge Lance, joined by Judge Schoelen, dissented from the court's analysis for the same reasons they had previously dissented in 2009. Pet. App. 52-56.

twined with the portion ordering a remand." *Ibid.* (internal quotation marks omitted).

The court of appeals stated that its interpretation of Section 7266(a) "fits the statutory language and context[,] * * * enables the Board's own rulings to provide the clarity that is desirable in a busy adjudicatory system," and "finds support in the longstanding treatment of certain partial-case resolutions in the federal courts" under Federal Rule of Civil Procedure 54(b). Pet. App. 9. The court explained that the correctness of its approach did not depend on "whether [petitioner] had one or more than one 'claim'—a term that is in Rule 54(b) but not in [S]ection 7266(a)." *Id.* at 11. The court emphasized that its holding provides clarity to veterans by allowing them "simply to follow express and unequivocal appealability directives from the Board" and also allows veterans to seek "quick correction of erroneous denials" of benefits. *Id.* at 11-12. The court also rejected petitioner's contention that *Henderson* entitles veterans to choose whether to file an appeal immediately or to wait until completion of all remand proceedings. *Id.* at 13. The court found that argument inconsistent with Section 7266(a)'s unambiguous and mandatory requirement that any "final decision" be appealed within 120 days. *Id.* at 12-13.

Judge Newman dissented. Pet. App. 16-44. She recognized that petitioner had the right to take a discretionary interlocutory appeal of the Board's 1998 rejection of his request for benefits under Section 1110. *Id.* at 26-27. She would have held, however, that Section 7266(a) did not *require* petitioner to pursue an immediate appeal in order to preserve the Section 1110 issue for eventual Veterans Court re-

view. *Id.* at 27-30. She argued that petitioner had presented only a single claim for benefits, supported by two theories of recovery (under Sections 1110 and 1117, respectively), and that the 1998 Board decision was not a complete adjudication of his claim. *Id.* at 31-33. Judge Newman also (1) rejected the majority's analogy to Rule 54(b); (2) asserted that the appeal notices accompanying the 1998 decision were "not unmistakably clear"; (3) invoked *Henderson*'s statement that provisions for veterans' benefits must be construed in favor of beneficiaries; and (4) criticized the majority for failing to heed the "premises" of this Court's GVR order. *Id.* at 34-44.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioner's 2004 appeal from the Board's 1998 denial of his request for benefits under Section 1110 was untimely. As explained above, Section 7266(a) provides the only mechanism by which a veteran can appeal a "final decision" of the Board with respect to his requests for benefits. See 38 U.S.C. 7266(a) (explaining what a veteran must do "[i]n order to obtain review by the [Veterans Court] of a final decision of the Board"); pp. 3-4, *supra*. Section 7103(a) establishes that a Board decision "determining a matter * * * is final" unless the Board Chairman subsequently orders reconsideration. The VA regulation addressing the "[f]inality of decisions of the Board" makes clear that "all Board decisions are final on the date stamped on the face of the decision[,] [*w*]*ith the exception of mat-*

ters" remanded to the regional office. 38 C.F.R. 20.1100(a) (emphasis added).

Here, the 1998 Board decision denying petitioner's request for benefits under Section 1110 was unambiguously "final" for purposes of Section 7266(a). The decision included a written statement of the Board's findings and conclusions that definitively rejected that request, see Pet. App. 165-172, as well as a one-sentence "Order" expressly denying relief under Section 1110. *Id.* at 172 ("The claim for entitlement to service connection for a lung disorder on a direct basis is denied."). A separate section of the Board decision remanded petitioner's request for compensation under Section 1117 but made no mention of his Section 1110 theory. *Id.* at 172-176. Because the Section 1110 issue was not among the "matters" remanded for further consideration, the Board's decision on that issue was final under 38 C.F.R. 20.1100(a).[5]

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[5] A *judicial* order resolving fewer than all of a plaintiff's claims is generally not final for purposes of 28 U.S.C. 1291. See, *e.g.*, *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198, 203-204 (1999). This case, however, neither involves a conventional appeal of a judicial order nor otherwise implicates Section 1291. Rather, it involves the finality of an administrative order subject to review "by an Article I tribunal as part of a unique administrative scheme," *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1204 (2011). As explained above, that scheme recognizes that a Board decision can be final (and therefore subject to immediate appeal under Section 7266(a)) as to some matters, even when the decision remands other matters for additional consideration. Pp. 3-6, *supra*; see also *Henderson*, 131 S. Ct. at 1205-1206 (noting that "[t]he contrast between ordinary civil litigation * * * and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic"); *Sims* v. *Apfel*, 530 U.S. 103, 109-110 (2000) (noting the "wide differences between administrative agencies and courts," and warning against "reflexive[] assimi-

Because the Board issued a "final decision" rejecting petitioner's request for benefits under Section 1110, Section 7266(a) required that any appeal from that denial be filed within 120 days. This should have been evident to petitioner not only from the statutory and regulatory provisions discussed above, but also from the two different notices that VA provided petitioner when it sent him the 1998 Board decision. Those notices made clear that the Board's determination was the "final decision for all issues addressed in the 'Order' section of the decision"—that is, for the denial of benefits under Section 1110—and that petitioner was required to file any appeal of that decision within 120 days. Pet. App. 5.

Instead of complying with this statutory deadline, petitioner waited more than five years before seeking to appeal the denial of benefits under Section 1110. The Veterans Court and the court of appeals correctly held that the appeal was untimely.

2. None of petitioner's criticisms of the decision below is persuasive.

a. Petitioner contends (Pet. 7) that a Board decision cannot be "final" for purposes of Section 7266(a) unless it adjudicates a "claim" in its entirety. Petitioner further argues (Pet. 8-9) that he has advanced only a single, unitary "claim" for benefits supported by two distinct legal theories—one under Section 1110, the other under Section 1117. Petitioner appears to assert that the Board did not deny his unitary claim for benefits until April 2004, when the Board

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lat[ion of] the relation[ship] of administrative bodies and the courts to the relationship between lower and upper courts") (internal quotation marks omitted); Pet. 21-22 (emphasizing fundamental differences between VA adjudication and civil litigation).

rejected the Section 1117 theory that it had previously remanded in 1998.

Petitioner's theory of finality lacks support in the relevant statutory and regulatory provisions. None of those provisions conditions finality for Section 7266(a) purposes on whether the Board has adjudicated the veteran's entire "claim." Rather, 38 U.S.C. 7103(a) indicates that a "decision of the Board determining a *matter*" is final, and 38 C.F.R. 20.1100(a) and (b) confirm that any "*matters*" remanded for further consideration are not final (emphases added).

Those provisions plainly contemplate Board decisions, like the one at issue here, in which the Board definitively rejects one theory of relief while remanding for further consideration of one or more other asserted grounds for awarding benefits. The Board's 1998 decision in this case makes clear that the Board itself viewed its decision as encompassing two distinct "claims." See Pet. App. 172 (stating that "[t]he claim for entitlement to service connection for a lung disorder on a direct basis [*i.e.*, under Section 1110] is denied," but that "additional development of the evidence should be accomplished prior to further consideration of the veteran's claim of entitlement to service connection for a chronic disorder manifested by shortness of breath, due to an undiagnosed illness, claimed as secondary to Persian Gulf War service [*i.e.*, under Section 1117]"). But because the statutory and regulatory provisions that govern appeals from Board decisions do not use the word "claim," nothing of substance turns on that terminological choice. As the court of appeals explained, the Veterans Court therefore was able to rule on the timeliness of petitioner's appeal "without resolving a dispute about whether

[petitioner] had one or more than one 'claim.'" *Id.* at 11.[6]

b. Petitioner contends (Pet. 11-14) that the court of appeals' holding will confuse veterans as to their appellate rights. As explained above, however, the VA notice that petitioner received in 1998 made clear that (1) the Board's decision was final *except* with respect to matters that had been remanded for further proceedings, and (2) any appeal on any issue that was *not* remanded was required to be filed within 120 days. See pp. 5-6, *supra*. The court of appeals correctly noted that this bright-line rule "enables the veteran simply to follow express and unequivocal appealability directives from the Board," and that "[p]redicating appealability on the Board's unambiguous instructions provides clarity" to veterans. Pet. App. 11.

c. Petitioner argues (Pet. 14) that the court below "misunderstood the basic lesson of *Henderson* [v. *Shinseki*, 131 S. Ct. 1197 (2011)]," namely, that "VA's pro-claimant policy—its core founding principle—pervades the entire adjudicatory regime." But the Court in *Henderson* held only that the 120-day deadline in Section 7266(a) "does not have jurisdictional

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[6] In support of his theory that a Board decision is "final" only if it adjudicates a veteran's entire "claim," petitioner cites (Pet. 7-8) *Bingham* v. *Nicholson*, 421 F.3d 1346, 1348-1349 (Fed. Cir. 2005) and *Roebuck* v. *Nicholson*, 20 Vet. App. 307, 314 (2006). But the court in *Bingham* neither addressed finality under Section 7266(a) nor considered whether the Board's definitive rejection of one theory of relief in a binding order is rendered non-final by its remand for further consideration of other theories. And, as the Veterans Court clarified in 2009, the rule announced in *Roebuck* applies only when the court reserves a particular theory for *its own* further consideration, *without* remanding the matter to the Board. Pet. App. 82-85.

attributes." *Id.* at 1206. It neither addressed principles of finality nor defined the circumstances in which a Board determination constitutes a "final decision" subject to the requirements of Section 7266(a). The Court's holding that Section 7266(a)'s time limit is not jurisdictional has no logical bearing on the question presented here, *i.e.*, whether a remand for further consideration of one legal theory renders a Board decision non-final with respect to another theory that the Board has definitively rejected.

To the extent petitioner invokes *Henderson* for the general proposition that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," Pet. 15 (quoting *Henderson*, 131 S. Ct. at 1205-1206), VA does not disagree. Contrary to petitioner's assertion, however, the court of appeals' interpretation of Section 7266(a) *does* favor veterans. By construing Section 7266(a) to allow an immediate appeal of the Board's denial of relief under one theory, even when other issues are remanded for further agency proceedings, the court's interpretation expedites veterans' access to Veterans Court review. As the court itself emphasized, allowing immediate appeals "makes possible quick correction of erroneous denials" of benefits. Pet. App. 11-12. It also provides veterans with the clarity of a bright-line rule. *Id.* at 11.

To be sure, the statutory scheme would be even *more* favorable to veterans if (as petitioner urges, Pet. 7-8) Section 7266(a) permitted an appeal to be taken, at the veteran's option, *either* promptly after the Board's rejection of a particular legal theory *or* after the completion of additional remand proceedings to consider alternative grounds for awarding benefits.

But petitioner identifies no sound rationale under which the statute could be read to authorize that "discretionary" (Pet. 7) approach. Section 7266(a) provides the only mechanism by which veterans may obtain Veterans Court review, and it authorizes review only "of a final decision of the Board." 38 U.S.C. 7266(a). In a case like this one, where the Board definitively rejects one theory for relief while remanding for further consideration of another, the rejection therefore is appealable only if it is a "final decision" within the meaning of Section 7266(a). And if that is so, Section 7266(a) requires that any notice of appeal seeking review of the rejection must be filed within 120 days after the date on which notice of the decision is mailed to the veteran. See pp. 5-6, *supra*. There simply is no plausible reading of Section 7266(a)'s text that would allow such a decision to be treated as either "final" or "non-final" at the veteran's option. The pro-veteran canon of construction embraced in *Henderson* and other precedents cannot trump this plain statutory language. See, *e.g.*, *Boyer* v. *West*, 210 F.3d 1351, 1355-1356 (Fed. Cir. 2000).

d. Petitioner criticizes (Pet. 19-22) the court of appeals' invocation of Federal Rule of Civil Procedure 54(b) in support of its conclusion that Section 7266(a) authorizes an immediate appeal of final Board determinations on particular issues, even when the Board remands other issues for further consideration. Rule 54(b) authorizes a district court in civil litigation to enter "a final judgment as to one or more, but fewer than all, claims" upon "determin[ing] that there is no just reason for delay." Fed. R. Civ. P. 54(b); see, *e.g.*, *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 434-438 (1956). Here, the court of appeals stated that, like a

district court under Rule 54(b), the Board can determine that a denial portion of its decision "is definitive and sufficiently separate from a remand portion that it should be designated as final and thus immediately appealable." Pet. App. 10.

Petitioner correctly notes (Pet. 21-22) that Rule 54(b) does not directly apply to this case, and that there are significant differences between the rules that govern VA adjudication and those that govern civil litigation. The court of appeals acknowledged, however, that the rules that apply to civil litigation do not "directly control[]" the inquiry here. Pet. App. 9-10. The court instead discussed Rule 54(b) as an "instructive model" for interpreting the rules applicable to VA adjudication, and the court offered that analogy only after interpreting the relevant statutes based on their text, precedent, and the need for clarity. *Id.* at 8-11. Nothing in the court's opinion suggests that the Rule 54(b) analysis was necessary to its statutory holding.

3. Petitioner contends (Pet. 18) that the court of appeals "ignored the clear import of" this Court's GVR order. That argument lacks merit. The purpose of a GVR is to "procur[e] the benefit of the lower court's insight" before this Court rules on the merits or decides whether to grant plenary review. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). But a GVR is not a "'final determination on the merits,'" nor is it "an invitation to reverse." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Henry* v. *Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam)); *Gonzalez* v. *Justices of Mun. Court*, 420 F.3d 5, 7 (1st Cir. 2005), cert. denied, 546 U.S. 1181 (2006). Rather, it "is merely a device that allows a lower court that had rendered its deci-

sion without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." *Gonzalez*, 420 F.3d at 7. In this case, the Court's GVR order allowed the court of appeals to reconsider its prior decision in light of *Henderson*, but the order did not state or imply that the court of appeals should reach a different result on remand.

The court of appeals unambiguously complied with this Court's GVR order. It considered the applicability of *Henderson* to its earlier decision and concluded that "*Henderson* does not support a radically different rule under [S]ection 7266(a), namely, that a veteran has the discretion to file an appeal immediately or to wait until completion of all remand proceedings." Pet. App. 13. In so holding, the court cited this Court's statement in *Henderson* that Section 7266(a)'s 120-day deadline is an "important procedural rule." *Id.* at 14 (quoting 131 S. Ct. at 1206). The court also correctly explained that, while under *Henderson* this deadline "might be excused for good reasons," this Court's decision does not suggest "that the rule [can] be disregarded at the veteran's discretion in the significant class of cases involving mixed decisions." *Id.* at 13-14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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