No. 05-605

In the Supreme Court of the United States

JOHN MAPU, JR., PETITIONER

v.

JAMES NICHOLSON,
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 the court of appeals correctly declined to apply equitable tolling, in the particular circumstances presented, to excuse petitioner's untimely filing of a notice of appeal under 38 U.S.C. 7266.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 397 F.3d 1375. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 13a-20a) dismissing petitioner's appeal is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. A petition for rehearing was denied on June 16, 2005 (Pet. App. 11a-12a). On September 7, 2005, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including November 13, 2005 (a Sunday), and the petition was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner failed to timely file his notice of appeal with the Court of Appeals for Veterans Claims (Veterans Court) seeking review of a decision of the Board of Veterans Appeals (Board) affirming a decision of the Department of Veterans Affairs (DVA) denying benefits for an alleged service-connected disability. Pet. App. 1a-2a. Under 38 U.S.C. 7266(a) (Supp. II 2002), a notice of appeal must be filed with the Veterans Court within 120 days after the date upon which the Board mailed its decision. There is no dispute that, pursuant to Section 7266(a), petitioner was required to file his notice of appeal with the Veterans Court by November 28, 2001, and that petitioner failed to file his notice of appeal with the Veterans Court by that date. Pet. 5; Pet. App. 1a-2a, 28a.

Instead, on November 28, 2001, the 120th day of the appeal period, petitioner went to a United States post office intending to send his notice of appeal to the Veterans Court via overnight United States mail. Pet. App. 1a-2a. Petitioner was informed by a Postal Service employee that, due to the anthrax crisis, overnight United States mail deliveries to Washington, D.C., had been suspended. *Id.* at 2a. The Postal Service employee told petitioner that, if he wanted his package delivered overnight, he should utilize a private carrier service. *Ibid.* Petitioner sent his notice of appeal by Federal Express overnight delivery service, and the Veterans Court received the package the following day—121 days after the Board's decision was mailed. *Ibid.*

2. In a single-judge order, the Veterans Court dismissed petitioner's appeal for lack of jurisdiction because the court had not received the notice of appeal

within 120 days of the mailing of the Board's decision, as required by 38 U.S.C. 7266(a) (Supp. II 2002). Pet. App. 28a-30a. The Veterans Court held that petitioner was not entitled to benefit from Section 7266(c) (formerly Section 7266(a)(3)), known as the "postmark rule," which provides that a notice of appeal shall be deemed received by the Veterans Court "[o]n the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed." 38 U.S.C. 7266(c)(2) (2000 & Supp. II 2002); Pet. App. 30a. The Veterans Court also rejected petitioner's request for equitable tolling of the appeal period. *Ibid.*

3. A three-judge panel of the Veterans Court affirmed the single-judge order, again finding that petitioner's appeal was untimely and that he was ineligible for equitable tolling of the appeal period. Pet. App. 25a-27a. Petitioner appealed to the Federal Circuit, which issued an order remanding the matter to the Veterans Court for consideration of the Federal Circuit's then-recent decisions in *Jaquay* v. *Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), and *Santana-Venegas* v. *Principi*, 314 F.3d 1293 (Fed. Cir. 2002), both of which concern the availability of equitable tolling under Section 7266. Pet. App. 23a. On remand, the Veterans Court found that both decisions were inapplicable to the facts of petitioner's appeal, and again held that his appeal was untimely. *Id.* at 13a-20a.

4. The Federal Circuit affirmed the Veterans Court's dismissal of petitioner's appeal.[1] Pet. App. 1a-

[1] As a preliminary matter, the court of appeals rejected petitioner's argument that the phrase "delivering or mailing," set forth in Section 7266(b), encompasses the act of sending a notice of appeal for delivery via Federal Express. Pet. App. 3a-4a; 38 U.S.C. 7266(b) (2000 & Supp.

10a. The court of appeals acknowledged that, under its case law, the doctrine of equitable tolling is applicable to the 120-day period for filing a notice of appeal under Section 7266. The court noted that it had declined to limit the doctrine of equitable tolling to a "small and closed set of factual patterns," and had "rejected the approach of looking to whether a particular case falls within the facts specifically identified in *Irwin* [v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)] or one of our prior cases." Pet. App. 6a-7a.[2] Rather, the court recognized that, in previous decisions, it had held that "equitable tolling of the deadline in 38 U.S.C. § 7266 is allowed 'in a variety of circumstances,'" *id.* at 5a (quoting *Barrett* v. *Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004)), and cited numerous Federal Circuit decisions that had applied equitable tolling to Section 7266's deadline for filing a notice of appeal. *Id.* at 6a.

To determine whether equitable tolling was appropriate in the circumstances of this case, the court of appeals looked to *Irwin*, which asked, *inter alia*, "whether Congress has either provided or intended that equitable tolling be unavailable in the situation at issue." Pet. App. 7a. After examining the language, structure, and legislative history of Section 7266, the court of appeals concluded that, in amending Section 7266 to provide that a notice of appeal is considered timely filed if it was re-

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II 2002). The petition does not contest that aspect of the court of appeals' decision. Pet. 8-9.

[2] *Irwin* described two situations in which equitable tolling has been recognized in private suits: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 95-96.

ceived and postmarked by the Postal Service within the appeal period, Congress clearly "wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service." *Id.* at 8a.

The court reasoned that "[t]he intention to limit the waiver of sovereign immunity to the strict confines of the postmark rule is further manifested in the provisions of Sections 7266(c) and (d), which clearly state that a Postal Service postmark is necessary for the postmark rule to apply." Pet. App. 8a-9a. The court cited legislative history for a related bill, set forth in a Joint Explanatory Statement, which stated "that the postmark rule would not be broadly applicable, but that only 'legible United States Postal Service postmarks would be sufficient.'" *Id.* at 8a (quoting 140 Cong. Rec. 28,849 (1994)).

The court of appeals also relied on language in the Joint Explanatory Statement which recognized that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it was received by the Court within the 120-day limit established by Congress." Pet. App. 8a (brackets in original) (quoting 140 Cong. Rec. 28,849 (1994)). Accordingly, the court concluded that Congress, which was aware that the Veterans Court requires actual receipt of the notice of appeal, "specifically limited the exception created by the postmark rule to notices of appeal sent through the Postal Service. Thus, notices of appeal delivered by other means were specifically excluded from the application of the new rule." *Id.* at 9a.

The court of appeals therefore rejected petitioner's attempt to apply equitable tolling in a manner that would extend the postmark rule to packages sent by private carrier service. Pet. App. 9a. The court rea-

soned that "Congress's *explicit* decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump an extension of equitable tolling to this case." *Ibid.* (emphasis added). Accordingly, the court concluded that "equitable tolling is unavailable in a case such as this one, in which the veteran's only excuse for a late filing of the notice of appeal is that a delivery service other than the Postal Service was used." *Ibid.*

ARGUMENT

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

1. As a threshold matter, petitioner's arguments lack merit because the 120-day period for filing a notice of appeal pursuant to 38 U.S.C. 7266 is not subject to equitable tolling. Contrary to the position adopted by the court of appeals in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), which authorized equitable tolling of the Section 7266 filing period in reliance on *Irwin*, the equitable tolling doctrine applies to statutes of limitations, like that at issue in *Irwin*, but has no application to timing-of-review provisions like Section 7266. See generally *Bailey*, 160 F.3d at 1371-1373 (Bryson, J., dissenting). As this Court has made clear, "[s]tatutory provisions specifying the timing of review [are] * * * 'mandatory and jurisdictional' * * * and are not subject to equitable tolling." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). Under a correct understanding of the governing legal principles, therefore, the question set forth in the petition is not presented in this case, be-

cause equitable tolling would be unavailable in any event.[3]

2. Contrary to petitioner's assertions (Pet. 8-15), the court of appeals did not foreclose the application of equitable tolling to Section 7266 as a matter of law, but instead held only that petitioner's particular excuse for late filing was not one that merited equitable relief. Petitioner simply ignores the court of appeals' analysis, which emphasized that equitable tolling *is applicable* to Section 7266's 120-day deadline "in a variety of circumstances." Pet. App. 5a. Far from erecting an "unforgiving citadel of technicality," as petitioner suggests (Pet. 16), the court of appeals took a broad view of the availability of equitable tolling under Section 7266 by refusing to limit equitable tolling to a "small and closed set of factual patterns." Pet. App. 7a. The court noted that "[s]uch a conclusion would run counter to our holding that 'requiring ruthless application of the time limit [of Section 7266] is somewhat arbitrary.'" *Ibid.* (first brackets in original) (quoting *Bailey*, 160 F.3d at 1364).

Additionally, the court of appeals cited approvingly to several cases in which the Federal Circuit applied equitable tolling to excuse the untimely filing of a notice of appeal under Section 7266. Pet. App. 5a-6a (citing *Brandenburg* v. *Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004); *Barrett*, 363 F.3d at 1318; *Santana-Venegas*, 314 F.3d at 1298; *Jaquay*, 304 F.3d at 1288; and *Bailey*, 160 F.3d at 1385). Thus, the court of appeals' decision did not render equitable tolling inapplicable to Section 7266—to the contrary, the court recognized that the

[3] The government did not raise this argument in the court of appeals because it was foreclosed by Federal Circuit precedent. Particularly in light of the jurisdictional nature of the objection, it has not been waived.

Federal Circuit has repeatedly permitted equitable tolling of the 120-day deadline in a broad array of factual situations.

3. Petitioner cites several decisions of this Court for the proposition that "limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." Pet. 2 (quoting *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted)); see Pet. 9-12 (citing *Young*, 535 U.S. at 49; *United States* v. *Beggerly*, 524 U.S. 38 (1998), *United States* v. *Brockamp*, 519 U.S. 347 (1997)). Petitioner also references several court of appeals decisions for the general proposition "that Congress does *not* implicitly preclude equitable tolling by simply providing one or more specific exceptions to a particular statutory deadline." Pet. 2 (citing *Neverson* v. *Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung* v. *Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999)).

The court of appeals' decision in this case, however, is not inconsistent with *Young*, *Beggerly*, or *Brockamp*, or with the various court of appeals decisions relied on by petitioner. In the first place, those decisions involved statutes of limitations, not jurisdictional timing-of-review provisions like Section 7266, and thus provide no support for a broad rule of equitable tolling in the circumstances of this case. Even leaving that basic distinction aside, moreover, the approach taken by the court of appeals here is consistent with those decisions. The court first concluded that equitable tolling of Section 7266 *is available* as a general matter, and then asked whether "Congress has either provided or intended that equitable tolling be unavailable in the situation at issue."

Pet. App. 7a. (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); see *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986) (determining first "whether equitable tolling is consistent with Congress' intent in enacting [the statute]," and then deciding "whether tolling is appropriate on these facts"). That is precisely the approach mandated by this Court's equitable tolling cases and followed by the decisions from other circuits cited by petitioner.

In deciding whether equitable tolling applies to the particular circumstances presented here, the court of appeals did not proceed by negative implication alone. Rather, the court looked to the text, structure, and legislative history of the statute to determine that equitable tolling was not available in the specific context of untimeliness due to the use of a private mail carrier. Pet. App. 3a-4a. Petitioner's argument that deposit with an overnight carrier is sufficient to invoke equitable tolling is contrary to the plain language of the statute and, indeed, would create another exception not contemplated by Congress. Cf. *Beggerly*, 524 U.S. at 48-49 (given "the unusually generous nature of the [Quiet Title Act's] limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted").

The legislative history of Section 7266 demonstrates that Congress specifically considered whether the benefit of the postmark rule should apply to private common carriers like Federal Express, and determined that it should not. Pet. App. 7a-9a. Indeed, regarding the proposed amendment to Section 7266, Congress recognized that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it was received by the Court

within the 120-day limit established by Congress." *Id.* at 8a (quoting 140 Cong. Rec. at 28,849).

Congress' clear intent to apply the postmark rule only to filings made by United States mail would thus be thwarted if equitable tolling could be used to excuse the untimeliness of a notice of appeal made tardy solely because the appellant used a private courier or delivery service rather than the United States mail. The court of appeals was therefore correct to conclude that "Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case." Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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