No. 09-1036

In the Supreme Court of the United States

DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 38 U.S.C. 7266(a), which establishes a 120-day time limit for filing a notice of appeal in the Court of Appeals for Veterans Claims in order to seek review of a decision of the Board of Veterans' Appeals, is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 589 F.3d 1201. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 74a-92a) is reported at 22 Vet. App. 217. The opinion of the Board of Veterans' Appeals (Pet. App. 103a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010, and was granted on June 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 7266(a) of Title 38 of the United States Code 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.

STATEMENT

1. Veterans who claim benefits must apply to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* The initial decision on a benefits claim is generally issued by a VA regional office. See *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1701 (2009). A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. See 38 U.S.C. 7252. A statutory provision entitled "[n]otice of appeal" provides in pertinent part that, "[i]n 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." 38 U.S.C. 7266(a).

Decisions of the Veterans Court may in turn be appealed to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. 7292. In such an appeal, the Federal Circuit shall "decide all relevant questions of law." 38 U.S.C. 7292(d). Except to the extent that the appeal "presents a constitutional issue," however, the court may not review "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case." *Ibid.*

2. Petitioner David L. Henderson was a veteran who applied for, and received, 100% disability benefits for paranoid schizophrenia connected to his military service.[*] Pet. App. 3a. In August 2001, he applied for supplemental benefits for in-home care. *Ibid.* The regional office denied his claim, and petitioner sought Board review. *Ibid.* In a decision dated August 30, 2004, the Board denied petitioner's appeal. *Ibid.* Petitioner then sought review in the Veterans Court, but he did not file a notice of appeal until January 12, 2005—15 days after the expiration of the 120-day period prescribed by Section 7266(a). *Ibid.*

3. The Veterans Court dismissed petitioner's appeal as untimely. Pet. App. 98a-102a. The court agreed with petitioner that the 120-day time limit for filing a notice of appeal is subject to equitable tolling "[i]n limited circumstances." *Id.* at 100a. The court concluded, however, that petitioner had failed to establish an entitlement to tolling because he had "not shown how a mental or physical illness caused his [notice of appeal] to be untimely." *Id.* at 102a.

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[*] We are informed by petitioner's counsel that Mr. Henderson died on October 24, 2010, and that counsel intends to file a motion to substitute his surviving spouse as petitioner.

Petitioner sought reconsideration of that ruling. The Veterans Court granted the motion for reconsideration and requested supplemental briefing on whether this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), which held that statutory time limits for initiating an appeal are jurisdictional, precluded equitable tolling of the deadline for taking an appeal to the Veterans Court. Pet. App. 93a-95a. The Veterans Court ultimately concluded that the deadline in Section 7266(a) is not subject to tolling, and it again dismissed petitioner's appeal. *Id.* at 74a-92a.

4. Petitioner appealed to the Federal Circuit, and the case was argued before a panel of the court of appeals. After argument, but before the case was decided, the court *sua sponte* granted rehearing en banc. The en banc court affirmed the Veterans Court's dismissal order. Pet. App. 1a-43a.

a. The court of appeals began by noting this Court's holding in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 25a (quoting *Bowles*, 551 U.S. at 214). The court construed Section 7266(a) to be "a notice of appeal, or time of review, provision," and it concluded that the 120-day time limit "is jurisdictional" and therefore "not subject to equitable tolling." *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that Section 7266(a) is more analogous to a statute of limitations than to a time-of-review provision. The court observed that Section 7266 is entitled "Notice of appeal" and that Section 7266(a) refers to the "timely filing of a notice of appeal" "in order to obtain *review*" by the Veterans Court. *Id.* at 26a-27a. The court further noted that the review performed by the Veterans Court is on the agency record and is performed under standards

"characteristic[] of appellate review, rather than of an assessment of claims in the first instance." *Id.* at 27a.

The court of appeals next examined the text and legislative history of Section 7266(a), discerning no "clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions." Pet. App. 29a. Nor, in the court's view, could *Bowles* persuasively be distinguished on the ground that it involved an appeal to an Article III court rather than to the Article I Veterans Court. *Id.* at 36a-37a. To the contrary, the court noted that jurisdictional limitations apply with "*added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)). Finally, the court of appeals rejected petitioner's contention that the proclaimant nature of the veterans benefit system alters the jurisdictional character of Section 7266(a). *Id.* at 40a-41a. The court explained that "although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone." *Id.* at 41a (quoting *Sanders*, 129 S. Ct. at 1707).

b. Judge Dyk concurred, joined by Judges Gajarsa and Moore. Pet. App. 44a-45a. While joining the opinion of the court, the concurring judges expressed the view that "the rigid deadline of the existing statute can and does lead to unfairness," *id.* at 44a, and they suggested "that Congress should amend the statute to provide a good cause exception," *id.* at 45a.

c. Judge Mayer dissented, joined by Judges Michel and Newman. Pet. App. 46a-73a. The dissenting judges characterized Section 7266(a) "as a statute of limitations

rather than a rigid jurisdictional bar," *id.* at 53a, and they viewed this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), as establishing a presumption of equitable tolling that was undisturbed by *Bowles*. Pet. App. 47a-48a. The dissenting judges also concluded that the court had failed to give adequate weight to what they described as the "uniquely pro-claimant adjudicatory scheme" that governs veterans benefits determinations. *Id.* at 66a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the time limit prescribed in 38 U.S.C. 7266(a) for filing a notice of appeal in the Veterans Court to obtain review of a decision of the Board of Veterans' Appeals is not subject to equitable tolling.

In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court reaffirmed its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. That treatment reflects the recognition that Congress's authority to "decide[] what cases the federal courts have jurisdiction to consider" means that Congress "can also determine when, and under what conditions, federal courts can hear" those cases. *Id.* at 212-213. Congress defines the jurisdiction of appellate courts when it prohibits them "from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." *Id.* at 213. Accordingly, in a series of decisions going back to the nineteenth century, both this Court and the courts of appeals have treated such statutory time limits as jurisdictional. *Id.* at 210.

Section 7266(a) is a statute that prescribes a "time limit[] for taking an appeal." *Bowles*, 551 U.S. at 210. Petitioner suggests that it is actually a statute of limita-

tions governing the filing of a new civil action, but that contention is refuted by the statute itself—which refers to the filing of a "notice of appeal"—and by its title: "Notice of appeal." 38 U.S.C. 7266. And like a court of appeals reviewing an administrative agency's decision, the Veterans Court applies a deferential standard of review and limits its consideration to the record before the agency. In addition, the legislative history of Section 7266(a) shows that Congress viewed the Veterans Court as analogous to the federal courts of appeals, and that it considered the time limit of Section 7266(a) to be a deadline governing the initiation of an appeal.

Because Section 7266(a) is a statutory time limit for taking an appeal, it is jurisdictional under the rule recognized in *Bowles*. Petitioner suggests various features of Section 7266(a) that, in his view, make that rule inapplicable. He observes that Section 7266(a) is a provision separate from other statutes defining the Veterans Court's jurisdiction, that it refers to the actions of litigants and does not expressly address the power of the court, and that the Veterans Court is established under Article I of the Constitution. None of those observations, however, renders inapplicable the rule that "statutory time limits for taking an appeal [are] jurisdictional." *Bowles*, 551 U.S. at 210.

Petitioner contends that a jurisdictional time limit for taking an appeal to the Veterans Court would be an anomaly within the generally pro-veteran administrative scheme for adjudicating benefits claims. But that pro-veteran scheme coexisted for years with a complete preclusion of judicial review. When Congress first authorized judicial review of VA benefits decisions in 1988, it provided an unusually lengthy 120-day time limit for filing notices of appeal. The pro-veteran character of

the relevant administrative scheme affords no basis for reading into that statutory time limit an exception that Congress did not provide. Rather, the court of appeals correctly recognized that although "'Congress has expressed special solicitude for the veterans' cause,' [the court] do[es] not have free rein to establish special procedural schemes governing the veterans' system alone." Pet. App. 41a (quoting *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009)).

Finally, petitioner argues that enforcement of the jurisdictional time limit in Section 7266(a) will lead to harsh results. Petitioner's concerns are overstated and fail to take account of features of the VA system that ensure that veterans are informed of their appeal rights and have multiple opportunities to obtain any benefits to which they are entitled. In any event, the potential for unfair results is a consideration for Congress to take into account in deciding whether to amend the statute. It is not a basis for courts to "create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214.

ARGUMENT

THE DEADLINE FOR FILING A NOTICE OF APPEAL PRESCRIBED BY 38 U.S.C. 7266(a) IS JURISDICTIONAL AND NOT SUBJECT TO EQUITABLE TOLLING

In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that "statutory time limits for taking an appeal" are jurisdictional. *Id.* at 210. Strict enforcement of such time limits will undoubtedly produce painful results in particular cases. See *United States* v. *Locke*, 471 U.S. 84, 101 (1985). It is ultimately up to Congress, however, to strike what it views as the appropriate balance between the protection of deserving litigants' access to

appellate review, on the one hand, and countervailing systemic interests in finality and efficient administration on the other. In striking that balance in the specific context of veterans-benefit appeals, Congress may take account of the fact that such appeals involve individuals to whom our Nation owes the greatest of debts.

This case involves 38 U.S.C. 7266(a), which prescribes the deadline for filing a notice of appeal in the Veterans Court to obtain review of a VA benefits determination made by the Board of Veterans' Appeals. Under the rule recognized and reaffirmed in *Bowles*, that deadline is a limitation on the jurisdiction of the Veterans Court, and the court of appeals correctly held that it is not subject to equitable tolling.

A. Statutory Time Limits For Taking An Appeal Are Jurisdictional

1. In *Bowles*, this Court reaffirmed its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. The Court considered 28 U.S.C. 2107, which provides that a notice of appeal in a civil case must be filed within 30 days of the judgment. See 28 U.S.C. 2107(a). Section 2107(c) gives district courts authority, in certain circumstances, to reopen the filing period for 14 additional days. The district court had purported to reopen the period for 17 days, and petitioner had filed a notice of appeal on day 16—that is, within the time set by the district court but outside of the period permitted by the statute. 551 U.S. at 207.

This Court held that the court of appeals lacked jurisdiction over the appeal. *Bowles*, 551 U.S. at 208. In reaching that conclusion, the Court noted that it had "long held that the taking of an appeal within the pre-

scribed time is 'mandatory and jurisdictional.'" *Id.* at 209 (quoting *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)). It also observed that courts of appeals "routinely and uniformly dismiss untimely appeals for lack of jurisdiction," and that, "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* at 210; see, *e.g.*, *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

The Court in *Bowles* acknowledged recent decisions in which it had "undertaken to clarify the distinction between claims-processing rules and jurisdictional rules." 551 U.S. at 210. In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), for example, the Court held that Federal Rule of Bankruptcy Procedure 4004(a), which imposes a deadline for filing an objection to a debtor's discharge, does not affect the subject-matter jurisdiction of the bankruptcy court. Similarly, the Court held in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), that the deadline for new-trial motions under Federal Rule of Criminal Procedure 33 is not jurisdictional. Each of those cases, however, involved a time limit for taking some subsidiary step in pending trial-court proceedings, rather than a deadline for seeking appellate review. In addition, both cases involved rules of court, not statutes enacted by Congress. For those reasons, the Court in *Bowles* explained, the decisions in *Kontrick* and *Eberhart* did not "call[] into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210.

2. A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the inferior tribunal ends and that of the appellate court begins. See *Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal is an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Just as Congress has authority to "decide[] what cases the federal courts have jurisdiction to consider," Congress "can also determine when, and under what conditions, federal courts can hear" those cases. *Bowles*, 551 U.S. at 212-213. Congress defines the jurisdiction of appellate courts when it prohibits them "from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." *Id.* at 213.

As the Court recognized in *Bowles*, Congress remains free if it wishes to "authorize courts to promulgate rules that excuse compliance with the statutory time limits," whether through equitable tolling or otherwise. 551 U.S. at 214. Where Congress has not conferred such discretion, however, courts have "no authority to create equitable exceptions to jurisdictional requirements." *Ibid.*

3. Petitioner relies heavily (Br. 18-21, 35-38) on this Court's decision in *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010). Contrary to petitioner's contentions, however, that decision does not cast doubt on the principle that statutory time limits for taking an appeal are jurisdictional. In *Reed Elsevier*, the Court held that compliance with 17 U.S.C. 411(a) (Supp. III 2009), which requires copyright holders to register their works before suing for infringement, is not a jurisdictional pre-

requisite to an infringement action. In reaching that conclusion, the Court emphasized that the determination whether a particular provision is jurisdictional turns not on the presence or absence of "a 'jurisdictional' label," but instead on "whether the type of limitation that [it] imposes is one that is properly ranked as jurisdictional absent an express designation." 130 S. Ct. at 1248.

The Court analogized the statute at issue in *Reed Elsevier* to other nonjurisdictional "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." 130 S. Ct. at 1246-1247. For example, the requirement that a prisoner exhaust administrative remedies before challenging prison conditions in court is not jurisdictional, 42 U.S.C. 1997e(a); see *Jones* v. *Bock*, 549 U.S. 199, 216 (2007), nor is the requirement that a discrimination claimant file a timely charge with the Equal Employment Opportunity Commission (EEOC) before bringing a Title VII action in court, 42 U.S.C. 2000e-5(f)(1); see *Zipes* v. *TWA*, 455 U.S. 385, 392-398 (1982). Section 411(a), the Court concluded, imposes a similar nonjurisdictional "precondition to suit." *Reed Elsevier*, 130 S. Ct. at 1247.

The Court in *Reed Elsevier* distinguished Section 411(a) from the "type[s] of limitation" at issue in *Bowles*—that is, "statutory deadlines for filing appeals"—which, it reaffirmed, are properly regarded as jurisdictional. 130 S. Ct. at 1248. The *Reed Elsevier* Court noted that the Court in *Bowles* had examined "the historical treatment of statutory conditions for taking an appeal" and had "emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107." *Ibid.* Unlike Section 411(a), the Court explained, "[t]he statutory limitation in *Bowles* was of a type that [the Court] had long held *did*

'speak in jurisdictional terms' even absent a 'jurisdictional' label." *Ibid.* Accordingly, *Reed Elsevier* is fully consistent with the principle that statutory time limits governing appeals are jurisdictional.

B. Section 7266(a) Prescribes A Statutory Time Limit Governing The Taking Of An Appeal To The Veterans Court

Section 7266(a) establishes a statutory time limit governing the taking of an appeal to the Veterans Court. Under the rule reaffirmed in *Bowles*, that time limit is jurisdictional. Petitioner attempts to avoid that conclusion by arguing that Section 7266(a) is actually a statute of limitations, but that argument is inconsistent with the statutory text, with the structure of the veterans judicial review system, and with the legislative history.

1. The plain language of Section 7266(a) makes clear that it prescribes a time limit for taking an appeal

Congress could hardly have been clearer in specifying that Section 7266(a) imposes a time limit on the initiation of an appeal. The provision states that, "[i]n order to obtain review" in the Veterans Court of a decision of the Board, a person aggrieved by the decision "shall file a *notice of appeal* with the Court within 120 days." 38 U.S.C. 7266(a) (emphasis added). If there were any doubt on the point, it would be resolved by the title of Section 7266, which is "Notice of appeal." See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

Petitioner contends that Section 7266(a) is a statute of limitations that "establishes the time limit for a veteran to commence a civil action against the Secretary." Br. 19 (emphasis omitted). Petitioner argues that Section 7266(a) is analogous in particular to the statutes of

limitations governing Title VII actions and Social Security benefits claims, which, this Court has held, are subject to equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990); *Bowen* v. *City of New York*, 476 U.S. 467 (1986). Those analogies are misplaced because the language of Section 7266(a) is significantly different from that of the provisions at issue in *Irwin* and *Bowen*.

The Court in *Irwin* construed 42 U.S.C. 2000e-16(c) (1988), which permitted a federal employee to "file a civil action" based on a discrimination complaint "[w]ithin thirty days of receipt of notice of final action" by the EEOC. See 498 U.S. at 94-95. And the Court in *Bowen* construed 42 U.S.C. 405(g), which provides that an individual aggrieved by an administrative decision concerning Social Security benefits "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." See 476 U.S. at 478; *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). Unlike those statutes, Section 7266(a) does not refer to the "fil[ing]" or "commence[ment]" of a new "civil action," but only to the filing of a "notice of appeal." This Court's treatment of statutes of limitations therefore has no bearing here.

2. The structure of the veterans judicial review system demonstrates that Section 7266(a) prescribes a time limit for taking an appeal

In addition to the textual differences between Section 7266(a) and the statutes at issue in *Bowen* and *Irwin*, there is also an important structural difference. Whereas the deadlines at issue in *Irwin* and *Bowen* pertained to the commencement of suit in district courts, the Veterans Court is an *appellate* court. Petitioner

identifies no case in which the deadline for seeking review of a decision in an appellate court has been held not to be jurisdictional.

a. The Veterans Court's status as an appellate court is apparent not only from the court's name—the "United States *Court of Appeals* for Veterans Claims," 38 U.S.C. 7251 (emphasis added)—but also from the nature of the veterans judicial review system. Unlike the federal district courts, the Veterans Court has no original jurisdiction. Its only statutory responsibility is to review the final decisions of a body—the Board of Veterans' Appeals—that itself performs an adjudicative function. See 38 U.S.C. 7252. The Veterans Court lacks authority to conduct its own factfinding and must limit its review to "the record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b). In examining that record, it must apply a deferential standard of review, setting aside the Board's factual findings only if it determines that they are clearly erroneous. 38 U.S.C. 7261(a)(4); see 38 U.S.C. 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."). It also must take due account of the rule of prejudicial error, which means that it must apply "the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1704 (2009) (quoting United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (emphasis omitted); 38 U.S.C. 7261(b).

Thus, both the functions of the Veterans Court and the manner in which it performs those functions are characteristic of appellate courts. To be sure, the Veterans Court is in the unusual position of being a federal

appeals court that is reviewed by another federal appeals court, but that neither transforms the Veterans Court into a trial court nor transforms its notice-of-appeal statute into a mere claims-processing deadline. And for certain aspects of a veteran's claim, the *only* available judicial appellate review is performed by the Veterans Court, since the Federal Circuit's jurisdiction is generally limited to reviewing questions of law. Except in constitutional cases, the Federal Circuit cannot review factual findings, even for clear error, and it cannot review the application of law to fact. 38 U.S.C. 7292(d); *Forshey* v. *Principi*, 284 F.3d 1335, 1345-1347, 1351 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). Those features of typical appellate review are performed only by the Veterans Court.

b. Petitioner emphasizes (Br. 33-34) that a case in the Veterans Court does not have the same docket number it had before the Board. That fact hardly establishes, however, that the proceeding before the Veterans Court is a "new civil action." Cases in the federal courts of appeals are assigned docket numbers that differ from those that were used in the district court, just as cases in this Court have different docket numbers from those used in the underlying cases in the courts of appeals. That does not cast doubt on the fact that this Court and the courts of appeals act as appellate tribunals.

c. Petitioner argues (Br. 31-34) that because the Social Security disability system is analogous to the veterans disability system, Section 7266(a) should be construed similarly to 42 U.S.C. 405(g), which the Court in *Bowen* construed as establishing a nonjurisdictional limitations period. That argument lacks merit.

To be sure, the Social Security and veterans-benefit review mechanisms share significant common attributes.

In addition to the fact that both involve claims for federal disability benefits, the courts in both contexts review a pre-existing agency record under a deferential standard. Nothing in *Bowen* suggests, however, that the Court relied on *those* attributes in concluding that Section 405(g)'s 60-day deadline was not jurisdictional. To the contrary, confinement to an existing record and application of a deferential standard of review are more typically associated with appellate review than with trial-court proceedings. The *Bowen* Court's holding that Section 405(g) is not jurisdictional is best understood as resting on attributes of that provision that Section 7266(a) does not share. As explained above, whereas a veteran who seeks to challenge an adverse decision of the Board must appeal to the Veterans Court by filing a "notice of appeal," 38 U.S.C. 7266(a), a claimant wishing to challenge a decision by the Social Security Administration must "commence[]" a "civil action" in the district court, 42 U.S.C. 405(g), a step that is accomplished "by filing a complaint with the court," Federal Rule of Civil Procedure 3. And unlike the district courts that hear Social Security cases, the Veterans Court functions exclusively as an appellate tribunal.

Petitioner also contends that because a veteran who files a notice of appeal pursuant to Section 7266(a) thereby "appears for the first time in court," the notice of appeal is properly regarded as "commenc[ing] a suit." Br. 42; see Br. 35 (noting that a proceeding in the Veterans Court is not a "court-to-court appeal"). That argument lacks merit. To be sure, Congress *could* have authorized veterans (like Social Security claimants) to challenge agency benefits decisions by commencing a new suit. Section 7266(a)'s text (see pp. 13-14, *supra*) and history (see pp. 19-23, *infra*) make clear, however,

that Congress conceived of Veterans Court proceedings as "appeal[s]" rather than new civil actions.

Petitioner's argument logically suggests that, under the various statutory provisions that authorize direct court of appeals review of specified categories of agency decisions, the deadlines for seeking review are not jurisdictional, since under such provisions the court of appeals is the first court to act in the relevant matter. Petitioner cites no decision supporting that proposition, however, and the precedents of this Court and the courts of appeals are to the contrary. In *Stone* v. *INS*, 514 U.S. 386, 406 (1995), the Court held that the deadline for filing a petition for review of a decision of the Board of Immigration Appeals is jurisdictional, even though a petition for review provides the first opportunity to have a removal order considered by a court. Similarly, in other cases governed by the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, courts of appeals have uniformly held that the 60-day time limit on petitions for review of agency orders is jurisdictional and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997). Petitioner identifies no case in which a time limit for seeking review of an agency decision in an appellate court has been treated as nonjurisdictional.

Taken together, this Court's decisions in *Bowen*, *Bowles*, and *Stone* make clear that (1) statutory time limits for commencing suit against the government in a trial court are presumptively nonjurisdictional, and (2) statutory time limits for initiating an appeal, or for seeking review of agency action in a federal appellate court, are presumptively jurisdictional. Under that frame-

work, the 120-day deadline established by Section 7266(a) is presumptively jurisdictional. This Court has recognized that the text or history of a particular statute may override the presumptions described above. See *Bowles*, 551 U.S. at 214 ("If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-139 (2008) (holding that, although most limitations periods for commencing suit are subject to waiver or forfeiture, the six-year deadline for filing suit in the Court of Federal Claims is not). Nothing in the text of Section 7266(a), however, suggests an intent to depart from the usual rule that statutory deadlines for initiating appeals are jurisdictional. And, as we explain below, neither the history of Section 7266(a) nor its placement within the overall statutory scheme supports petitioner's view that the 120-day deadline is subject to equitable tolling.

3. The legislative history makes clear that Section 7266(a) prescribes a jurisdictional time limit for taking an appeal

Section 7266(a) was enacted in 1988 as part of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105, which, for the first time, provided for judicial review of VA benefits decisions. The legislative history of the VJRA makes clear that Congress regarded review in the Veterans Court as an appeal—not a new civil action—and that it considered the time limit of Section 7266(a) to be a deadline governing the initiation of an appeal.

a. The initial Senate version of the VJRA would not have created the Veterans Court but would instead have

provided for review of Board decisions in district court. S. 11, 100th Cong., 1st Sess. § 302 (1987) (proposed 38 U.S.C. 4025); see S. Rep. No. 418, 100th Cong., 2d Sess. 6-7 (1988) (*Senate Report*). To obtain such review, a claimant would have been required to "commence[]" a "civil action" by filing a "complaint" within 180 days after receiving notice of an adverse Board decision. *Id.* at 7. In the next iteration of the bill, the reviewing court was changed from the district court to the court of appeals. *Id.* at 17. The Senate passed that version, 134 Cong. Rec. 17,479 (1988), and the bill then moved to the House, which introduced the Veterans Court, but as a replacement for the Board, H.R. 5288, 100th Cong., 2d Sess. § 5 (1988); see H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 5 (1988) (*House Report*). Under the House version, a veteran could obtain review of the Veterans Court's legal conclusions, though not its factual findings, by filing a "notice of appeal" with the Federal Circuit. H.R. 5288, § 5 (proposed 38 U.S.C. 4042(a)(1)(A)).

The compromise bill, which was eventually enacted, retained the Board and created the Veterans Court, with that court serving as the initial reviewer of decisions made by the Board. Under that compromise, a claimant can seek review in the Veterans Court not by "commenc[ing]" a civil action, but by filing a "notice of appeal * * * within 120 days" after the Board's decision. 38 U.S.C. 7266(a). A claimant may then seek review of an adverse Veterans Court decision—on legal, but not factual, issues—by filing a "notice of appeal" to the Federal Circuit. 38 U.S.C. 7292(a). In describing the compromise version of Section 7266, Senator Cranston, the chief sponsor of the VJRA, stated:

> In order to make an appeal to the [Veterans Court], an appellant would be required to file a notice of appeal with the court within 120 days after a final [Board] decision. * * * This is a slightly shorter time to take an appeal than that provided for in S. 11—180 days—but the amount of activity that would have to be accomplished to file the appeal under the compromise agreement is also reduced. Under S. 11, the appellant would have had to file a civil suit within the 180-day time period. Under the compromise agreement, the only action required is the filing of a notice of appeal.

134 Cong. Rec. at 31,470.

Those remarks reflect the chief sponsor's understanding that Section 7266(a) would not, as petitioner suggests (Br. 19), "establish[] the time limit for a veteran to *commence* a civil action against the Secretary." To the contrary, Senator Cranston's comments indicate that Congress chose the "notice of appeal" language in a deliberate effort to distinguish an appeal to the Veterans Court from the commencement of a civil action. Indeed, Congress chose the same language to describe the initiation of an appeal to the Veterans Court that it used to describe, in a subsequent section of the Act, the initiation of an appeal to the Federal Circuit.

b. The evolution of the Veterans Court's role in the successive legislative proposals that culminated in the VJRA further demonstrates that Congress viewed that court as equivalent to a federal court of appeals and therefore as subject to similar rules. As explained above, the initial version of the Senate bill called for review of Board decisions by district courts. In the next iteration of the bill, the courts of appeals replaced the

district courts. The primary reason for that change was "the view that judicial review under S. 11 is based solely on the record as developed at the [Board] and, as a result, there is no need for fact-finding, a function with which the Federal district courts have significant experience. Courts of appeals, on the other hand, have significant experience reviewing cases based on the record before them." *Senate Report* 70. Under the competing House version, in which the Veterans Court replaced the Board, that court's review of the decision of the VA regional office would have been de novo as to both factual and legal issues. See *House Report* 6.

In the compromise bill, the Veterans Court was designed to perform essentially the same role as the courts of appeals in the Senate version—that is, reviewing the agency's decision based on the record before the Board. 38 U.S.C. 7252(b). One of the few differences between the compromise bill and the Senate bill was the standard of review for factual issues. Senator Cranston explained that the Senate had adopted the "clearly erroneous" standard in the compromise bill because it is "the standard used by U.S. Courts of Appeals when they review factual determinations made in district court." 134 Cong. Rec. at 31,471; see *id.* at 31,788 (statement of Rep. Edwards) (same). That history reinforces the conclusion that Congress viewed the Veterans Court as an appellate court and intended the Veterans Court's procedures to mirror those of the federal courts of appeals.

c. The only explicit discussion in the legislative history of good-cause exceptions supports the conclusion that Section 7266(a)'s time limit is a jurisdictional deadline for the taking of an appeal. Under the House bill, a claimant was given 90 days to file an appeal with the Veterans Court, but that period could be "extended by

the Court for good cause shown." H.R. 5288, § 5 (proposed 38 U.S.C. 4015(d)(1)). That "good cause" exception does not appear in the statute as enacted. By contrast, Congress did include a good-cause exception in 38 U.S.C. 7105(d)(3), the statute prescribing the time limit for perfecting an appeal of a regional office decision to the Board, further indicating that its failure to include such an exception in Section 7266(a) was deliberate.

d. Since 1988, Congress has amended the VJRA, including Section 7266, on various occasions. Petitioner points out (Br. 29) that, during the period from 1998 until its en banc decision in this case, the Federal Circuit permitted equitable tolling of the time limit set out in Section 7266. In his view, the amendments to the statute must therefore have ratified the court of appeals' prior understanding that equitable tolling is available. That argument lacks merit.

As an initial matter, although the court of appeals held in 1998 that the deadline prescribed in Section 7266(a) is subject to equitable tolling, *Bailey* v. *West*, 160 F.3d 1360, 1362-1368 (Fed. Cir.) (en banc), earlier precedent had held that the deadline was *not* subject to tolling, see *Butler* v. *Derwinski*, 960 F.2d 139, 140-141 (Fed. Cir. 1992); *Dudley* v. *Derwinski*, 2 Vet. App. 602, 603 (1992) (en banc). In 1994, Congress amended Section 7266 without overturning those decisions. Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 511, 108 Stat. 4670. On petitioner's theory, the inference that Congress ratified the pre-1998 case law precluding tolling is at least as compelling as the argument that later amendments ratified the post-1998 case law permitting tolling.

In any event, although Congress may be presumed to adopt a settled judicial interpretation of a statute when

it "re-enacts a statute without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), here Congress did not reenact the language of Section 7266(a) but simply modified the statute in ways that are not relevant to the question presented here. Nor is the other "requirement[] for congressional ratification" satisfied in this case, because "the supposed judicial consensus [was not] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama* v. *ICE*, 543 U.S. 335, 349 (2005). On the contrary, the interpretation that petitioner believes Congress ratified was embodied only in a divided decision of a lower court, a decision that was contrary to the precedents on which this Court relied in *Bowles*. See *Bailey*, 160 F.3d at 1371-1372 (Bryson, J., dissenting). As the en banc court of appeals explained in its decision below, "it would be inappropriate to rely on congressional 'silence' to find approval of [petitioner's] position * * * when the Supreme Court itself has characterized its precedent as having 'long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature.'" Pet. App. 32a (quoting *Bowles*, 551 U.S. at 206) (emphasis omitted).

C. The Rule Recognized In *Bowles* Applies To This Case

Petitioner identifies various characteristics of Section 7266(a) and the Veterans Court that, in his view, make the rule reaffirmed in *Bowles* inapplicable. He points out that Section 7266(a) is a provision separate from other statutes defining the Veterans Court's jurisdiction, that the provision refers to the actions of litigants rather than the court, and that the Veterans Court is an Article I rather than an Article III court. None of those observations undermines the conclusion that Sec-

tion 7266(a)'s time limit on the initiation of appeals in the Veterans Court is jurisdictional.

1. Petitioner observes (Br. 21) that the time limit imposed by Section 7266(a) is contained in a provision separate from 38 U.S.C. 7252(a), which gives the Veterans Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." Petitioner suggests (Br. 22) that a statutory time limit for taking an appeal is not jurisdictional if it appears in a provision separate from the statute conferring jurisdiction on the appellate court. That suggestion is refuted by *Bowles*, in which the Court held that 28 U.S.C. 2107, the statute specifying the deadline for appeals in civil cases, imposes a jurisdictional requirement, even though that provision does not even appear in the same chapter of Title 28 as 28 U.S.C. 1291, which authorizes courts of appeals to review the final judgments of district courts. As the Court explained, "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." 551 U.S. at 210 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)) (brackets in original).

Petitioner identifies (Br. 21) various cases in which the Court considered whether a statutory requirement was contained in the same statute as the underlying jurisdictional grant. But in all of those cases, the location of the requirement was merely one of several factors the Court considered in determining whether the relevant provision was jurisdictional. See *Reed Elsevier*, 130 S. Ct. at 1245-1247; *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 (2006); *Zipes*, 455 U.S. at 393. More importantly, none of the cases involved a statute imposing a time limit on the initiation of an appeal. As *Bowles* makes clear, the location of the statute, by itself, is not

determinative. What matters is "the type of limitation" at issue, and when the limitation is a "statutory deadline[] for filing appeals," it is treated as jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1248.

2. Petitioner also asserts (Br. 20) that Section 7266(a) is not jurisdictional because it is addressed to "the litigant rather than the court" in that it requires the "person adversely affected by [the] decision" of the Board to "file a notice of appeal" within 120 days. The Court in *Bowles* did not suggest, however, that a statutory deadline for the initiation of an appeal can be treated as nonjurisdictional simply because it is phrased as a directive to the litigant rather than to the court. To the contrary, the *Bowles* Court recognized that the time limit for filing a petition for a writ of certiorari in a civil case is jurisdictional, 551 U.S. at 211-212; see *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), even though the statute imposing that limit is addressed to litigants, instructing that "any writ of certiorari * * * shall be * * * applied for within ninety days" of the judgment. 28 U.S.C. 2101(c). Similarly, this Court has held that the time limit for seeking review of an order of deportation is jurisdictional, but the statute imposing that limit similarly refers to the timing of the petition, not the authority of the court. See *Stone*, 514 U.S. at 406; 8 U.S.C. 1105a(a)(1) (Supp. V 1993) (stating that a petition for review "may be filed not later than 90 days after the date of the issuance of the final deportation order"); see also 8 U.S.C. 1252(b)(1) (current version of the time limit, stating that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal"). Petitioner identifies no decision of this Court holding that a statute limiting the

time for taking an appeal was not jurisdictional, no matter how the limitation was phrased.

3. Finally, petitioner observes (Br. 38-39) that the Veterans Court was created under Article I, rather than Article III, of the Constitution. That is hardly a basis for adopting a more expansive interpretation of that court's jurisdiction. To the contrary, the inherent equitable authority of Article I courts is more limited than that of Article III courts, and the rule that "it is for Congress to determine the subject-matter jurisdiction of federal courts" therefore "applies with added force to Article I tribunals." *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009). See *United States* v. *Rodriguez*, 67 M.J. 110, 114-115 (C.A.A.F.), cert. denied, 130 S. Ct. 459 (2009) (applying *Bowles* to conclude that the statutory time limit for filing an appeal to the United States Court of Appeals for the Armed Forces, an Article I appellate court, is jurisdictional); cf. *John R. Sand & Gravel Co.*, 552 U.S. at 133-139 (holding that, although most limitations periods for commencing suit are subject to waiver or forfeiture, the six-year deadline for filing suit in the Court of Federal Claims is not). Petitioner cites no contrary authority.

D. The Pro-Veteran Orientation Of The VA Adjudication System Does Not Support Petitioner's View That The Deadline Prescribed By Section 7266(a) Is Subject To Equitable Tolling

1. As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Judicial review in the Veterans Court, how-

ever, follows the traditional adversarial model of appellate litigation. *Forshey*, 284 F.3d at 1355. The unique nature of the VA adjudication system therefore provides no basis for deviating from the general rule that statutory deadlines for the taking of appeals are jurisdictional.

Just last year, this Court rejected the specialized framework devised by the Federal Circuit for resolving harmless-error questions in appeals to the Veterans Court. *Sanders*, 129 S. Ct. at 1704-1706. The Court held that the statutory command to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2), required the Veterans Court "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases," 129 S. Ct. at 1704. In other cases as well, this Court has disapproved the Federal Circuit's creation of special rules applicable to cases within its specialized subject-matter jurisdiction, and it has directed that court to apply rules of general applicability consistent with the precedents of this Court and the regional circuits. See, *e.g.*, *eBay, Inc.*, v. *MercExchange, L.L.C.*, 547 U.S. 388, 391-394 (2006); *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832-834 (2002).

In this case, the court of appeals appropriately took account of *Sanders* in reconsidering its pre-*Bowles* decisions permitting equitable tolling of the appeal period prescribed in Section 7266(a). The court observed that it had "recently been reminded by the Supreme Court that, although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone." Pet. App. 41a (quoting *Sanders*, 129 S. Ct. at 1707). While recognizing that "the veter-

ans' system is unique," the court was properly "wary of hinging different procedural frameworks solely on the special nature of that system." *Id.* at 42a.

2. Emphasizing Congress's "special solicitude for the veterans' cause," *Sanders*, 129 S. Ct. at 1707, petitioner argues (Br. 29) that this Court should apply a "pro-veteran canon of statutory construction" in interpreting Section 7266(a). But that canon provides that "interpretive *doubt* is to be resolved in the veteran's favor," and it therefore has no application in the absence of statutory ambiguity. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (emphasis added). In light of the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional," there is no such ambiguity here. *Bowles*, 551 U.S. at 210.

3. Petitioner suggests (Br. 24) that a jurisdictional time limit for appealing Board decisions to the Veterans Court would be anomalous because it "would be an anti-veteran rule within an otherwise pro-veteran scheme." He also observes (Br. 37) that there is "[n]o [s]ettled [t]radition" of jurisdictional time limits on appeals by veterans. But until 1988, VA decisions were not subject to judicial review at all. Since a total preclusion of judicial review coexisted for years with the "pro-veteran" administrative scheme, there is no reason why jurisdictionally limited review should be inconsistent with that regime. See *Senate Report* 30-31 (explaining that the decision to provide review was "not based on a belief that the current preclusion of judicial review * * * result[ed] in wide-spread injustices"); see also *id.* at 49-50.

Petitioner's argument also overlooks that Section 7266(a) establishes an unusually long (120-day) time period for filing a notice of appeal. That period is longer

than the period for taking an appeal in a civil case, 28 U.S.C. 2107 (30 days, or 60 days if the government is a party), for petitioning for review of an agency's decision under the Hobbs Act, 28 U.S.C. 2344 (60 days), or for petitioning for a writ of certiorari in a civil case, 28 U.S.C. 2101 (90 days). Thus, to the extent that some veterans may have greater difficulty than other litigants in promptly seeking appellate review, Congress responded to that concern by providing an unusually long filing deadline, not by making the deadline nonjurisdictional. Cf. *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998) (relying on "the unusually generous nature" of the limitations period governing the Quiet Title Act, 28 U.S.C. 2409a, as a basis for concluding that "extension of the statutory period by additional equitable tolling would be unwarranted").

E. Petitioner's Policy Arguments Do Not Justify Treating Section 7266(a)'s 120-Day Deadline As Nonjurisdictional

Petitioner argues that application of the jurisdictional time limit of Section 7266(a) will lead to harsh results. He states that veterans "prevail in roughly 80 percent of cases decided by the Veterans Court on the merits, and have been awarded attorneys' fees in more than 50 percent of cases." Br. 27 (emphasis omitted). He also points out (Br. 26) that many veterans are not represented by attorneys before the Board. He concludes that, under the decision below, "those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Br. 25 (quoting Pet. App. 46a (Mayer, J., dissenting)). Petitioner's arguments are more appropriately directed to Congress than to this Court. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) ("Our unwillingness

to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is long-standing."); *Locke*, 471 U.S. at 101. In any event, his policy concerns are overstated.

1. Petitioner's assertion that appellants prevail in 80% of the cases decided by the Veterans Court "on the merits" is technically accurate but incomplete. Of the 4379 cases decided by the Veterans Court in fiscal year 2009 (when equitable tolling was available), 1109 (approximately 25%) were dismissed, many for default but others for lack of jurisdiction or as a result of a voluntary dismissal. United States Court of Appeals for Veterans Claims, *Annual Reports*, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf. In 1758 of the remaining cases, the court granted a joint motion to remand. *Ibid.*; see James D. Ridgway, *Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 152 (2009) (*Ridgway*). Although such remands are identified as "merits decisions" in the court's annual reports, they generally involve no decisionmaking by the Veterans Court, and the parties' joint motions may be predicated on changes in law or procedural grounds involving no concession of error by the VA.

Of the 1464 cases in which the Veterans Court actually decided the merits, it affirmed in 571 cases (39%), affirmed in part and reversed in part in another 496 cases (34%), and reversed and remanded in only 397 (27%). *Annual Reports*. Moreover, in the great majority of cases in which the court ordered a remand, it did so for the purpose of requiring additional explanation for the Board's decision or of providing additional proce-

dures. The remand rate therefore does not imply that claimants who fail to preserve their appeal rights are routinely being deprived of benefits to which they are entitled. Cf. *Ridgway* 165 ("Much of the debate since the creation of the [Veterans Court] has been premised on the belief that the outcomes of the court's appeals are highly unusual, but this turns out to be unsubstantiated by an empirical analysis.").

Similarly, the high rate of fee awards in veterans' appeals does not indicate that the VA has taken unjustified positions in a disproportionate number of its administrative decisions. Rather, it results from the VA's practice of agreeing to procedural remands and from the Veterans Court's unique jurisprudence regarding the payment of fees under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325. The Federal Circuit has held that virtually any type of remand from the Veterans Court will confer "prevailing party" status, and the Veterans Court has taken a very liberal approach to the "substantial justification" requirement, finding that nearly any procedural error can establish a lack of substantial justification. *Kelly* v. *Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006) ("[W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party . . . without regard to the outcome of the agency proceedings.") (quoting *Former Employees of Motorola Ceramic Prods.* v. *United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003)); see *Cullens* v. *Gober*, 14 Vet. App. 234, 251 (2001) (en banc) (Holdaway, J., dissenting) ("No other court in the country awards EAJA fees as liberally as this one. * * * [N]o other federal court awards EAJA

fees when an agency fails to appropriately articulate reasons for its administrative decision.").

2. Petitioner is correct that only about eight percent of veterans are represented by attorneys when they appear before the Board. That does not mean, however, that veterans lack any assistance in Board proceedings. In fact, more than 80% of veterans appearing before the Board have non-attorney representatives from service organizations such as Disabled American Veterans or the American Legion. Board of Veterans Appeals, *Report of the Chairman*: *Fiscal Year 2009*, at 21 (2010), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. Those representatives must meet VA training and certification requirements, see 38 C.F.R. 14.629(a), and they help veterans to present their claims to the VA and can also inform them about their appeal rights.

In addition, when the Board issues a decision, it is required by statute to "provide to the claimant * * * notice of such decision" on "a timely basis," and that notice must "include an explanation of the procedure for obtaining review of the decision." 38 U.S.C. 5104(a). The VA complies with the statute by mailing its decisions to claimants together with a copy of VA Form 4597, *Your Rights To Appeal Our Decision* (Aug. 2009), http://www4.va.gov/vaforms/va/pdf/VA4597.pdf. That form is a two-page document that explains, *inter alia*, the claimant's right to "[a]ppeal to the United States Court of Appeals for Veterans Claims." *Ibid.* A section entitled "How long do I have to start my appeal to the Court?" informs claimants:

> You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. * * *

> You should know that * * * *it is your responsibility to make sure that your appeal to the Court is filed on time*.

Ibid. The next section—entitled "How do I appeal to the United States Court of Appeals for Veterans Claims?"—advises claimants to send a notice of appeal directly to the Veterans Court, provides the court's address, and refers claimants to the court's website for "information about the Notice of Appeal [and] the procedure for filing a Notice of Appeal." *Ibid.* It then reiterates that "you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office." *Ibid.* The form also provides websites and a phone number for finding service organizations or pro bono attorneys. *Ibid.* Thus, the VA tries to ensure that claimants are informed of the deadline imposed by Section 7266(a) and of what they must do to meet it.

3. Petitioner's arguments also overlook other features of the VA adjudication scheme that further increase the likelihood that eligible veterans will receive the benefits to which they are entitled. Even after an adverse final decision by the Veterans Court—or an adverse final Board decision that is not timely appealed—a veteran may pursue a number of remedies to obtain benefits. A veteran may request reopening of a previously denied claim by submitting "new and material evidence" to the VA. 38 U.S.C. 5108; see 38 C.F.R. 3.156(a) (stating that, to be "material," new evidence need only "relate[] to an unestablished fact necessary to substantiate the claim" and "raise a reasonable possibility of substantiating the claim"). In addition, a veteran may seek collateral review of a final regional office or Board decision by requesting review for "clear and unmistakable error," 38 U.S.C. 5109A and 7111, or may at any time re-

quest that the Board reconsider its decision, 38 U.S.C. 7103. Successful invocation of any of those mechanisms may provide the same relief as a successful appeal to the Veterans Court. Thus, the VA adjudication scheme provides claimants with multiple opportunities to obtain any benefits to which they are entitled.

4. As this Court has explained, if "rigorous" jurisdictional rules "are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." *Bowles*, 551 U.S. at 214. With that principle in mind, the VA has urged Congress to permit the Veterans Court, upon a showing of good cause, to extend the appeal period for up to 120 days from the expiration of the original period. See Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) (transmitting the VA's proposed "Veterans Benefit Programs Improvement Act of 2010," including Section 209, "Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims"). Br. in Opp. App. 1a-6a. A bill with a provision similar to the VA's proposal has been introduced in the Senate. S. 3517, 111th Cong., 2d Sess. § 212 (2010). If enacted, that bill "would ameliorate harsh results in extreme circumstances" but "would not unduly undermine the finality of Board decisions, which is necessary for efficient administrative functioning." *Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (July 1, 2010) (statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin., United States Dep't of Veterans Affairs).

The VA has urged the enactment of such a proposal because it believes that the decision below gives rise to some potential for unfair results in cases where circumstances beyond a veteran's control prevent him or her from filing a timely notice of appeal. There is no basis, however, for judicial creation of an open-ended exception to the time limit under the doctrine of equitable tolling. Unless Congress acts to amend the statute, the courts have "no authority to create equitable exceptions to jurisdictional requirements" like that prescribed in Section 7266(a). *Bowles*, 551 U.S. at 214.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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