

CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)
 LTD.,)
)
 Appellant,)
)
 vs.)
)
 MICHAEL O. LEAVITT, SECRETARY)
 U.S. DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES, *et al.*,)
)
 Appellees.)

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 CIVILIAN BOARD OF
 CONTRACT APPEALS
 CBCA 190-ISDA and 289-ISDA
 through 297-ISDA
 (IBCA 4794-4803-2006)

**APPELLANT ARCTIC SLOPE NATIVE ASSOCIATION'S
 SUPPLEMENTAL BRIEF REGARDING *BOWLES v. RUSSELL***

The Supreme Court in *Bowles v. Russell* held that a statutory time-limit for taking an appeal from a district court to a court of appeals is jurisdictional and can not be enlarged or waived, except as provided by the statute and its implementing rule. 127 S. Ct. 2360 (2007) (discussing 28 U.S.C. § 2107(c) and Fed. R. App. P. 4(a)(6)).

In so holding, the Court (1) reaffirmed longstanding principles regarding appellate filing deadlines stretching back nearly 160 years, *id.* at 2366 (discussing, *inter alia*, *United States v. Curry*, 6 How. 106 (1848)), (2) declared as a holding that which the Court had previously indicated through *dictum*, *id.* at 2364 (discussing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)), and (3) made note of the uniquely important constitutional context in which the issue in the case arose, *id.* at 2365 (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when and under what conditions, federal courts can hear them.”)

The issue here presented by IHS's dismissal motion has nothing to do with the issue presented in *Bowles*. IHS does not challenge a court's jurisdiction to hear an appeal. It does not even challenge this *Board's* jurisdiction to hear this appeal. Rather, it challenges the timeliness of the contractor's submission of its original claim to the contracting officer. As noted elsewhere, that issue is purely one of limitations law, in a setting where the Supreme Court has recently reiterated that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties," *Franconia Assoc's v. United States*, 536 U.S. 129, 145 (2002); *see also* Aplt ASNA's Surreply in Opp. to Aples' Mot. to Dismiss at 3-4 (discussing same), and where the Supreme Court has also repeatedly stated that the law regarding mandatory class action tolling, as well as equitable tolling, fully applies. *Id.* at 4-20. To suggest that, with nary a word, the Court in *Bowles* silently wiped the slate clean of this entire body of law is simply not plausible, all the more so given the effort by the dissent to draw an express analogue to that very body of law, *see Bowles*, 127 S. Ct at 2369 (Souter, J. dissenting) (discussing rule that "[s]tatutes of limitations may thus be waived"). Fairly read, the Court in *Bowles* left that body of law untouched, and focused its ruling strictly on the narrow matter at hand.¹

IHS argues that the Court's citation in *Bowles* to a footnote in an earlier opinion, which in addition to 28 U.S.C. § 2107 also made reference to 28 U.S.C. § 2401 of the Federal Tort Claims Act means that the Court in *Bowles* actually made holdings not just about the jurisdictional statute at issue in *Bowles* (§ 2107), but also about the Federal Tort Claims Act and all other time limitations

¹ IHS argues that *Bowles* now calls into question the Federal Circuit's decision in *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cr. 1994). IHS Supp. Br. at 2 n.2. But again, this confuses the law regarding the timeliness of appeals to a federal court (the issue in *Bowles*) with the law regarding statutes of limitations (the issue in *Bath Iron*). In any event, this Board remains bound by Circuit precedent.

that are set forth in a statute not at issue in the case, including the unmentioned Contract Disputes Act's 6-year claim presentment period. *See Bowles*, 127 S. Ct. at 2365 (discussing *Kontrick v. Ryan*, 540 U.S. 443, 453 and n.8 (2004)); IHS Supp. Br. at 2-3. That attenuated argument carries case analysis beyond legitimate bounds. *Bowles* makes no such sweeping categorical ruling, as perhaps best noted by the Majority's approval of this quote from *Barnhart*: "The accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants ... while others are not, even when incorporated into the jurisdictional provision." *Barnhart*, 537 U.S. at 160 n.6 (emphasis added) (quoted in part at *Bowles*, 127 S. Ct at 2364). And as noted earlier, the Court also rejected the dissenters' plea to conform the law regarding "statutes of limitations" with the law regarding the time for taking appeals to a federal circuit court.²

In short, *Bowles* does not concern a statute of limitation. This case does. *Bowles* does not concern mandatory class action tolling. Again, this case does. Nothing in the Court's opinion in *Bowles* suggests a retreat from the settled law that limitations periods applicable to claims against the Government are subject to class action tolling, as well as equitable tolling. For these reasons, together with those set forth in ASNA's prior briefs, ASNA respectfully requests that IHS's motion to dismiss be denied.

Respectfully submitted this 2d day of July 2007.

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² IHS's discussion of new waiver cases, IHS Supp. Br. at 3, like its discussion elsewhere of old waiver cases, misses the mark. Exhaustion here indisputably occurred. The main issue presented is whether the limitations period to exhaust was tolled by a pending class action and the *America Pipe* Tolling Rule.

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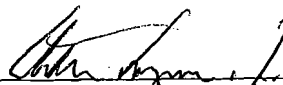
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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by electronic mail and first class mail to the following parties of record this 2nd day of July 2007:

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