

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DORETHA H. HENDERSON, AUTHORIZED   :

4   REPRESENTATIVE OF DAVID L.         :

5   HENDERSON, DECEASED,                :

6                    Petitioner                 :     No. 09-1036

7                    v.                                 :

8   ERIC K. SHINSEKI, SECRETARY OF     :

9   VETERANS AFFAIRS                    :

10  - - - - - x

11   Washington, D.C.

12   Monday, December 6, 2010

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14                   The above-entitled matter came on for oral

15   argument before the Supreme Court of the United States

16   at 10:03 a.m.

17   APPEARANCES:

18   LISA S. BLATT, ESQ., Washington, D.C.; on behalf of

19    Petitioner.

20   ERIC D. MILLER, ESQ., Assistant to the Solicitor

21    General, Department of Justice, Washington, D.C.; on

22    behalf of Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-1036, Henderson v. Shinseki.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT  
ON BEHALF OF THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

The Federal Circuit's decision in this case forecloses judicial review when the very disability for which a veteran seeks benefits prevents the veteran from filing a timely appeal with the Veterans Court. That decision is wrong, and for three reasons the court of appeals erred in holding that the deadline at issue in this case is jurisdictional.

First, the statute contains no clear indication that the deadline is jurisdictional. Rather, the text and structure point away from a jurisdictional reading.

Second, a deadline that applies to disabled and largely uncounseled veterans seeking their first day in court is not the type of deadline that Congress would be expected to rank as jurisdictional.

1           And, third, a jurisdictional reading would  
2 render some of the most disabled of veterans the least  
3 likely to obtain benefits and would treat veterans worse  
4 off than almost all litigants in our Federal system.

5           JUSTICE GINSBURG: Ms. Blatt, you do have a  
6 substantial hurdle to contend with in this Court's  
7 decision in *Bowles v. Russell*, which seemed to say if  
8 you have a time limit and it's statutory, it is  
9 mandatory and jurisdictional.

10           So here, we have a time limit set by  
11 statute, not by rule, and why doesn't -- why isn't that  
12 dispositive?

13           MS. BLATT: Because neither this Court's  
14 decision in *Bowles* nor any other decision by this Court  
15 holds that this type of an appeal from a pro-claimant  
16 and non-adversarial proceeding to a court of first  
17 review clearly speaks in jurisdictional terms,  
18 notwithstanding the lack of a jurisdictional label.

19           JUSTICE SCALIA: Gee, I thought *Bowles* was a  
20 nice, clear case. I mean, you can always find some  
21 distinction in the next case, and I thought the object  
22 of *Bowles* was to say if it's a -- if it's a limit on  
23 appeal, it's jurisdictional. That would -- and that's,  
24 I gather, what the Federal Circuit took it to mean. And  
25 I would have done that if I was down there, probably.

1 MS. BLATT: I mean, I can understand why  
2 maybe the Federal Circuit did it, because of the one  
3 statement that the court, I think, took out of context.  
4 But this Court's decision in Bowles didn't purport to  
5 extend to any statute, no matter what the statute said  
6 or what the context it arose in. And the most closely  
7 analogous context of an appeal of agency action to a  
8 court of first review is a Social Security context.

9 And even if you don't think that that  
10 context is directly on point, then the historical  
11 backdrop at most would be inconclusive, and that hardly  
12 would rise to the type of --

13 JUSTICE SCALIA: But doesn't -- doesn't the  
14 Social Security context -- it doesn't speak of an  
15 appeal, does it? It talks of a civil action.

16 MS. BLATT: That's right. I mean, it --

17 JUSTICE SCALIA: I mean, you're right that  
18 -- you know, that there is -- there is a parallel in  
19 what's going on, but the statute does not call it an  
20 appeal. It calls it bringing a civil action --

21 MS. BLATT: Right, and the -- and there's --

22 JUSTICE SCALIA: -- to challenge their  
23 decision.

24 MS. BLATT: There's nothing inherently  
25 jurisdictional about the word "appeal." And,

1 Justice Scalia, if Congress that passed this statute  
2 wanted to pick up on the jurisdictional rule under 28  
3 U.S.C. 2107, presumably it would have written a statute  
4 that looks something like that statute with the safety  
5 valves.

6 Of course, when a -- all litigants, civil  
7 litigants who are appealing a district court judgment to  
8 a court of appeals, they have a jurisdictional deadline,  
9 but the district court can extend it for good cause or  
10 excusable neglect or when the party lacks notice of an  
11 adverse judgment. More importantly, the Federal Rules  
12 of Appellate Procedure cure the situation when a  
13 litigant timely files his appeal but does so in the  
14 wrong forum.

15 In this statute, Congress knew how to  
16 incorporate the jurisdictional rule of Bowles. It did  
17 so in a separate provision of the statute in 7292(a).  
18 It said when a litigant wants to go from the Veterans  
19 Court and appeal that decision to the Federal Circuit,  
20 the litigant has to follow the time and the manner  
21 prescribed for appealing district court judgments to  
22 court of appeals.

23 JUSTICE GINSBURG: And that is  
24 jurisdictional, 7292?

25 MS. BLATT: Yes. Yes. And interestingly,

1 it also goes on to say if you want to appeal to this  
2 Court, you have to apply for certiorari. So Congress --

3 JUSTICE SCALIA: You -- so --

4 JUSTICE SOTOMAYOR: Counsel -- I'm sorry.

5 JUSTICE SCALIA: Go on.

6 JUSTICE SOTOMAYOR: I'm -- I'm not sure why  
7 Congress would have actually known the difference that  
8 we established in Bowles, because when it passed this  
9 statute, it was before Bowles, wasn't it?

10 MS. BLATT: Yes.

11 JUSTICE SOTOMAYOR: So what to read of its  
12 knowledge of Bowles, whether it meant jurisdiction or  
13 not, is -- is a bit of a fiction, isn't it?

14 MS. BLATT: No. I think what's important is  
15 that Bowles is relying on a series of decisions that had  
16 nothing to do with the word "notice of appeal," of  
17 course, because they were dealing with cases involving  
18 writs of error and petitions for a writ of certiorari.  
19 It was all in the context of court-to-court appeals.  
20 Bowles doesn't even mention agency appeal of agency  
21 action to a court of first review.

22 JUSTICE SOTOMAYOR: So what's the rule?  
23 Justice Scalia said Bowles seemed to establish a  
24 sensible, clear rule, which is if Congress uses the word  
25 "notice of appeal," it intends a jurisdictional

1 restriction.

2 MS. BLATT: Well, what --

3 JUSTICE SOTOMAYOR: That appears to be the  
4 rule that Justice Scalia articulated.

5 What would be your rule or test now to  
6 determine Congress's purpose? What -- what of our cases  
7 would you point to that establish a different rule?

8 MS. BLATT: The rule of Reed Elsevier, which  
9 was a unanimous decision, which says -- and it was  
10 written by the same author of Bowles -- that all the  
11 decisions are consistent. You require a clear statement  
12 of jurisdictional intent. And in Bowles, this Court had  
13 read the type of limitation that was at issue in Bowles  
14 as to clearly speak in jurisdictional terms,  
15 notwithstanding a label. Here, you have --

16 JUSTICE SOTOMAYOR: I'm not sure what that  
17 distinction is. I'm sorry. It --

18 MS. BLATT: You had a century --

19 JUSTICE SOTOMAYOR: But what we went on was  
20 the word "notice of appeal" in Bowles, with -- within a  
21 historical context.

22 MS. BLATT: I don't think this Court said  
23 the word "notice" -- and notice of appeal is not  
24 jurisdictional in the criminal context, and Congress  
25 used the word "appeal" throughout this particular



1 statute in a non-jurisdictional meaning in all the  
2 proceedings that go in the agency. It used the term  
3 "appellate" and "review on appeal." It's actually  
4 called the Board of Veterans' Appeal. Substantive  
5 appeal. None of those words have "jurisdictional." And  
6 if Congress was just thinking of the word "notice of  
7 appeal," it -- I mean, the term has a non-jurisdictional  
8 meaning in the criminal context.

9 But if you just look at this statute, which  
10 says -- it's directed just at the litigant's obligation  
11 to file his -- his appeal within a certain time line,  
12 and there's actually a completely separate statute that  
13 speaks to the power of the court, the Veterans Court,  
14 7252(a), and that makes no reference to the 120-day  
15 deadline.

16 And I think in terms of the context,  
17 let's -- this is exactly the type of deadline that  
18 Congress would be expected to be subject to equitable  
19 tolling. Let me just give you the three reasons --

20 JUSTICE ALITO: When you -- you would have  
21 us make a statute-by-statute determination as to what we  
22 think Congress intended whenever it uses the term  
23 "notice of appeal." And perhaps that's not a big  
24 problem, if there are not a lot of other statutes like  
25 this one that use the term "notice of appeal" and with

1 respect to which it is not settled whether it is  
2 jurisdictional.

3 Do you have any sense of how many others  
4 there might be?

5 MS. BLATT: Yes. I think I found four that  
6 used the term "notice of appeal," and it was in  
7 connection with the district court, and they weren't  
8 even reported cases. They were very esoteric  
9 situations, like an order from the Department of  
10 Agriculture. I mean, maybe the Government has  
11 different.

12 What you mostly see is the Hobbs Act  
13 context, where you're talking about either an organic  
14 statute or 28 U.S.C. 2344, which is just a simple  
15 petition for review. That doesn't even use the word  
16 "notice of appeal." So this case is not going to  
17 dictate a whole lot, except for the veterans context,  
18 where not only do you have the standard lack of  
19 indication that this is not jurisdictional, but you have  
20 the unique features in that Congress established this  
21 court to open the door to veterans seeking disability  
22 benefits, and it would just conflict with that purpose  
23 to, at the same time, shut the door when the veteran's  
24 disability prevents him from getting to the courthouse.

25 JUSTICE SCALIA: Although that -- although

1 that would happen when he appeals from the -- from the  
2 veterans' appeals court, right?

3 MS. BLATT: Yes, and -- but that points out  
4 the irony: He's in better off shape if he appeals to  
5 the court of appeals, because there, there's at least  
6 important exceptions.

7 The Government's position assumes that no  
8 matter what the circumstances were -- and remember, a  
9 lot of these cases, the veteran is actually timely  
10 filing his appeal; he mistakenly files in the Veterans  
11 Administration rather than the Veterans Court. And the  
12 Government's position assumes that these uncounseled  
13 veterans are simply out of time and out of luck with no  
14 exception.

15 JUSTICE GINSBURG: How much time does 7292  
16 give to go from the Veterans Court to the Federal  
17 Circuit?

18 MS. BLATT: It says you have to follow the  
19 exact time and procedure that is set forth in the  
20 process for appealing a United States district court  
21 decision to the United States courts of appeals. So it  
22 is the procedures under 28 U.S.C. 2107.

23 JUSTICE SCALIA: But this one, to get to the  
24 Veterans Court, is 120 days, which is a lot of time. Do  
25 you know of any other time limit that is that long?

1 MS. BLATT: Well, sure. I mean, the statute  
2 of limitations in Zipes, which is 180 days to file a  
3 charge with the EEOC. But in the veterans context --

4 JUSTICE SCALIA: No, for appeal. For  
5 appeal.

6 MS. BLATT: Right.

7 JUSTICE SCALIA: Do you know of any other  
8 appeal statute that --

9 MS. BLATT: Yes, the veterans context. The  
10 -- this is a blink of an eye in the veterans context.  
11 The veteran is given an entire year -- not 120 days, a  
12 year -- after an initial decision comes down from a  
13 regional office to decide whether to appeal to the  
14 Boards of Veterans' Appeals.

15 And you have to keep in mind that this is  
16 the type of extra time we're talking about. An extra 30  
17 to 60 days would be an extremely poor and unlikely means  
18 for Congress to address the type of situation where  
19 equitable tolling might be needed, which is either  
20 because the Secretary has held onto the notice of appeal  
21 until after the 120 days and then tells the veteran, or  
22 the veteran has some devastating mental illness and has  
23 difficulty with processing deadlines and dealing with  
24 concepts.

25 JUSTICE SCALIA: Well, the latter I can

1 understand, but I don't have a whole lot of sympathy  
2 for -- I mean, when he loses below, he gets a notice  
3 that says specifically he has to file an appeal with  
4 this court, doesn't it? Doesn't it say that?

5 MS. BLATT: Yes, and it says --

6 JUSTICE SCALIA: So he sends it -- he sends  
7 it to the VA instead of to this court?

8 MS. BLATT: Well, it is a -- you can look it  
9 up. It's --

10 JUSTICE SCALIA: Would equitable tolling  
11 even cover that situation? It would seem to me -- I'd  
12 say it told you where to file; you simply didn't follow  
13 the instructions.

14 MS. BLATT: Not only has the Federal Circuit  
15 ruled en banc that it does, but this Court's decision in  
16 Irwin and in United States v. Young specifically  
17 recognized that a classic equitable tolling situation is  
18 when there's no prejudice to the other side and the  
19 litigant files in the wrong forum.

20 And you have to keep in mind, there's a  
21 Federal Rule of Appellate Procedure on point. Rule 4(d)  
22 says when a litigant mistakenly files his notice of  
23 appeal in the court of appeals, that's presumed to be  
24 correctly filed in the district court. And whatever you  
25 think about what your -- what an average-type person

1 might see when they see a two-page single-spaced form  
2 with a lot of legalese, it's -- this form is difficult  
3 for a lawyer to read, and to expect -- the vast majority  
4 of the claimants reading this form are uncounseled. And  
5 I urge you to read the form. It doesn't just say you  
6 have 120 days to appeal. It goes on and on and on  
7 telling --

8 JUSTICE SCALIA: Where is that? Is that --

9 MS. BLATT: It's cited in the Government's  
10 brief. It's got the VA form, and I -- I had to look it  
11 up just by punching it in on the Internet.

12 But whatever you think about the clarity --  
13 of someone -- of your statute -- that might be able to  
14 understand it, time and time again, veterans file in the  
15 wrong forum. And it's not always just the veteran's  
16 fault. Sometimes the Secretary is giving the veteran  
17 misleading advice. We cite cases in our brief, and so  
18 do the amici, where the Veterans Administration is  
19 giving the veteran just misleading advice.

20 JUSTICE GINSBURG: Ms. Blatt, you are  
21 making -- you said that the closest comparison is in the  
22 Social Security, because there's disability benefits in  
23 both cases. Apart from that we -- one is commenced by a  
24 complaint filed in the district court, the other, a  
25 notice of appeal, is there any difference in the brand

1 of review? That is -- as I understand it, Social  
2 Security review, although it's by the district court, is  
3 also on the administrative record.

4 MS. BLATT: Well, it's purely appellate, and  
5 district courts always say when they get these things:  
6 This is an appeal of a Social Security decision.

7 But I think the three reasons that I'm  
8 trying to get on why this is precisely the type of  
9 deadline that Congress would not rank as jurisdictional  
10 and would want to be subject to equitable tolling are  
11 the -- pretty much the reasons that apply even more so  
12 in the veterans context.

13 And that is, the first, is that this is an  
14 extremely favored class of litigants. These are  
15 veterans who have fought for their country and who are  
16 seeking service-connected disability benefits.

17 This is also the veterans' first opportunity  
18 to get to a court, which is true in the Social Security  
19 system. And, importantly, the vast majority of veterans  
20 go to the court without counsel. The numbers are over  
21 50 to 70 percent. And that was true in the Social  
22 Security system.

23 I don't think that --

24 CHIEF JUSTICE ROBERTS: Well, counting -- I  
25 appreciate all those points, but counting -- cutting,

1 perhaps, the other way is that it's not a real  
2 adversarial system before you get to that stage. It's a  
3 collaborative effort, the Veterans Administration and  
4 the -- the individual.

5 MS. BLATT: That's right.

6 CHIEF JUSTICE ROBERTS: Which seems to me  
7 may counterbalance a little bit the fact that the  
8 veterans are uncounseled.

9 MS. BLATT: Well, I mean, up until 2006,  
10 they were actually barred from having lawyers.

11 But this is the same thing as the Social  
12 Security context, which is what this Court relied on  
13 unanimously in Bowen, in holding that it's not  
14 jurisdictional, and it's also what this Court relied on  
15 in Zipes, is that you wouldn't expect Congress to enact  
16 an inflexible, harsh, no exceptions whatsoever  
17 jurisdictional deadline when Congress presumably knew  
18 that the vast majority of people who would be navigating  
19 this system, coming out of this extremely informal  
20 adversarial system where the Secretary had a duty to  
21 actually assist the veteran and then hitting what is  
22 then an adversarial system, and you would think that you  
23 would want equitable tolling. The --

24 JUSTICE SCALIA: They don't navigate it  
25 entirely unassisted. I mean, isn't there usually



1 assistance from a nongovernmental organization such as  
2 the American Legion or --

3 MS. BLATT: Yes, in the Veterans  
4 Administration, not in Veterans Court. So 50 to 70  
5 percent --

6 JUSTICE SCALIA: That's right, but do they  
7 -- do they drop them like a hot potato once the VA  
8 portion is over? They don't counsel about how to file  
9 an appeal?

10 MS. BLATT: That's correct, but I wouldn't  
11 say they drop them like a hot potato. These are people  
12 who are sitting in the VA, and they -- remember, like in  
13 this case, it's 3 years later; they don't even get  
14 notice of the final decision, which is just sent to the  
15 veteran. They don't have any kind of lawyer  
16 relationship. It's like someone at one of the VA  
17 offices who says: Let me help you, tell you what to do.  
18 And then that's it. So, no, they don't -- they don't  
19 practice in Veterans Court. They don't -- they don't  
20 say, you know, here's my card, let's keep in touch. And  
21 it might be 3 to 4 years later that a notice is sent to  
22 the veteran.

23 JUSTICE SCALIA: And you think normally he  
24 isn't assisted -- he is not assisted by one of these  
25 people?

1 MS. BLATT: Well, I know that. The Veterans  
2 Court's statistics says it's 70 percent. Pro se.

3 JUSTICE SCALIA: Well --

4 MS. BLATT: No lawyer. And the actual --

5 JUSTICE SCALIA: I'm not talking about a  
6 lawyer; I'm talking about advice from somebody at -- in  
7 the American Legion.

8 MS. BLATT: Even if -- okay. They're still  
9 not lawyers, but the -- the veterans' assistance  
10 organizations who filed in this case are telling you  
11 they don't participate in Veterans Court. That's not  
12 what they do. They are set up in the VA system. So --

13 CHIEF JUSTICE ROBERTS: I think -- unless  
14 I'm missing the point of my colleague's question, it's  
15 two different issues.

16 Of course, they don't participate in the  
17 court. They're not -- they're not lawyers. But it's  
18 not clear to me why they wouldn't participate at least  
19 in the process of saying you've got to file your notice  
20 and here's where you file it.

21 Are you saying they don't do that?

22 MS. BLATT: They, by and large, don't do  
23 that, and the veterans' organizations that filed amicus  
24 briefs say they also make the same mistake. They're not  
25 lawyers, and they often file in the wrong forum, too.

1 But, again, what's --

2 CHIEF JUSTICE ROBERTS: I mean, they do it  
3 regularly, and they -- every now and then, they file it  
4 in the wrong place?

5 MS. BLATT: Yes. I mean, half the cases  
6 that we --

7 CHIEF JUSTICE ROBERTS: I don't see how that  
8 works. You've got somebody there, and he has been  
9 telling them where to file it and file it and file it,  
10 and all of a sudden he tells him to file it someplace  
11 else?

12 MS. BLATT: Again, as far as I am aware,  
13 they don't counsel veterans after they make their final  
14 decision.

15 JUSTICE GINSBURG: Earlier, Ms. Blatt, you  
16 said that they wouldn't even know.

17 MS. BLATT: They wouldn't -- right.

18 JUSTICE GINSBURG: Because they don't get  
19 notice; only the veterans --

20 MS. BLATT: Right. They wouldn't get  
21 notice. It would be -- someone would have to have some  
22 sort of relationship and call that person. But in this  
23 case -- I mean, I can tell you there was no -- the  
24 veteran just had his wife, and there was no one else  
25 involved in the process other than his doctors. But in

1 terms of --

2 JUSTICE ALITO: What happens if the veteran  
3 doesn't get notice?

4 MS. BLATT: Well, he's out of luck,  
5 according to the Government. That's just tough.

6 But, again, thinking about -- and remember  
7 that not only is there a clear statement rule in types  
8 of jurisdiction, but we have an equally strong canon  
9 that veterans' statutes are to be construed liberally in  
10 the --

11 CHIEF JUSTICE ROBERTS: What -- what clear  
12 statement rule are you talking about?

13 MS. BLATT: Just the rule of Reed Elsevier  
14 and Arbaugh, that unless a statute clearly speaks in  
15 jurisdictional terms --

16 CHIEF JUSTICE ROBERTS: Yes, I know. I  
17 remember that.

18 MS. BLATT: -- you don't presume it's  
19 jurisdictional.

20 CHIEF JUSTICE ROBERTS: I remember that. I  
21 thought that that was a prospective bright-line rule.  
22 It's kind of hard to apply a new bright-line rule  
23 retrospectively. I understood what we said in those  
24 cases to be: Look, Congress, we're tired of trying to  
25 sort out this ambiguity. From now on, if you want it to

1 be treated as jurisdictional, tell us it's  
2 jurisdictional.

3 That makes sense prospectively, but it  
4 doesn't make sense to do that to statutes that were  
5 passed before we announced our bright-line preference.

6 MS. BLATT: Well, it doesn't sense to say in  
7 1988 Congress was trying to map onto some -- some  
8 pre-existing structure that didn't exist. Bowles didn't  
9 exist. You may --

10 CHIEF JUSTICE ROBERTS: No. I'm trying -- I  
11 understand -- changing the subject -- but in my  
12 question, you invoked the bright-line rule of Arbaugh  
13 that the statute should say "jurisdictional." And I'm  
14 just saying that only makes sense prospectively.

15 MS. BLATT: I can see your point. I don't  
16 think that that's what Arbaugh intended. I think it  
17 said that when you have a statutory requirement and when  
18 it doesn't speak to the jurisdiction of the court,  
19 there's no reason to think that it should restrict the  
20 jurisdiction of the court. This doesn't say anything  
21 about the court's power.

22 JUSTICE GINSBURG: Ms. Blatt, are you -- are  
23 you -- we have in Bowles itself -- it was from the  
24 district court to the court of appeals, and then we have  
25 from the court of appeals to this Court. Those two

1 provisions were cited in Bowles, the 2107. And what is  
2 the provision for -- for cert?

3 MS. BLATT: 2101(c).

4 JUSTICE GINSBURG: 2101. Those -- those, as  
5 far as I remember, were the only provisions that were  
6 cited.

7 MS. BLATT: Well, and the predecessors  
8 called writ of error. Right, they were -- I mean, this  
9 couldn't be further from it. Congress, when it passed  
10 this statute, said you have 120 days to file your  
11 appeal. And then in a whole -- and said -- didn't say  
12 anything about the jurisdiction. And a separate version  
13 said: Here's the jurisdiction, and we'll incorporate  
14 some procedural requirements, but we're not even going  
15 to mention the 120-day deadline. And then it goes to  
16 great pains to say 2107 will apply when you appeal from  
17 the Veterans Court to the Federal Circuit, and you'll  
18 have to apply for certiorari.

19 But to think about what the Government's  
20 position is, is that, notwithstanding that criminal  
21 defendants and Social Security claimants do not face  
22 jurisdictional deadlines, all the civil litigants in our  
23 system who do face jurisdictional deadlines can get an  
24 extension for good cause, excusable neglect, when they  
25 don't have notice of an adverse judgment, and the

1 situation is cured when they actually timely file but  
2 they mistakenly file with the wrong court.

3 JUSTICE SCALIA: So whenever we have time  
4 limits in the future that do not contain any -- any  
5 explicit provision for waiver of failure to meet those  
6 time limits, you're asking us to find that all of those  
7 are non-jurisdictional?

8 MS. BLATT: Well, all statute of limitations  
9 are not jurisdictional. So there's no question --

10 JUSTICE SCALIA: Well, is it a filing  
11 requirement? It's -- it's a --

12 MS. BLATT: Well --

13 JUSTICE SCALIA: It's an appeal. It's a  
14 requirement for appeal.

15 Whenever there is an appeal deadline that  
16 does not have an exception for -- you know, you -- you  
17 can get it extended for 10 days or whatnot -- whenever  
18 there's no exception, you want us to hold it's not  
19 jurisdictional?

20 MS. BLATT: No, of course not. Like I just  
21 said, I don't know of any that even come up, except  
22 for -- I think I found four that say "notice of appeal."

23 All the types of cases that you see are  
24 dealing with a petition for review of agency action,  
25 à la the Hobbs Act context. So what I'm asking you to

1 hold is that when you have a -- this particular statute,  
2 which the text and structure certainly say it's not  
3 jurisdictional, it is exactly the -- it is not the type  
4 of deadline you would expect it, and it would undermine  
5 all of the purposes that Congress set up this court,  
6 which was to ensure they had their day in court, they  
7 get the benefits they are entitled to, and, importantly,  
8 to cure the perception that veterans were being -- not  
9 being treated the way all other claimants seeking  
10 Federal benefits were.

11 This would completely counter that purpose,  
12 to say: Here's a court; we have built it for you, but  
13 if you can't get up the courthouse steps, that's too  
14 bad. If your very disability prevents you from filing  
15 or you've been abused by the VA -- the VA bureaucracy,  
16 you're out of luck and out of court.

17 JUSTICE SCALIA: Although you're willing  
18 to -- to allow that happen when there's an appeal  
19 from -- from the first appeal, right?

20 MS. BLATT: And here's why, Justice Scalia.  
21 The veteran has had a day in court. Once he is out of  
22 the Veterans Court, he is like every -- or she is like  
23 every other litigant in our Federal system, which -- the  
24 deadline applies to the government; the deadline applies  
25 to the party -- to any party. That's 2107, which



1 applies to all civil litigants equally. They've had  
2 their day in court, and if it's in the Hobbs Act  
3 context, usually they've had some sort of adversarial,  
4 court-like proceeding in the administrative agency.

5 But no decision -- and, again, keep in mind  
6 there were three decisions in the Social Security  
7 context -- no decision has ever said a pro-claimant,  
8 non-adversary appeal to a court of first review is  
9 jurisdictional. So Congress was acting against that  
10 backdrop.

11 JUSTICE GINSBURG: And that was --

12 MS. BLATT: There's no such decision.

13 JUSTICE GINSBURG: That was the Federal  
14 Circuit's position until Bowles, right? But this was an  
15 en banc decision, and it overruled two prior cases --

16 MS. BLATT: Right. And they did go back and  
17 forth, so there was a period of 6 years that they held  
18 it was jurisdictional, and then a period of 11 years,  
19 the last 11 years, where it has been non-jurisdictional,  
20 and there has been equitable tolling.

21 JUSTICE ALITO: If the veteran is so  
22 profoundly disabled that the veteran can't file the  
23 notice of appeal within 120 days after the notice of the  
24 decision, at what point after the 120-day period would  
25 the right to file a notice of appeal be cut off? Would

1 this go on potentially indefinitely?

2 MS. BLATT: No. I mean, in adopting  
3 equitable tolling by the Federal Circuit for mental  
4 disabilities -- that case is Barrett v. Principi on  
5 page 9 of our brief. It goes through how all the sister  
6 circuits have dealt with the issue of mental disability  
7 and Title VII, in the Social Security system, and -- and  
8 how you would deal with that.

9 But let's take this case, because it's a  
10 good example. The doctor said he was -- he's paranoid  
11 schizophrenic, so he's having periods, and what -- to  
12 quote the doctor that was submitted to the Veterans  
13 Court, he had episodes of what was basically called  
14 psychomotor retardation and total inability to function,  
15 and at other times he was just simply disorganized, had  
16 difficulty with recall and memory.

17 So he wrote a handwritten note within  
18 15 days saying: I've been on and off. And he was  
19 obviously extremely heavily medicated.

20 If I could reserve the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Miller.

23 ORAL ARGUMENT OF ERIC D. MILLER

24 ON BEHALF OF THE RESPONDENT

25 MR. MILLER: Mr. Chief Justice, and may it

1 please the Court:

2 In Bowles v. Russell, this Court reaffirmed  
3 its longstanding treatment of statutory time limits for  
4 the taking of appeals as jurisdictional. Section  
5 7266(a) imposes a 120-day time limit on the taking of an  
6 appeal to the Veterans Court, and under the rule  
7 reaffirmed in Bowles, that time limit is a limit on the  
8 court's jurisdiction, and the judgment of the court of  
9 appeals should be therefore be affirmed.

10 JUSTICE SOTOMAYOR: So it's only --

11 CHIEF JUSTICE ROBERTS: Of course --

12 JUSTICE SOTOMAYOR: I'm sorry.

13 CHIEF JUSTICE ROBERTS: Of course, in Bowles  
14 it was from an Article III court to another Article III  
15 court. Here, although we're dealing with an Article I  
16 court, there are characteristics of what you might call  
17 internal agency review. The court is specialized with  
18 respect to veterans' affairs, and there are particular  
19 standards for review that you don't find when you're  
20 talking about between the district court and the court  
21 of appeals.

22 MR. MILLER: Well, I --

23 CHIEF JUSTICE ROBERTS: I guess it's  
24 related -- just to get everything out on the table, it's  
25 related to the same point that I thought was significant

1 in Bowles: That you are dealing with a time limitation  
2 that lawyers had long recognized as being, you know, a  
3 drop-dead date.

4 MR. MILLER: That -- that is true, but what  
5 Bowles emphasized was not just the historical treatment  
6 of the particular time limit in section 2107, but the  
7 historical treatment of statutory time limits for  
8 appeals in general, which is why the Court cited not  
9 only 2107 cases but --

10 JUSTICE GINSBURG: It didn't mention --  
11 Bowles didn't mention anything like an appeal from an  
12 agency where the district court is -- is sitting,  
13 essentially, as an appellate court.

14 But Bowles really was dealing with  
15 court-to-court, because it mentioned 2107 and 2101, and  
16 I don't recall that it mentioned any -- anything other  
17 than court-to-court situations.

18 MR. MILLER: You're -- you're correct that  
19 Bowles was focused on court-to-court appeals, but, of  
20 course, in Stone v. INS, which involved a deadline for  
21 petitioning for review of a final decision of the Board  
22 of Immigration Appeals, the Court held that that time  
23 limit was jurisdictional. So I think that the same  
24 principle applies to appeals from agencies --

25 JUSTICE GINSBURG: Except that -- that one

1 is an adversarial proceeding, the immigration  
2 proceeding, and the veterans' is supposed to be  
3 claimant-friendly.

4 But I think that the -- the -- just as  
5 Bowles is -- is a challenge for Ms. Blatt, so for you is  
6 the Social Security context, because it seems to me the  
7 quality of review is the same; that is, what the  
8 district court does in a Social Security disability case  
9 is the same thing that the Veterans Court does in a  
10 veteran's disability case.

11 MR. MILLER: It -- it is true that  
12 functionally, the review that takes place under section  
13 405(g) has a lot of appeal-like features, but what's --  
14 and so in that sense, you know, Bowen was like a hybrid  
15 case, because you have something that looks a little bit  
16 like an appeal, but it takes place in a district court  
17 and in a court of original jurisdiction, and, most  
18 importantly, Congress referred to it as a civil action  
19 that is commenced by the party who is filing a  
20 complaint.

21 JUSTICE GINSBURG: But it is -- it is an  
22 appellate review, isn't it? I mean, the district court  
23 goes on the record before the agency.

24 MR. MILLER: The -- the review is very much  
25 like -- functionally like what would happen in the court

1 of appeals, but Congress chose to call it commencing a  
2 civil action. And you commence it by filing a  
3 complaint, which is quite different from the notice of  
4 appeal here. On the notice of appeal, there's a form  
5 for doing it, or if you don't use the form, all it takes  
6 is one sentence. And --

7 JUSTICE BREYER: Are we supposed to still  
8 pay some attention to what we think Congress would have  
9 intended?

10 MR. MILLER: Certainly.

11 JUSTICE BREYER: All right. And if the  
12 answer is "certainly," how likely do you think it is  
13 that Congress would have intended its statutes, in an  
14 ordinary case where two big businesses are suing each  
15 other and they've already had a day in court and now one  
16 of them wants to appeal and Congress writes in, if you  
17 miss the deadline, you can have it extended through  
18 excusable neglect, and you can even have it extended  
19 much later if nobody got a notice. That's with two big  
20 businesses.

21 But if you have someone who served his  
22 country and was wounded and has post-traumatic stress  
23 syndrome or schizophrenia, to that person you say -- who  
24 has never had a day in court -- if you don't meet the  
25 deadline, you are out, no matter how excusable it is.

1                   How -- who in Congress would have likely  
2 thought such a thing?

3                   MR. MILLER: Well -- I think in evaluating  
4 what Congress thought in 1988, one factor that's  
5 significant is that this was taking place -- the  
6 Veterans' Judicial Review Act -- against a backdrop of  
7 decades of no judicial review whatsoever of veterans' --  
8 of VA administrative decisions.

9                   And so Petitioner's position is that  
10 essentially, Congress, in one fell swoop, went from no  
11 review whatsoever to what would be the most forgiving  
12 appeal deadline in the entire United States Code.

13 And --

14                   CHIEF JUSTICE ROBERTS: And it made some  
15 sense. I mean, when you look at the statistics, when  
16 you get into this court, the veterans almost always win,  
17 right?

18                   MR. MILLER: When you look at decisions on  
19 the merits as opposed to agreed-upon remands, the  
20 veterans win in most cases. I --

21                   JUSTICE BREYER: What is the relevance of  
22 that, if the veterans win? I mean, perhaps they are  
23 entitled to win. Is the idea that you would cut off  
24 their right to appeal because you are afraid they'd win?

25                   MR. MILLER: Of course not. I --

1 CHIEF JUSTICE ROBERTS: My point was the  
2 exact opposite: That if you -- if they almost always  
3 win, you assume that Congress wouldn't want to cut them  
4 off, because it's -- you know, if only 1 percent of the  
5 veterans appealing win, then you might understand an  
6 absolute rule, because they're not as -- statistically  
7 anyway, we're not losing much.

8 But if, as I understand to be the case,  
9 about 80 percent of them win, you might cut them a  
10 little slack on appealing because it is a very  
11 significant part of the -- the process.

12 MR. MILLER: First, I would say I think the  
13 reversal rate is not necessarily out of line with what  
14 you find in other agency review contexts, but --

15 JUSTICE GINSBURG: What is --

16 CHIEF JUSTICE ROBERTS: What -- what is the  
17 reversal rate?

18 MR. MILLER: I think, of cases that are  
19 decided on the merits, about a quarter are reversed and  
20 remanded, and about 34 percent are affirmed in part and  
21 reversed in part.

22 CHIEF JUSTICE ROBERTS: Any idea what the  
23 normal rule is from district court to court of appeals?

24 MR. MILLER: I -- I don't know the  
25 percentage there, but I think in considering that rate,



1 it's significant that the great majority of claimants  
2 who file claims in the regional office are given relief  
3 there.

4 And so only about 4 percent of cases are  
5 even appealed all the way from the regional office to  
6 the board, and only another 9 percent to the Veterans  
7 Court, so -- because the board gives relief in most  
8 cases before it. So it's not like --

9 JUSTICE SCALIA: Mr. Miller, do you -- do  
10 you really think Congress thought about this? Do you  
11 think the members of Congress who voted for this bill  
12 thought about this -- this rather narrow point, about  
13 whether, if you file too late, it's jurisdictional or  
14 not?

15 MR. MILLER: There is no indication that  
16 they did.

17 JUSTICE SCALIA: So don't we pretty much  
18 have to go on what they wrote?

19 MR. MILLER: Yes. And when -- when they  
20 wrote a notice of appeal provision -- and it is clear  
21 from the text as well as from the history that it is, in  
22 fact, an appeal -- that was a considered decision.

23 JUSTICE SCALIA: I'll bet you a dollar to a  
24 donut that -- that nobody thought about this narrow --  
25 narrow issue. So it -- it ought to be a question of --

1 of what this language ought to be taken to mean. What's  
2 its fairest reading?

3 Now, I'm not sure that means you win, but --  
4 but surely that's the issue, not -- not what -- you  
5 know, whether -- whether Congress could have been so  
6 mean. They didn't think of this.

7 MR. MILLER: Right. And -- and in looking  
8 at the --

9 JUSTICE BREYER: What do you mean, "right"?  
10 I thought within -- first of all, a donut costs a  
11 dollar, so I don't see much appeal there.

12 (Laughter.)

13 JUSTICE BREYER: But -- but don't we,  
14 throughout the statute books, try to work out from  
15 context, language, and objective purpose what a  
16 reasonable member of Congress would have intended,  
17 whether they thought about it or whether they didn't  
18 think about it, which would require X-rays into the  
19 brain that have not yet been invented?

20 MR. MILLER: What -- what this Court has  
21 held, in Bowles on the one hand and Irwin on the other,  
22 is that statutory notice of appeal deadlines are  
23 presumptively jurisdictional and statutes of limitation  
24 are presumptively not. And --

25 JUSTICE SOTOMAYOR: But that's court to

1 court. Do you have any case, at the time or before the  
2 statute was passed, that ever held that a statutory  
3 deadline from an agency to a court of appeal was  
4 jurisdictional in the sense of Bowles?

5 MR. MILLER: Stone v. INS, which was  
6 after 1988 --

7 JUSTICE SOTOMAYOR: Well after.

8 MR. MILLER: But -- but in the courts of  
9 appeals, there was a long history of cases under the  
10 Hobbs Act, cases under more specialized statutes, the  
11 Communications Act, the Federal Power Act, and the  
12 environmental statutes --

13 JUSTICE SOTOMAYOR: But those had different  
14 language. They used "barred" language rather than  
15 "filing" language. Most of those.

16 MR. MILLER: No, ma'am. In fact, the Hobbs  
17 Act says a party aggrieved by the order may seek review  
18 by filing a petition for review. It doesn't say  
19 anything about "and a claim shall be barred if you  
20 don't."

21 JUSTICE BREYER: But Bowles itself made --  
22 made a major point, which I thought was relevant.  
23 Though I didn't join it, I thought it was relevant. And  
24 that is we look at the statute, if you are looking at  
25 the statute, and notice that there are exceptions

1 written into it. And the fact that there are exceptions  
2 written into it lends some support to the notion that  
3 we, as a court, should not read other exceptions into it  
4 that weren't mentioned. Now, that's something the Court  
5 seemed to emphasize.

6           And here, when I looked at this statute, I  
7 noticed there are no exceptions written into it. And,  
8 therefore, following Bowles rather than rejecting  
9 Bowles, it would seem that Bowles would support the  
10 reading of this statute to allow courts to read into it,  
11 because they don't mention anything themselves.

12           MR. MILLER: I would say two things about  
13 that. The first is that there are many statutes,  
14 including the Hobbs Act, the immigration statute, that  
15 have no provision for exceptions. This Court's  
16 certiorari deadline can be extended by a justice, but  
17 there is no provision for a good cause exception. The  
18 extension provision that was specifically at issue in  
19 section 2107 in Bowles hadn't -- wasn't even enacted  
20 until 1991. And even with an extension, I'm not aware  
21 of any other provision that gives you as much as 120  
22 days that you have here.

23           JUSTICE BREYER: That's the main thing.  
24 Leaving that out for a second, if you -- if you thought  
25 there can't be a rule that governs all of the thousands

1 of different -- or many different statutes, you should  
2 look at the context.

3 So sometimes you will see that Congress,  
4 given the context, probably did want to give the court  
5 some leeway to make exceptions -- where, for example,  
6 it's no fault of the litigant -- and in other instances,  
7 they didn't.

8 Now, you've listed -- and Bowles, I thought,  
9 left that open. But -- but if it does leave it open,  
10 and I'm looking to those factors, you've mentioned one:  
11 That this is a long period of time, 120 days. You're  
12 right about that.

13 Is there anything else?

14 MR. MILLER: Well, I -- I guess I would take  
15 issue with the premise of what the presumption is that  
16 Bowles set up.

17 Bowles established a presumption that notice  
18 of appeal deadlines in statutes are jurisdictional  
19 unless there is something in the text or in the history  
20 as, for example --

21 JUSTICE BREYER: And what they found, one  
22 thing in the text, was that there were exceptions  
23 written in. That cuts against you.

24 One thing cuts for you; that's the length of  
25 time. Is there anything else that cuts for you? I just

1 want to be sure I have all of the factors that you're  
2 weighing.

3 MR. MILLER: I mean, what we're emphasizing  
4 is that this is an appeal deadline, and in Bowles,  
5 although it is true there were exceptions there, that  
6 was not something that the Court emphasized in its  
7 reasoning. The Court's -- the rationale behind Bowles  
8 is that there's a presumption that appeal deadlines are  
9 jurisdictional. And whatever one thinks --

10 JUSTICE ALITO: What happens if the -- if  
11 the notice of decision is mistakenly mailed to the wrong  
12 address, comes back undeliverable, and no further notice  
13 is sent? Your -- your position is, once the 120 days  
14 expires, the veteran is out of luck?

15 MR. MILLER: No, Your Honor, because in that  
16 case, the 120 days wouldn't start running because  
17 section 7266(a) says have you to file within 120 days  
18 after the date on which notice of the decision is mailed  
19 pursuant to section 7104(e), and section 7104(e), in  
20 turn, requires that the notice be mailed to the address  
21 of record for the claimant, and also, incidentally,  
22 requires that if the claimant has an authorized  
23 representative in proceedings before the court, that the  
24 notice also be mailed to the representative.

25 JUSTICE ALITO: All right. But what if it's

1 just lost in the mail? What if it's sent to the right  
2 address, but it's lost in the mail or is not received by  
3 the veteran? What is the veteran supposed to do? Call  
4 every -- every week to see whether a decision has been  
5 issued?

6 MR. MILLER: I -- I think Congress, in  
7 writing the statute, assumed that the mail can be relied  
8 upon in the ordinary course to be delivered, and so it  
9 made provision for the case in which the mail -- the  
10 mailing is not made.

11 JUSTICE SCALIA: You -- you say that a copy  
12 of the notice is also sent to the representative, the  
13 American Legion or whoever, who has been representing  
14 the veteran?

15 MR. MILLER: Yes, section 7104(e)(2) says  
16 that if the claimant has a representative, a copy is  
17 mailed.

18 JUSTICE KENNEDY: In what percentage of the  
19 cases is there a representative?

20 MR. MILLER: I think it's about 80 percent  
21 that there's --

22 CHIEF JUSTICE ROBERTS: No, what I --

23 MR. MILLER: -- 80 percent, Your Honor.

24 CHIEF JUSTICE ROBERTS: I sense some  
25 confusion here, given what you and your friend have

1 said. What do you mean when you say "counseled"? Do  
2 you mean --- I mean, if you have somebody from the  
3 American Legion that is telling this person here's what  
4 you need to do, does he get a notice, or are you talking  
5 about just the situation where somebody comes in and  
6 says, I'm -- well, I'm this person's lawyer, or I'm  
7 representing him in some other way?

8 MR. MILLER: There -- there is a procedure  
9 for official accreditation of representatives --

10 CHIEF JUSTICE ROBERT: Right.

11 MR. MILLER: -- from organizations like the  
12 American Legion, and if that person is registered as the  
13 claimant's representative in the proceeding before the  
14 board, then they would get a copy of the notice under  
15 7104.

16 JUSTICE KENNEDY: And you say -- you say  
17 that 80 percent of the time there is a registered --

18 MR. MILLER: Yes, that's --

19 JUSTICE KENNEDY: -- advocate or counsel?

20 MR. MILLER: Yes. Now, I think, as I was --

21 JUSTICE GINSBURG: But what happened in this  
22 case? Was there -- was there a registered  
23 representative?

24 MR. MILLER: I'm -- I'm not sure whether  
25 there was. I -- I don't believe so.



1                   JUSTICE GINSBURG: You made a point earlier  
2 that, well, this is -- the Social Security, there are  
3 many resemblances, but one is started by complaint and  
4 the other by notice of appeal. It could be that  
5 Congress, having been so kind to veterans, thought: Why  
6 should we burden this pro se, or at least lawyer-less,  
7 veteran with writing out a complaint? The notice of  
8 appeal is just a simple one-line document.

9                   So could that explain why Congress said you  
10 begin with a notice of appeal instead of a formal  
11 complaint?

12                   MR. MILLER: I think that may well be what  
13 Congress had in mind. But, nonetheless, the -- the rule  
14 established in this Court's cases is that when a notice  
15 of appeal deadlines -- and -- and I think that point  
16 just illustrates that this is, in fact, a notice of  
17 appeal deadline -- notice of appeal deadlines are  
18 different from statutes of limitations. And whatever  
19 one thinks of the original theoretical underpinnings of  
20 that distinction, it's a distinction that's firmly  
21 engrained in the law, and this --

22                   JUSTICE SCALIA: Did Congress -- let's  
23 assume we -- we come out with a decision against the  
24 veteran. Could Congress change the rule retroactively,  
25 including for this poor fellow?

1                   MR. MILLER: It could if it chose to do so,  
2 yes.

3                   JUSTICE SCALIA: And that wouldn't be  
4 contrary to any of our decisions because the government  
5 is the defendant and is essentially waiving its  
6 sovereign immunity? Would that be the theory?

7                   MR. MILLER: I think if Congress -- well --

8                   JUSTICE SCALIA: I mean, there has been --  
9 will have been a final decision in this case, right?

10                  MR. MILLER: Yes.

11                  JUSTICE SCALIA: So can Congress say, you  
12 know, go back and do it over again and give it to this  
13 guy?

14                  MR. MILLER: I -- I believe that, you know,  
15 since what's at stake is -- I think, ultimately, the  
16 question would be whether the government issues a  
17 monetary award to him. And Congress certainly has the  
18 power to simply direct that money be paid to this  
19 claimant. So, for sure, I think it could direct that  
20 his case be reopened.

21                  JUSTICE GINSBURG: But there's no -- been no  
22 determination on the merits whether this claimant should  
23 prevail.

24                  MR. MILLER: No.

25                  JUSTICE GINSBURG: That hasn't been aired

1 because the Veterans Court said it had no jurisdiction,  
2 and the Federal Circuit said that's right. So we don't  
3 know if this is a good or bad claim.

4 MR. MILLER: Right, but I --

5 JUSTICE GINSBURG: So Congress couldn't just  
6 award money because there has to be an adjudication.

7 MR. MILLER: Congress would have the  
8 constitutional power to just award money.

9 I had understood Justice Scalia's question  
10 to be whether --

11 JUSTICE GINSBURG: Justice Scalia just asked  
12 you: Could this be -- if Congress decided that this was  
13 a harsh result, could it be made retroactive? But for  
14 Congress to say, well, just -- what is it going to rely  
15 on to say whether it gives compensation or not? I mean,  
16 the Government's position was he wasn't entitled to  
17 compensation for home care, which is what he was  
18 seeking.

19 MR. MILLER: Right. The question I was  
20 trying to address was whether Congress could amend the  
21 statute so as to retroactively reopen Petitioner's  
22 claim. And my answer was yes, it could do that, if it  
23 were to choose to do so.

24 Now, the VA, of course, has submitted a  
25 proposal to Congress for an extension of the period on

1 showing a good cause up to 120 days. The VA's proposal  
2 would not apply retroactively, but Congress in its  
3 discretion could choose.

4 JUSTICE GINSBURG: On the length of time,  
5 which is, you said, 120 days -- yes, that's a long time,  
6 but isn't it on cert? It's 90 days plus 60, right? So  
7 it's even more.

8 MR. MILLER: Right. Although if you -- I  
9 mean, if somebody who misses the 90 days -- my  
10 understanding of the operation of this Court's Rule 13  
11 is that the clerk will not accept for filing a petition  
12 filed on day 91.

13 JUSTICE GINSBURG: But the total number of  
14 days would exceed 120, assuming that the application is  
15 made --

16 MR. MILLER: Right. Although --

17 JUSTICE GINSBURG: Application to extend is  
18 timely.

19 MR. MILLER: Although, of course, filing a  
20 cert petition is a much greater undertaking than filing  
21 a notice of appeal. You have to -- it's much more than  
22 a simple -- simple one-line document that we have here.

23 JUSTICE BREYER: What is supposed to  
24 happen -- and I've probably seen this on page 16 of the  
25 Federal Circuit Bar's amicus brief. They list about 30

1 or 40 cases where the veteran perhaps wasn't represented  
2 and maybe had some stress syndrome, whatever it is. He  
3 just filed the paper in the wrong court, and the -- or  
4 the wrong agency, and that agency didn't get around to  
5 returning it to him in time so he could have met this  
6 deadline.

7                   What, in your opinion, is supposed to happen  
8 in those circumstances? Just say too bad, you're out of  
9 luck; there we are, you got the wrong address; no  
10 recovery?

11                   MR. MILLER: I think it's significant that  
12 Congress did address the question of mailing of notices  
13 of appeal. In 1994, it amended section 7266 and added a  
14 subsection (c), which unfortunately is not reproduced in  
15 the briefs, but that -- the effect of that is to give  
16 the benefit of a mailbox rule so that a petition is  
17 deemed filed on the day it is mailed, but only, quote,  
18 "if the notice is properly addressed to the court." So  
19 it's significant --

20                   JUSTICE BREYER: Well, in all these cases,  
21 actually, that they've raised in the brief, the veteran  
22 does get his appeal.

23                   MR. MILLER: Well, no. In those cases, the  
24 notice would not have been properly addressed to the  
25 court. It would have been sent somewhere else and --

1 JUSTICE BREYER: So they could do it again.

2 MR. MILLER: And certainly --

3 JUSTICE BREYER: That's good.

4 MR. MILLER: And certainly one would hope  
5 that the VA, you know, ideally would get those notices,  
6 figure out what they are, and send them to the court.  
7 The problem that the VA encounters is that it receives a  
8 tremendous volume of mail, which is not generally opened  
9 by attorneys, and it's often not clear when it gets  
10 something in the mail that just says, you know, I don't  
11 like the decision in my case, whether that's a notice of  
12 appeal to the court or a motion for reconsideration or a  
13 motion to file a new claim --

14 JUSTICE BREYER: These people in footnote 3,  
15 did they get their appeal or didn't they?

16 MR. MILLER: They did not.

17 JUSTICE BREYER: They did not?

18 MR. MILLER: Yes.

19 JUSTICE BREYER: Okay. There's a problem.

20 MR. MILLER: Well, yes, and we -- we do not  
21 deny -- and, in fact, it's true by definition -- that to  
22 say that there is no equitable tolling is to say that  
23 there will be cases in which the result is not  
24 equitable. But -- and I think if you were to look at  
25 just the cases like the ones Your Honor has identified,

1 some of the others in Petitioner's brief and in the  
2 amicus briefs, and if you could identify with no  
3 transaction costs what those cases are and were to ask,  
4 as a policy matter, should there be -- should the late  
5 filing be excused in those cases, I think just about  
6 everyone would say yes.

7 JUSTICE BREYER: And so if we're in a void  
8 and the language doesn't have the exceptions -- and I  
9 think you can distinguish it from these other cases, and  
10 you have older cases that says unless Congress is clear,  
11 read it as non-jurisdictional, and nobody could say it  
12 was inequitable -- or rather to the contrary, nobody  
13 could say it was equitable to follow your position here,  
14 why isn't there a simple remedy? We take the opposite  
15 position?

16 MR. MILLER: Well, I think there are two  
17 answers to that, and the first is that whatever you  
18 think of the rule in Bowles -- and we obviously believe  
19 that it was correctly decided but understand that not  
20 everyone takes that view --

21 JUSTICE BREYER: Except that for purposes of  
22 this, it governs. I'm just looking at the parts of it  
23 that did, in fact, make clear the special nature of the  
24 particular provision at issue in that case.

25 MR. MILLER: But the -- the question of

1 whether a particular time limit is or is not  
2 jurisdictional would seem to be a quintessential example  
3 of the sort of issue where it is more important that the  
4 law be settled than that it be settled any particular  
5 way.

6 And the great virtue of the rule in Bowles  
7 is that it provides clear guidance that appeal deadlines  
8 are going to be presumed to be jurisdictional, and if  
9 Congress doesn't want them to be, it can say so.

10 JUSTICE GINSBURG: That's really the only  
11 thing that counsels your result, because in Reed you  
12 took -- the Government took the position that a  
13 statutory provision is non-jurisdictional if it does not  
14 speak in jurisdictional terms and doesn't address the  
15 power of the court. I understand that was the  
16 Government's position in Reed.

17 Today you're saying that the only thing that  
18 counsels your result is the fact that Congress used the  
19 words "notice of appeal." Is that correct?

20 MR. MILLER: Yes. Our position is  
21 consistent with what we said in Reed, because Reed, of  
22 course, did not involve a time limit. Reed involved the  
23 requirement that copyrights be registered before an  
24 infringement action is brought. And what the Court said  
25 in Reed is that the presence or absence of a



1 jurisdictional label on the statute is not  
2 determinative. What's -- what matters is whether the  
3 type of limitation that the statute imposes is one  
4 that's properly ranked as jurisdictional, absent a  
5 label. And if --

6 JUSTICE GINSBURG: Is there any -- any  
7 statute on the time to appeal? Has any statute been  
8 held, quote, "jurisdictional" when there is no safety  
9 valve of any kind written into it; that is, that -- on  
10 2107, that extensions are possible? Is -- is there a,  
11 quote, "jurisdictional" statute that says 121 days or  
12 whatever, and that's it; no extension, no matter what  
13 the circumstances are?

14 MR. MILLER: Yes. The Immigration and  
15 Nationality Act at issue in Stone has no provision for  
16 extensions. The Hobbs Act has no provision for  
17 extensions. And many of the various agency-specific  
18 statutes that I mentioned earlier don't have any  
19 provisions for extensions. And although this Court  
20 hasn't ruled on them, Petitioner hasn't identified any  
21 decision from any court of appeals holding that any of  
22 those statutes is not jurisdictional.

23 So there really is, as recognized in Bowles,  
24 a uniform rule regarding time limits for the taking of  
25 appeals and proceedings like appeals, writs of

1 certiorari and petitions for review.

2 JUSTICE SCALIA: What other acts do you  
3 think would be swept up into a rule that we adopted  
4 here, that not all limitations on appeal time are  
5 jurisdictional? The Hobbs Act cases; what else?

6 MR. MILLER: The -- which ones would be  
7 swept up, I suppose, depends on what the Court were to  
8 say in distinguishing this case. But there's the Hobbs  
9 Act, the --

10 JUSTICE SCALIA: Well, I'm sure we'd say  
11 these are veterans, and I'm sure there -- there are  
12 other categories of sympathetic people who might come  
13 under the Hobbs Act.

14 MR. MILLER: There -- there might well be,  
15 and I think that's why one of the virtues of the rule in  
16 Bowles is that it provides clear guidance to Congress.  
17 And in that respect, it's much preferable to a rule that  
18 statutes of -- or statutes --

19 JUSTICE SCALIA: But you haven't answered my  
20 question.

21 MR. MILLER: Oh --

22 JUSTICE SCALIA: The Hobbs Act --

23 MR. MILLER: Well, the Hobbs Act, the  
24 Federal Power Act, the Communications Act, various EPA  
25 orders are reviewed under their specific -- each statute

1 has its own review procedure.

2 JUSTICE BREYER: All these agency matters  
3 are matters where there has never been judicial input.  
4 This is review of an agency action. The agency takes an  
5 action. No judge has looked at this. And the first  
6 time that you look at the rulemaking by the agency under  
7 the Hobbs Act, I guess, is when you go file it in the --  
8 in the court.

9 So if a -- if a ruling against you here were  
10 to encompass a ruling under most review of agency  
11 action, would that be such a terribly unworkable thing?

12 MR. MILLER: Well, I -- I suppose that the  
13 Court could come up with a rule. Whether that would  
14 prove to be workable, I -- I don't know. But I think --  
15 I guess what I would say about that is that, given that  
16 there is an inherent arbitrariness to any filing  
17 deadline and, therefore, there is to some degree an  
18 inevitable arbitrariness in any system of exceptions to  
19 the filing deadline, I'm not --

20 JUSTICE GINSBURG: Why wouldn't it be a  
21 bright, clear line if we said, court to court, Bowles  
22 controls; agency to court, Bowles does not control?  
23 That would be a clear line.

24 MR. MILLER: It would be clear, but it would  
25 be contrary to Stone. It would be contrary to decades

1 of uniform holdings from courts of appeals under all the  
2 other statutes.

3 JUSTICE KENNEDY: Stone was somewhat mixed,  
4 though. It was a motion for reconsideration of the  
5 agency, whether or not that tolled the time to go to the  
6 court; am I correct?

7 MR. MILLER: That -- that's right, Your  
8 Honor.

9 JUSTICE KENNEDY: That's sort of a hybrid  
10 problem in the context of Justice Ginsburg's dichotomy.

11 MR. MILLER: But -- I mean, you're right  
12 that that was the issue in Bowles, but -- excuse me, in  
13 Stone, but the reason that that mattered in Stone was  
14 because the Court held that the timely filing of a  
15 petition for review in compliance with the statute was a  
16 prerequisite to the exercise of jurisdiction by the  
17 court of appeals.

18 JUSTICE BREYER: Cases -- what was the other  
19 case that you said decades -- what is an example of a  
20 case where a person, for an incredible, equitable strong  
21 reason, such as the wind blew his paper -- I don't  
22 know -- some tremendously equitable, strong reason he  
23 wants review of an agency action --

24 JUSTICE SCALIA: The dog ate it, maybe.

25 JUSTICE BREYER: Yes. Right. The dog ate

1 the court, and the -- the -- there is a case which says  
2 there is no extension of a -- of a deadline to file for  
3 review of an agency action, no matter how equitable your  
4 case? Which is our -- which is the Supreme Court case  
5 that holds that? I -- I am not familiar with it.

6 MR. MILLER: I don't know one in the  
7 specific context of agency actions, but, of course --

8 JUSTICE BREYER: Well, I'm only talking  
9 about agency actions, judicial review of agency action.

10 MR. MILLER: If -- if the time limit is  
11 jurisdictional as the --

12 JUSTICE BREYER: Well, I know the rule, but  
13 I'm just saying --

14 MR. MILLER: There is no authority --

15 JUSTICE BREYER: I know the rule. I'm  
16 saying what's the case? Stone -- I understand you can  
17 make a case of Stone. Is there another?

18 MR. MILLER: I -- I don't know of any from  
19 this Court, but, of course, in the courts of appeals,  
20 Petitioner hasn't identified any in which an exception  
21 was made.

22 And then I would point out that Bowles -- in  
23 Bowles, the petitioner had a very sympathetic equitable  
24 claim in that he had done what the district court told  
25 him to do and filed on the schedule given to him by the

1 district court, and the Court nonetheless held that  
2 because the time limit was jurisdictional, there was no  
3 authority to create an exception to it.

4 If there are no further questions, we ask  
5 that the judgment be affirmed.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Blatt, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF LISA S. BLATT

9 ON BEHALF OF THE PETITIONER

10 MS. BLATT: Thank you, Mr. Chief Justice.

11 Let me just point out on the Hobbs Act, the  
12 actual statute says the jurisdiction is invoked by  
13 filing a timely petition for review. So there's an  
14 express jurisdictional hook. And I think Justice Scalia  
15 points out an interesting fact on -- I think it's safe  
16 to say, in 1988, Congress wasn't sitting down thinking  
17 is this deadline jurisdictional; they're subject to  
18 equitable tolling.

19 What we had is a period where veterans were  
20 not given judicial review. We had World War II and the  
21 Vietnam conflict and the Korean conflict, which made it  
22 just untenable that veterans were not being treated on  
23 par with other claimants seeking disability benefits.  
24 And the sponsor of the bill points out, since Social  
25 Security disability benefits get judicial review, how

1 can we not treat our nation's veterans the same?

2 Now --

3 CHIEF JUSTICE ROBERTS: Counsel, I want to  
4 clear up this represent -- represented business.

5 MS. BLATT: Sure.

6 CHIEF JUSTICE ROBERTS: I understood you to  
7 say in the -- your opening that represented -- most of  
8 these people are not represented, and they're -- to the  
9 extent the American Legion participates, they don't get  
10 notice of the order that triggers the 120 days.

11 Now, I understood Mr. Miller to tell us that  
12 80 percent of the people have registered representatives  
13 and they do get notice.

14 MS. BLATT: Right. I think you correctly  
15 understand that we have a different understanding of  
16 reality. So my understanding is that representation  
17 is -- like the -- Mr. Henderson's wife at one point  
18 tried to become his authorized representative. There is  
19 no question he had somebody helping him, a veteran's  
20 service organization process.

21 CHIEF JUSTICE ROBERTS: Right.

22 MS. BLATT: This can take up to 4 or 5  
23 years --

24 CHIEF JUSTICE ROBERTS: Right.

25 MS. BLATT: -- to get notice. My --

1 CHIEF JUSTICE ROBERTS: Was that person  
2 helping him registered as a representative?

3 MS. BLATT: No, not that I know of. But  
4 this is not --

5 CHIEF JUSTICE ROBERTS: Well, is that the  
6 exception, then? I mean, Mr. Miller tells us 80 percent  
7 of the people do have registered representatives.

8 MS. BLATT: Right. I understand, and I'm  
9 just telling you that my understanding from not only  
10 just the amici briefs, that they do not have anything to  
11 deal with the court, is that the veterans organizations  
12 don't have notice. They are the ones that are filing in  
13 this case telling you that this decision will be  
14 disastrous for them. But even if they do, they are  
15 uncounseled. They are not lawyers.

16 JUSTICE KENNEDY: But it won't be disastrous  
17 if they can ask to be registered.

18 MS. BLATT: I agree. But these are -- the  
19 veterans' service -- like in this case, where he lives  
20 in North Carolina, there's only, like, 50 VA regional  
21 offices. So his representative may be 100, 200 miles  
22 away, and there's not that kind of connection. But if  
23 the case comes --

24 CHIEF JUSTICE ROBERTS: It doesn't matter  
25 how far away they are if he gets notice.



1 MS. BLATT: They don't -- I understand, and  
2 I'm just -- my understanding is that they either -- they  
3 don't get notice, and even if they have notice, they  
4 have -- feel no obligation, because they're not in a  
5 representative capacity at that point, that they would  
6 process his appeal or advise him.

7 JUSTICE SCALIA: Well, why give them notice?  
8 I mean, isn't the very giving of -- of notice --

9 MS. BLATT: Right. And I --

10 JUSTICE SCALIA: -- an indication that they  
11 are expected to do something?

12 MS. BLATT: And I understand the Government  
13 representing that there's notice, and I'm telling you  
14 that is not my understanding; that when he said  
15 authorized representative, I don't think that that meant  
16 veterans service organization. I may be wrong. It  
17 sounds like we have a different understanding.

18 But if I can get back on to what is really  
19 before this Court, is that when there's no indication,  
20 all we have is the three words "notice of appeal" when  
21 we know that those three words are non-jurisdictional in  
22 the criminal context, that there's nothing  
23 jurisdictional about the word "notice of appeal." It  
24 accurately describes that an appeal is going on. It  
25 doesn't say anything about whether the deadline is

1 jurisdiction.

2           And the question is: Was Congress thinking  
3 about the type of people who appeal district courts to  
4 courts of appeals? Yes, they were, but they made  
5 separate provisions for that. Or were they thinking  
6 about the Hobbs Act, which deals with licensing of  
7 nuclear power plants and orders by the FCC, and has an  
8 express statement in the text that it's jurisdictional?

9           I doubt that -- I think it is safe to say  
10 that Congress was not thinking about any of those  
11 contexts. They were trying to give veterans their day  
12 in court. And this decision would say no matter what  
13 the circumstances are, they are deprived.

14           Now, there was some discussion on the  
15 120-day deadline. I think another thing that is very  
16 safe to say is that time is not of the essence in the  
17 veterans system. It never has been. One hundred and  
18 twenty days is a blink of an eye. It's true that Social  
19 Security are given 60 days and other appellants are  
20 given 30.

21           JUSTICE KENNEDY: Are you helped or hurt in  
22 making that argument when this is not de novo review? I  
23 think you're helped. If it's not de novo review, that  
24 helps --

25           MS. BLATT: Yes, there's no prejudice. They

1 don't even -- the Government doesn't even contest these  
2 because it has to be based on the record before, and all  
3 we're talking about is an extra 30 days or 60 days.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 The case is submitted.

6 (Whereupon, at 11:04 a.m., the case in the  
7 above-entitled matter was submitted.)

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| <b>A</b>  |  |   |  |  |
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