

No. 09-1036

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IN THE  
**Supreme Court of the United States**

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DAVID L. HENDERSON,  
*Petitioner,*

v.

ERIC K. SHINSEKI,  
SECRETARY OF VETERANS AFFAIRS,  
*Respondent.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

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**BRIEF OF ALLAN G. HALSETH AS  
*AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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### **QUESTION PRESENTED**

Whether the 120-day time limit under 38 U.S.C. § 7266(a) for a veteran to seek review of a decision denying service-connected disability benefits restricts the jurisdiction of the Veterans Court and therefore cannot be subject to equitable tolling.

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**INTEREST OF *AMICUS CURIAE***

This Nation has long provided disability benefits to veterans for service-connected illnesses, both as an inducement to serve and as compensation for veterans' loyal service to their country.<sup>1</sup> This case concerns whether 38 U.S.C. § 7266(a)'s 120-day time limit for a veteran to

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<sup>1</sup> The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk in accordance with this Court's Rule 37.3(a). Pursuant to this Court's Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* and its counsel made such a contribution.

seek review of a decision denying him disability benefits in the Court of Appeals for Veterans Claims (“Veterans Court”) may be equitably tolled because, for example, the very disability for which he seeks compensation prevented him from meeting that deadline.

That issue is of grave concern to *amicus* Allan Halseth. *Amicus* served in the U.S. Marine Corps from 1968 to 1972. *Halseth v. Shinseki*, No. 05-3646, Rec. on Appeal at 2, 58-76 (C.A.V.C.) (“*Halseth* ROA”). He fought in Vietnam, *id.* at 76, received several medals for combat service, *ibid.*, and was honorably discharged, *ibid.* Due to a head injury suffered while in the Marines, *amicus* suffers from “recurrent temporal disorientation,” a “neurocognitive deficit[.]” that not only “interfer[es] with his capacity to carry out routine daily activities of daily living in a consistent manner,” but also causes him “to ‘lose track’ of significant passages of time (days, perhaps weeks) and thus miss critical deadlines or appointments.” Vet. Ct. Case No. 05-3646, Apr. 10, 2006 Dkt. Entry, at 2-3; Apr. 20, 2006 Dkt. Entry, at 1. After initially being denied benefits for that injury,<sup>2</sup> *amicus* then filed an untimely notice of appeal as a result of his temporal disorientation.

The Veterans Court instructed *amicus* to present evidence that his failure to file a timely notice of appeal resulted from his diagnosed illness. Feb. 17, 2006 Dkt. En-

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<sup>2</sup> *Amicus* sought compensation for (among other things) a left shoulder injury and a head injury suffered during his time in uniform. *Halseth* ROA 380-381. Consistent with his doctor’s diagnosis, *amicus* presented evidence that his head injury caused memory loss. *Id.* at 940-942, 948. On July 29, 2005, the Board of Veterans’ Appeals denied service connection for his claim. *Id.* at 1-20. *Amicus* filed his notice of appeal from that decision on December 21, 2005. See Vet. Ct. Case No. 05-3646, Dec. 21, 2005 Dkt. Entry, at 1.

try, at 2. Based on testimony from *amicus's* physician, the Veterans Court eventually determined that the standard had been met. The “evidence presented in this case,” the Court found, “is sufficient to warrant equitable tolling.” *Halseth v. Nicholson*, No. 05-3646, 2006 WL 1523106, at \*2 (Vet. App. June 1, 2006). Accordingly, on June 1, 2006, the Veterans Court ordered that *amicus's* notice of appeal be considered timely. *Ibid.*

Two years later, however, the Veterans Court dismissed petitioner’s case, holding that this Court’s decision in *Bowles v. Russell*, 551 U.S. 205 (2007), precluded equitable tolling. *Henderson v. Peake*, 22 Vet. App. 217 (2008). Relying on the decision in petitioner’s case, the Veterans Court dismissed *amicus's* appeal. *Halseth v. Peake*, No. 05-3646, 2008 WL 3978971, at \*1 (Vet. App. Aug. 21, 2008). Petitioner and *amicus* separately appealed to the Federal Circuit. *Amicus's* case was stayed pending the outcome in petitioner’s.

Because of *amicus's* interest in this matter, the Federal Circuit granted him leave to present oral argument before the panel below, and he submitted an *amicus* brief. *Amicus* retains the same strong interest before this Court.<sup>3</sup> *Amicus*, moreover, has a unique perspective and experience regarding the practical impact of the decision below on the operation of the veterans benefits

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<sup>3</sup> Indeed, following the decision below, *amicus* and the United States agreed that the Federal Circuit should summarily affirm the Veterans Court’s judgment dismissing *amicus's* appeal as untimely. See *Halseth v. Shinseki*, No. 2009-7048, Dkt. Entry Nos. 14, 15 (Fed. Cir.). Doing so would have allowed *amicus* to seek further review before this Court. The Federal Circuit refused (and again refused after a request for reconsideration), instead staying the case pending the Court’s decision in this case. See *id.*, Dkt. Entry Nos. 16-18. The absence of a final judgment from the Federal Circuit precluded *amicus* from filing his own petition for a writ of certiorari.

system: The Veterans Court has *already* determined that the very injury for which *amicus* seeks benefits prevented him from filing a timely notice of appeal and that equitable tolling therefore *would apply* if § 7266(a) permits it. That gives *amicus* both a substantial interest in this case and a unique perspective on the decision’s likely impact.

### SUMMARY OF ARGUMENT

The Nation’s system of veterans benefits must be interpreted, where possible, liberally in favor of the veteran in “special solicitude for the veterans’ cause.” *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009). That principle reflects the historical understanding that, because those who have served and sacrificed for their country are owed a debt of gratitude, the system established for their benefit is presumed to embody “benign polic[ies],” borne of “humane motive,” and to exclude constructions that do not represent “a fit discrimination of national gratitude.” *Walton v. Cotton*, 60 U.S. (19 How.) 355, 358 (1856). The construction of 38 U.S.C. § 7266(a) adopted by the court below—which renders § 7266(a)’s 120-day deadline a harsh and exceptionless trap—cannot be reconciled with that principle. Indeed, under that construction, the court would strip a veteran of his right to judicial review based on an untimely filing even when that default resulted from the very disability for which the veteran seeks compensation.

A. This Court’s cases demonstrate that a statute is presumptively jurisdictional if and only if its text places a limit on the power of a court to hear a case. By contrast, where the statute does not address itself to the authority of the court, but rather instructs a *litigant* on how to proceed, it is likely non-jurisdictional.

Section 7266(a) by its terms falls squarely in the latter category. It provides that “a *person adversely affected by*” a final decision of the Board of Veterans’ Appeals “*shall file* a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed.” 38 U.S.C. §7266(a) (emphasis added). It thus clearly directs itself to the steps the veteran must take. As this Court has held in cases like *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen v. City of New York*, 476 U.S. 467 (1986), statutes phrased in such terms—as opposed to focusing on the power of the court—are non-jurisdictional.

B. While the text of §7266(a) alone demonstrates that it is non-jurisdictional, any ambiguity must be resolved based on this Court’s longstanding canon that veterans benefits statutes should be interpreted liberally in the veteran’s favor. The canon derives from a millennia-old understanding that governments have a duty to provide for those who have served them so loyally. That canon requires Article III courts to give the veteran the benefit of any “interpretive doubt.”

C. *Amicus*’s own experience demonstrates precisely why the government’s attempt to convert §7266(a) into a categorical bar on relief for untimely filings is untenable. The Veterans Court has *already* determined that *amicus* missed his deadline because of one of the very illnesses for which he seeks compensation. That illness has already cost *amicus* his mental health. The government would have it cost him his appellate rights as well.

D. The government relies almost exclusively on *Bowles v. Russell*, 551 U.S. 205 (2007). But *Bowles* did not establish a categorical rule that all timing-of-review

provisions are jurisdictional. Such a reading of *Bowles* would make no sense in light of the text, structure, and purposes of veterans benefits statutes generally and the Veterans Judicial Review Act specifically. And this case presents none of the separation-of-powers or finality concerns raised by *Bowles*. Such considerations, not an over-reading of *Bowles*, control the outcome here.

### ARGUMENT

Since well before this Nation's founding, countries have provided compensation and benefits to veterans injured while serving their country. Those benefits serve both as inducement for loyal service and compensation for sacrifices made. Consistent with those purposes, veterans benefits and compensation are awarded through a system that offers "special solicitude for the veterans' cause." *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Ibid.* The veteran has made extreme sacrifices for the Nation. The Nation, in turn, acts with a corresponding spirit of gratitude and generosity in repayment of those sacrifices. As President Lincoln proclaimed in closing his second inaugural address, it is the Nation's duty "to care for him who shall have borne the battle and for his widow and his orphan." U.S. Gov't Printing Office, *Inaugural Addresses of the Presidents of the United States* 142, 143 (1989).

The modern veterans benefits system and this Court's cases construing it resonate with that same theme. Veterans seeking benefits are not subjected to an adversarial process; they are supposed to encounter a cooperative system in which the Secretary of Veterans Affairs "make[s] reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's

claim for a benefit.” 38 U.S.C. § 5103A(a)(1). The Secretary must assist a claimant in “obtain[ing] relevant records” that would support his claim, *id.* § 5103A(b)(1), and in “providing a medical examination or obtaining a medical opinion” as necessary, *id.* § 5103A(d). And when the issues are sufficiently close, “the benefit of the doubt” must be given to the veteran. *Id.* § 5107(b).

Decisions denying benefits can be appealed to the Board of Veterans’ Appeals, 38 U.S.C. §§ 7104-7107, which likewise uses a “nonadversarial” system, 38 C.F.R. § 20.700(c). Further appeals to the Veterans Court are likewise replete with pro-claimant features. Only veterans can seek review of Board decisions; “[t]he Secretary may not seek review.” 38 U.S.C. § 7252(a). And Veterans Court decisions must “take due account of the Secretary’s application of section 5107(b),” *id.* § 7261(b)(1), which requires the Secretary to “give the benefit of the doubt to the claimant” when “there is an approximate balance of positive and negative evidence,” *id.* § 5107(b).<sup>4</sup> Moreover, this Court’s cases require that doubtful questions of statutory construction must “be resolved in the veteran’s favor.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Statutory provisions must be given “as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

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<sup>4</sup> While veterans may hire counsel, the fee agreement must be filed with the court, which can reduce any fee that “is excessive or unreasonable.” 38 U.S.C. §§ 7263(b)-(d). Most veterans proceed without counsel. Since 2000, the annual percentage of claimants unrepresented by counsel when filing with the Veterans Court ranged from just over half to just over two-thirds. See Pet. Br. 8.

Notwithstanding those principles, the Federal Circuit gave the 120-day time limit for seeking Veterans Court review a construction that is not merely distinctly ungenerous to veterans, but also imposes a legal disability in consequence of the physical disabilities the veteran suffered while serving the Nation. Under this Court's cases, "limitations periods are customarily subject to equitable tolling" where, for example, circumstances beyond the litigant's control prevent him from meeting the deadline. *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). But the government and the decision below claim that the general rule does not apply to the deadlines imposed on veterans seeking review in the Veterans Court. Congress, they insist, precluded equitable tolling by making that deadline jurisdictional. Thus, under their view, a veteran's failure to meet the deadline always forfeits his claims. Indeed, the Veterans Court applied that rule to dismiss *amicus's* claims even after concluding that the very service-related injury for which he was seeking compensation—"recurrent temporal disorientation" that causes him to "lose" significant "passages of time (days, perhaps weeks)"—also caused him to miss the deadline for further review.

That approach does not merely defy the statute's text, which is inconsistent with an intent to establish a jurisdictional deadline. Nor does it merely contravene the canon requiring statutes to be construed generously in favor of the veteran. It is also flatly inconsistent with the spirit of gratitude and generosity this Nation traditionally displays in the treatment of those who have sacrificed so much.

**A. Section 7266(a)'s Text Demonstrates That Its Timing Requirement Is Not Jurisdictional**

For generations, this Court has recognized that the web of statutes addressing veterans benefits must be construed, where possible, in the veterans' favor. Even apart from that canon, however, the Federal Circuit's decision to construe the 120-day time limit in 38 U.S.C. § 7266(a) as a harsh and inflexible trap for injured veterans cannot be sustained. As this Court has explained, it "is hornbook law that limitations periods are customarily subject to equitable tolling, \* \* \* unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). Here, nothing in the text of § 7266(a) makes the 120-day deadline a "jurisdictional" limit that cannot be tolled. To the contrary, this Court's decisions demonstrate that such a label is inappropriate. Section 7266(a) by its terms does not address itself to "jurisdiction" or the power of the court to adjudicate a case. It addresses itself instead to the obligations of a party.

1. This Court in recent years has become more critical of the sometimes "profligate" use of the term "jurisdictional," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006), and has "attempted to brush away confusion introduced by \* \* \* earlier opinions," *Eberhart v. United States*, 546 U.S. 12, 16 (2005). The primary lesson that has emerged from the Court's more recent cases is that subject-matter jurisdiction at its core "involves a court's power to hear a case." *Arbaugh*, 546 U.S. at 514 (emphasis added) (quotation marks omitted); see also *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Black's Law Dictionary* 853 (6th ed. 1990) ("jurisdiction" refers to "the power of the court to decide a matter in contro-

versy”). Consequently, the principal textual determinant of whether a provision is jurisdictional is whether the statute by its terms addresses the *power of a court* to hear a case; such statutes are typically jurisdictional. By contrast, a statute that merely imposes requirements or obligations on a party will rarely be jurisdictional.

As this Court has explained, a statutory provision that “delineat[es] the classes of cases \* \* \* *falling within a court’s adjudicatory authority*” is likely to be construed as jurisdictional. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (emphasis added). Similarly, where Congress enacts a statute that expressly uses the term “jurisdiction”—a word that inherently connotes power or scope of authority—the statute is also likely jurisdictional. See, e.g., *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 467-468 (2007). The federal-question statute represents a textbook example. It states that “[t]he district *courts* shall have *original jurisdiction*” over particular cases, namely “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (emphasis added). Likewise, the diversity statute gives “district *courts* \* \* \* *original jurisdiction*” over “civil actions” with diverse parties and an amount in controversy exceeding \$75,000. *Id.* § 1332(a) (emphasis added). In both provisions, Congress delineated the classes of cases falling within a court’s adjudicatory authority. Both are therefore jurisdictional. See *Arbaugh*, 546 U.S. at 513, 515.

Conversely, “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Arbaugh*, 546 U.S. at 516. Accordingly, when a provision speaks not to the “power of the court” but to “the rights or obligations of the parties,” it is ordinarily non-

jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1243 (quotation marks omitted). As the United States explained in its *amicus* brief in *Reed Elsevier*, a statutory provision is non-jurisdictional if it “does not speak in jurisdictional terms” and—instead of addressing the power of the court—“establishes steps that a [party] must take before filing suit.” U.S. Br. in No. 08-103, at 14 (June 2009) (emphasis added). Even though the statute in *Reed Elsevier* established certain mandatory steps for the party in “emphatic terms,” the government explained, not even emphatic language can convert a statute that “speaks to the obligations of the parties rather than the power of the court” into a jurisdictional limit. *Id.* at 14, 15.

2. This Court’s cases have repeatedly recognized that distinction—between statutes that “define[] the court’s authority to hear a given type of case,” and those that impose mandatory obligations on litigants—when distinguishing jurisdictional from non-jurisdictional provisions. See *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009) (quotation marks omitted). In *Arbaugh*, for example, the Court addressed “whether the numerical qualification contained in Title VII’s definition of ‘employer’ affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief.” 546 U.S. at 503. The Court unanimously held that the statute, which provided that “[t]he term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees,” was non-jurisdictional. *Id.* at 504. The 15-employee requirement, this Court reasoned, “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Ibid.* (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

In *Reed Elsevier*, the Court likewise addressed whether a copyright holder's failure to comply with a statutory registration requirement was jurisdictional. The statute there provided that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 130 S. Ct. at 1245 (emphasis added). The Court held that the statute was non-jurisdictional because it did not “clearly state[] that its registration requirement is ‘jurisdictional,’” and did not otherwise “speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Id.* at 1245-1246 (quoting *Arbaugh*, 546 U.S. at 515). Instead, it imposed a pre-filing requirement on the plaintiff, the party that traditionally “institute[s]” a “civil action for infringement.” *Id.* at 1245.

Similarly, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court again addressed a statute focusing on the behavior of the parties rather than the authority of the court. The statute there stated that, “[w]ithin thirty days of receipt of notice of final action taken by \* \* \* the EEOC \* \* \* an employee or applicant for employment \* \* \* may file a civil action as provided in section 2000e-5 of this title.” *Id.* at 94 (emphasis added). This Court again held that the statute was non-jurisdictional and therefore subject to equitable tolling. *Id.* at 95-96.

Finally, in *Bowen v. City of New York*, 476 U.S. 467 (1986), this Court held that a provision of the Social Security Act requiring a claimant to appeal an agency denial of benefits within a specified time period was not jurisdictional. *Id.* at 480-482. The statute in *Bowen* likewise focused on the steps a party must take to have her case heard, declaring that “[a]ny individual” contesting a So-

cial Security benefits determination “*may obtain a review* of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.” *Id.* at 472 n.3 (emphasis added); see also *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) (“It is anomalous to classify time prescriptions, even rigid ones, under the heading ‘subject matter jurisdiction.’”).

By contrast, in *Bowles*, the Court confronted a statute that by its terms addressed the authority of the court. The statutory provision there declared that “*no appeal shall bring* any judgment, order or decree in an action, suit or proceeding of a civil nature *before a court of appeals* for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.” 28 U.S.C. §2107(a) (emphasis added). That language is not a direction to the parties but a declaration regarding judicial power. It proclaims that an appeal is incapable of bringing the determination below before the appellate court unless the required notice is filed within 30 days. Congress’s express provision of a mechanism to extend the 30-day period in §2107(c) reinforced that conclusion. That is true not merely because the inclusion of an express exception to the 30-day requirement implies the absence of other, unlisted exceptions. It is also true because Congress, in making the exception, once again directed itself not to the obligations of the parties but to the *power of the court*. A “district court,” Congress provided, can “reopen the time for appeal” within 180 days of judgment for a period of 14 additional days in certain circumstances. *Id.* §2107(c); see also Fed. R. App. P. 4(a)(6). Because the text of those provisions “*prohibits federal courts from adjudicating* an otherwise legitimate

‘class of cases’ after a certain period has elapsed from final judgment,” the Court concluded that they are jurisdictional. *Bowles*, 551 U.S. at 213 (emphasis added); see also *Browder v. Dir., Dep’t of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

3. The provision at issue here, 38 U.S.C. §7266(a), parallels the provisions this Court held to be non-jurisdictional in *Arbaugh*, *Reed Elsevier*, *Irwin*, and *Bowen*, but is wholly unlike the statute held jurisdictional in *Bowles*. Like the statutes in the former cases and unlike the statute in *Bowles*, §7266(a) is not framed as an express limit on the authority of the reviewing court. To the contrary, it focuses on what the veteran must do. It provides that, “[i]n order to obtain review by the Court of Appeals for Veterans Claims \* \* \* a person adversely affected by such decision shall” take certain steps. 38 U.S.C. §7266(a) (emphasis added). Because §7266(a) “merely establishes steps that a [party] must take before filing suit,” U.S. Br. in No. 08-103, at 14 (June 2009), it is a paradigmatic example of the sort of statute that ought not be considered jurisdictional.

The court below “recognize[d] that while 28 U.S.C. §2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, §7266(a) is phrased in terms of the actions a veteran must take to preserve his or her right to appeal.” Pet. App. 39a. But the court nonetheless concluded that §7266(a) was jurisdictional. *Ibid.* That conclusion simply ignores the fundamental nature of “jurisdiction”—that it speaks to the power of courts, not the obligations of litigants appearing before them. Because Congress “d[id] not speak in jurisdictional terms or refer in any way to the jurisdiction” of the federal court, *Zipes*, 455 U.S. at 394, and spoke to

the obligations of the parties instead, *Reed Elsevier*, 130 S. Ct. at 1243, § 7266(a) is non-jurisdictional.

Had Congress intended § 7266(a)'s time limit to be jurisdictional, it could have easily achieved that result. Congress could have, for example, echoed the statute in *Bowles* by providing that “no appeal shall bring any final decision of the Board of Veterans’ Appeals before the Court of Appeals for Veterans Claims unless notice of appeal is filed within 120 days after the date on which notice of the decision is mailed.” Cf. 28 U.S.C. § 2107(a). Or Congress could have provided specific exceptions to that time limit and framed them in terms of judicial authority, making clear that courts had neither authority over cases not brought within the time limit set forth nor authority to infer the existence of unlisted exceptions. Cf. 28 U.S.C. § 2107(c). But a naked direction to an individual to undertake particular actions by a particular deadline, without any further detail, falls irremediably short of demonstrating a congressional intent to impose an exceptionless jurisdictional requirement that is immune from the ordinary background principles and exceptions that Congress is presumed to understand, accept, and incorporate into its laws.<sup>5</sup>

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<sup>5</sup> In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court held that a statute was jurisdictional where it provided that “[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.” *Id.* at 45; see 28 U.S.C. § 2101(c). Unlike that provision, however, § 7266(a) specifically identifies to whom it is directed—the litigant rather than the court—by stating that the “person adversely affected” must file his notice within 120 days. The statute in *Jenkins*, moreover, provided that a Member of this Court, “for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.” See

**B. The Decision Below Cannot Be Reconciled  
With Either The Canon Requiring Ambiguity  
To Be Resolved In The Veteran’s Favor Or The  
Humane Principles The Canon Reflects**

This Court has long applied the rule of construction that, in statutes dealing with veterans benefits, any “interpretive doubt is to be resolved in the veteran’s favor.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). For the reasons given above, this Court need not resort to that canon: Section 7266(a)’s text by itself demonstrates that it is non-jurisdictional. To the extent § 7266(a) is not unambiguously non-jurisdictional, however, it surely cannot be deemed unambiguously jurisdictional. Section 7266(a) nowhere designates its time limits as jurisdictional; it does not frame them as limits on the power of courts; and it certainly does not do so unmistakably. Any ambiguity must therefore be resolved in the veteran’s favor.

1. The canon requiring courts to construe veterans statutes liberally and compassionately in favor of veterans reflects a principle almost as old as government and

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495 U.S. at 44 n.12 (citing 28 U.S.C. § 2101(c)). Because Congress had provided for a specific exception to the deadline—as it did in 28 U.S.C. § 2107(c), a provision addressed in *Bowles*—it would have been inappropriate for this Court to imply more exceptions. Similarly, in *Stone v. INS*, 514 U.S. 386 (1995), this Court held that a motion for reconsideration of a Board of Immigration Appeals decision does not toll the requirement that “a petition for review [of a final deportation order] \* \* \* be filed not later than 90 days after the date of the issuance of the final deportation order.” *Id.* at 390, 405. There, however, Congress was acting for the specific purpose of expediting the removal of aliens and “to redress the related problem of successive and frivolous administrative appeals and motions.” *Id.* at 400; see Pet. Br. 50. Engrafting judicially created exceptions onto the statute would have defied Congress’s intent. A similar desire to impose harsh and exceptionless time limits on those who have afforded the Nation loyal service cannot be inferred here.

war—that the body politic for whom the soldier risks life and limb should exhibit a spirit of gratitude and generosity for those sacrifices. The “practice of compensating war veterans and disabled soldiers dates back to antiquity.” Library of Congress Federal Research Division, *Veterans Benefits and Judicial Review 2* (1992) (“*Veterans Benefits & Judicial Review*”). Egyptian Pharaohs made sure that their soldiers were given “plots of land, depending on the extent and character of their service.” *Ibid.* In Ancient Greece, “[s]oldiers wounded in battle were fed at public expense, and pensions were granted to those who could prove permanent injury.” *Ibid.* Rome likewise provided pensions for disabled soldiers financed in part “by proceeds from taxes on public sales.” *Id.* at 3.

A similar spirit of gratitude and generosity pervades European history. French King Phillip II “founded a hospice for veterans who had participated in the Crusades.” *Veterans Benefits & Judicial Review, supra*, at 4. Other examples of pre-modern European veterans benefits abound. See, e.g., *id.* at 9-10 (Russia); *id.* at 10-11 (Germany). In short, “[t]he care of the poor, sick, and maimed soldiers and sailors who had served in wars had occupied the attention of European countries for several centuries.” Gustavus A. Weber & Laurence F. Schmeckebier, *The Veterans’ Administration: Its History, Activities and Organization 3* (1934).

England adopted the same attitude. The King of the West Saxons provided land grants to veterans as early as the end of the 9th century. *Veterans Benefits & Judicial Review, supra*, at 13. The English Parliament enacted a series of laws toward the end of the 16th century that provided relief to disabled soldiers. *Id.* at 14. And, during Queen Elizabeth I’s reign, the “veterans of Sir Francis Drake’s forces” were awarded pensions “in gratitude

for Drake's defeat of the Spanish Armada." William F. Fox, Jr. *The Law of Veterans Benefits: Judicial Interpretation* 3 (3d ed. 2002); see also H.R. Rep. No. 100-963, at 9 (1988).

That same tradition of grateful generosity crossed the Atlantic to the new colonies. In 1636, the General Court of the Plymouth Colony passed a statute providing for lifetime benefits to injured soldiers. *Veterans Benefits & Judicial Review, supra*, at 21. Many colonies followed suit. See *id.* at 24 (Virginia); *id.* at 25 (Maryland); *id.* at 25-26 (New York); *id.* at 26-27 (New Hampshire); *id.* at 27 (New Jersey); *id.* at 28 (Rhode Island); *id.* at 22 (figure entitled "Veterans Benefits in the Thirteen Colonies, 1764"); H.R. Rep. No. 100-963, at 9 (1988). Thus, "[t]he English colonies in America, following the custom of the mother country, introduced pension systems for disabled veterans almost at the beginning of the colonization." Weber & Schmeckebier, *supra*, at 3.

Throughout the revolutionary period and the ensuing 200 years of this Nation's history, Congress adhered to the same spirit. The Continental Congress resolved to allow States to charge it for payments made to Continental Army soldiers disabled during the Revolutionary War. 5 *Journals of the Continental Congress 1774-1789*, at 702-705 (1906). Troops serving in state militias were often granted benefits as well. *Veterans Benefits & Judicial Review, supra*, at 37-39. Gradually, Congress consolidated the benefits process with the federal government. See *id.* at 40-45 (discussing various statutes); Weber & Schmeckebier, *supra*, at 7-9, 18-19, 26-27. By the time the Civil War ended, no one could possibly quibble with President Lincoln's proclamation that it was the country's duty "to care for him who shall have borne the battle and for his widow and his orphan." U.S. Gov't

Printing Office, *Inaugural Addresses of the Presidents of the United States* 142, 143 (1989). The phrase would later become the motto of the Department of Veterans Affairs.

Even though “[p]ensions for the nation’s war veterans” had by 1880 grown to become “the single largest expenditure of the Federal government” and consumed more than one-third of the federal budget by 1890, *Veterans Benefits & Judicial Review*, *supra*, at 59, the national commitment to caring for veterans did not abate. After World War I, the “trend of liberalizing veterans benefits” continued. Library of Congress Federal Research Division, *The Veterans Benefits Administration* 20 (1995). And even though the number of veterans grew by over 300% between 1942 and 1947, see *id.* at 35, Congress continued to maintain and expand veterans benefits, including disability benefits, in the post-World War II era, *id.* at 29-62.

The right to judicial review established in 1988 through §7266(a) reflected that same national commitment to caring for veterans who have rendered faithful service. During the early days of the Republic, Congress “intended that the courts play an active role in the administration of a veterans’ benefit system,” but “[f]ederal courts had refused to exercise that power.” *Veterans Benefits & Judicial Review*, *supra*, at 45.<sup>6</sup> As a result, decisionmaking authority was vested with the Secretary of War, and later in the Veterans Administration. Dissatisfied with the consequences of unreviewed and unre-

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<sup>6</sup> In 1792, Congress “imposed” “the duty of deciding whether a veteran’s disability was service-connected, and if so, the extent of his disability, on the Circuit Courts of the United States,” but the judges “were mostly of the opinion that Congress could not require the judiciary to make such determinations.” H.R. Rep. No. 100-963, at 9 (1988).

viewable agency determinations, Congress established a right to judicial review when it enacted the Veterans Judicial Review Act. See Pub. L. No. 100-687, 102 Stat. 4105 (1988). That Act—which created the Veterans Court along with §7266(a)’s 120-day deadline—was spurred by “Congress’ abiding concern that individuals who had put their lives on the line through service in the military had no right to have their claims for disability benefits reviewed in a court of law.” Pet. App. 67a (Mayer, J., dissenting). The “opportunity” for judicial review “[wa]s *necessary* in order to provide such claimants with *fundamental justice*.” S. Rep. No. 100-418, at 50 (1988) (emphasis added); see also *id.* at 29-31; H.R. Rep. No. 100-963, at 9-10 (1988).

2. The canon requiring courts to construe veterans statutes generously in favor of the veteran when possible arises out of the same commitment to wounded veterans. This Court has “recognize[d] that Congress has expressed special solicitude for the veterans’ cause.” *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009). “A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life.” *Ibid.* Consistent with that statutory commitment, this Court has long applied the canon “that interpretive doubt is to be resolved in the veteran’s favor.” *Brown*, 513 U.S. at 118. Under that canon, courts “constru[ing] the separate provisions of the Act” must “give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); see also *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977).

That canon dates from early in the Nation’s history. For example, this Court invoked the canon more than 150

years ago in *Walton v. Cotton*, 60 U.S. (19 How.) 355 (1856). Recognizing that Congress had established the veterans benefits at issue “from high motives of policy” and in “gratitude” for the veterans’ loyal service, the Court declared that, “where the language used” by Congress “may be so construed as to carry out a benign policy, it should be done.” *Id.* at 358.

In that case, the question was whether Congress, in authorizing payments to the “children” of a deceased veteran, intended such benefits to be paid to “grandchildren” where the veteran died “leaving no widow or children, but [only] grandchildren.” 60 U.S. at 358. In the context of wills, the Court observed, the word “children” had sometimes been “held to mean grandchildren.” *Ibid.* The Court explained that Congress had granted the benefits to “alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered.” *Ibid.* In light of that purpose, the Court rejected the claim that the term “children” excludes “grandchildren,” reasoning that to withhold the benefits from the veteran’s grandchildren, “who had the misfortune to be left orphans, \* \* \* would not seem to be a fit discrimination of national gratitude.” *Ibid.* To deny payment to veterans’ offspring whenever “a male pensioner dies, leaving no widow or children, but grandchildren,” the Court continued, “would seem to stop short of carrying out the humane motive of Congress.” *Ibid.* Invoking the rule that the statute must be “construed to carry out a benign policy” and the principle that Congress “will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result,” the Court held that “the word children, in the acts, embrace[s] the grandchildren” of the veteran as well. *Ibid.*

Since then, this Court has repeatedly invoked the canon requiring any ambiguity in a veterans statute to be construed in favor of the veteran. See, e.g., *Brown*, 513 U.S. at 117-118 (disability benefits statute); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (stating in the context of a reemployment provision that “provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor”); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (“The [Vietnam Era Veterans’ Readjustment Assistance Act of 1974] is to be liberally construed for the benefit of the returning veteran.”); *Fishgold*, 328 U.S. at 284-285 (Selective Training and Service Act of 1940). This Court and others have not hesitated to invoke the canon in a variety of contexts, whether procedural, substantive, or both. See *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (Act containing a provision permitting a stay of proceedings when a veteran is involved “is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation”); *Landsman v. United States*, 205 F.2d 18, 22 n.14 (D.C. Cir. 1953) (“If there were room for dispute, the humanitarian nature” of legislation allowing for veterans to make a timely application for a waiver of insurance premiums based on disability “would point to a liberal interpretation, in aid of the veteran.”). This Court must, moreover, “presume congressional understanding of such interpretive principles” when construing a veterans benefit provision. *St. Vincent’s*, 502 U.S. at 221 n.9.

3. To the extent § 7266(a) is not unambiguously non-jurisdictional, the canon requiring veterans statutes to be construed liberally in favor of the veteran must control this case. Whatever debate there can be about the proper construction of § 7266(a)’s text, that text surely

does not unambiguously establish the 120-day limit as jurisdictional. Under this Court's cases, *any* "interpretive doubt" must be resolved in favor of the veteran. *Brown*, 513 U.S. at 118; *Sanders*, 129 S. Ct. at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

Application of that canon is particularly appropriate given the extreme and inequitable consequences the contrary construction would impose. The whole point of the veterans benefits system is to provide compensation to those who suffer a disability while serving this Nation. And the point of providing further review was Congress's conclusion that it was critical to due process and fundamental fairness. See pp. 19-20, *supra*. Sometimes, however, the same disability that impairs the veteran's general functioning can also prevent her from meeting statutory deadlines. The government would construe the statute so that the very injury for which Congress sought to provide compensation can become the reason the veteran loses her rights to judicial review and compensation alike. That approach does not merely fall short of the "humane motive of Congress" that underlies veterans benefits programs. *Walton*, 60 U.S. at 358. It also would "frustrate the purposes" of the Veterans Judicial Review Act "and, in effect, cause the act to destroy itself." *Baltimore & Ohio R.R. Co. v. Pitcairn Coal Co.*, 215 U.S. 481, 494 (1910). That is especially true considering that many veterans file their notices of appeal without the assistance of counsel.<sup>7</sup> Whatever else it intended, Congress

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<sup>7</sup> "Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar."

plainly did not want the severity of the disability for which the veteran seeks compensation to become the very reason the veteran—often unaided by counsel—ends up being denied judicial review.

**C. *Amicus*'s Circumstance Demonstrates Precisely Why Congress Could Not Have Intended The Government's Construction**

The concern identified by *amicus* above—that the very injury for which a veteran seeks compensation might become the reason he cannot obtain it—is hardly hypothetical. The Veterans Court has already ruled that *amicus* missed the deadline precisely because of his disability, but refused equitable tolling nonetheless.

A Vietnam veteran, *amicus* suffered numerous injuries during his time in uniform and was honorably discharged. He has sought to establish entitlement to benefits for the service-connected disabilities that resulted from those injuries. One of the disabilities he has been diagnosed with—“recurrent temporal disorientation”—has “worsened over the years” and “significantly disrupt[s] his capacity to carry out routine daily activities in a consistent manner.” *Halseth v. Nicholson*, No. 05-3646, 2006 WL 1523106, at \*1 (Vet. App. June 1, 2006); Vet. Ct. Case No. 05-3646, Apr. 10, 2006 Dkt. Entry, at 2. As a result of those deficits, *amicus* loses track of days and

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Pet. App. 69a (Mayer, J., dissenting); cf. *Zipes*, 455 U.S. at 397 (reading a timing deadline as jurisdictional “would be ‘particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process’”). Interpreting the time limit in § 7266(a) would thus fly in the face of a system in which veterans, often unassisted by lawyers, must navigate through the statutory and regulatory labyrinth in order to receive benefits due for their service to the country.

even weeks; time just disappears. 2006 WL 1523106, at \*1-2.

It was that disability (among others) for which *amicus* sought compensation. And it was that disability that caused him to miss the 120-day deadline. After an adverse decision from the Board of Veterans' Appeals, *amicus* appealed—without counsel—to the Veterans Court one month outside § 7266(a)'s 120-day window. Relying on then-existing *en banc* Federal Circuit precedent, the Veterans Court determined that *amicus* would be entitled to equitable tolling if he proved he had a disability that prevented him “from handling his own affairs or functioning in society” if “his failure to file a timely [notice of appeal] was the direct result of [that] diagnosed mental illness.” Feb. 17, 2006 Dkt. Entry, at 2. After reviewing evidence from *amicus*'s physician regarding *amicus*'s recurrent temporal disorientation, the Veterans Court determined that his disability had prevented him from meeting the deadline. The “evidence presented in this case,” the Court ruled, “is sufficient to warrant equitable tolling.” 2006 WL 1523106, at \*2. Accordingly, on June 1, 2006, the Veterans Court ordered that *amicus*'s notice of appeal be considered timely. *Ibid.*

Two years later, however, the Veterans Court invoked this Court's decision in *Bowles* to hold that § 7266(a) categorically bars equitable tolling. See *Henderson v. Peake*, 22 Vet. App. 217 (2008). Citing that ruling, it then dismissed *amicus*'s appeal. See *Halseth v. Peake*, No. 05-3646, 2008 WL 3978971 (Vet. App. Aug. 21, 2008). The Veterans Court did not retreat from its ruling that *amicus* suffers from a neurocognitive disability. Nor did it retreat from the conclusion that *amicus* had demonstrated that “his failure to file a timely [notice of appeal] was the direct result of [that] diagnosed mental illness.”

Rather, it extended *Bowles* and concluded that § 7266(a)'s deadline is a bright-line, exceptionless rule that forecloses any tolling under any circumstance.

*Amicus*'s injuries have cost him his mental health. He should not lose his appellate rights as well. If allowed to stand, the decision below will close the doors to veterans like *amicus* who miss a deadline through no fault of their own and, indeed, as a result of the injuries they suffered while serving the Nation. It is utterly implausible that Congress—prompted by the “humane motive” and spirit of gratitude underlying the Nation’s veterans statutes—intended that harsh result.

#### **D. *Bowles* Does Not Compel A Contrary Result**

While the government has urged the contrary construction on the Court, see Br. in Opp. 5-13, *amicus* presumes that it does so reluctantly. The government, of course, has no interest in denying injured veterans the benefits that are their due; it does not seek to enrich the federal fisc at the expense of the wounded. The government likewise does not suggest that it would be in keeping with the policy of “national gratitude” and the “humane motive” of Congress in enacting these statutes to construe them to deny the veteran his day in court. Nor does the government urge that it is compelled to adopt its current position based statutory text, or on the positions it has taken in the past. Instead, the government mistakenly reads this Court’s decision in *Bowles* as compelling the conclusion that § 7266(a) must be jurisdictional because all provisions setting forth time limits for appellate review are necessarily jurisdictional.

1. This Court’s cases foreclose the government’s reading of *Bowles*. For example, in *Bowen v. City of New York*, 476 U.S. 467 (1986), this Court addressed a statute that allowed an individual contesting a benefits determi-

nation under the Social Security Act to “obtain a review” of that determination by filing suit within a given time period. This Court concluded that the time limit in that statute was non-jurisdictional. *Id.* at 480-482; see pp. 12-13, *supra*. *Bowen* precludes any reading of *Bowles* as establishing a categorical rule, regardless of what the particular statute governing the particular appeal by the particular type of litigant actually says.

Moreover, in a thorough and recent exposition of jurisdiction before this Court in *Reed Elsevier*, the United States argued *against* any categorical rule and *for* an emphasis on the text of a particular statute. See U.S. Br. in No. 08-103 (June 2009). In doing so, the United States asserted that a jurisdictional requirement is one that “define[s] the scope of the courts’ adjudicatory power.” *Id.* at 12. By contrast, rules that “address matters other than the courts’ power to decide,” even if they are “important and categorical, are not jurisdictional.” *Ibid.* According to the United States, that dichotomy—along with a “century’s worth of precedent”—drove this Court’s holding in *Bowles*. *Id.* at 16 & n.7. Because the statute in *Bowles* “sp[oke] to the power of the court of appeals (rather than to the behavior of the litigant) by stating that an untimely notice of appeal will not bring the case to the court,” the ordinary civil notice-of-appeal deadline was jurisdictional. *Id.* at 16 n.7.

Consistent with the United States’ position in *Reed Elsevier*, *Bowles* should not be read to announce a categorical rule applicable to all timing-of-review provisions, irrespective of what a particular provision actually says. Quite the contrary, *Bowles* reaffirmed the elementary principle that text matters. And when the text of a timing provision speaks to the power of a court—as it did in *Bowles*—then the statute may be viewed as jurisdic-

tional. But when the text of a timing provision speaks to the behavior of a party—as is the case here—the statute is non-judicial.

That principle applies with special force to statutes, like §7266(a), that are of recent vintage. In addition to text, *Bowles* emphasized “that context, including this Court’s interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as judicial.” *Reed Elsevier*, 130 S. Ct. at 1248. For generations, the timing-of-review provisions for appealing to an Article III appellate court, like the provisions at issue in *Bowles*, have been construed as “mandatory and judicial.” *Bowles*, 551 U.S. at 209. To the extent that there existed any doubt in the text of the statute in *Bowles*, it was removed by those precedents. By contrast, the intra-Executive Branch review of the veterans claims at issue here only dates to 1988. There is no history of construing that sort of provision for intra-Executive Branch review as judicial. Instead, given this Court’s decision in *Bowen* just two years before §7266(a)’s enactment, Congress almost certainly would have considered a provision providing for such review non-judicial.

2. *Bowles* is wholly inapposite for another reason. It neither involved nor even referenced any statutes or rules governing intra-Executive Branch review by an Article I court.<sup>8</sup> It instead concerned whether this Court

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<sup>8</sup> *Bowles* repeatedly referenced review by Article III courts only. See, e.g., 551 U.S. at 210 (“[E]ven prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction.”); *ibid.* (“[T]he courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction.”); *id.* at 213 (“*Bowles*’ failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction.”); *ibid.* (“Because Congress spe-

should interpret a statutory provision to allow an Article III court to equitably expand the scope of judicial authority. Construing the statute in *Bowles* to allow for equitable tolling, in other words, would have expanded the power of federal courts to countermand Executive determinations. Such judicial enlargement of the judiciary’s own powers, at the expense of another branch of government, implicates separation-of-powers concerns. For that reason, the “jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.” *Stoneridge Inv. Partners, LLC v. ScientificAtlanta*, 552 U.S. 148, 164 (2008). Here, by contrast, construing § 7266(a) as allowing for equitable tolling would not enlarge the scope of Article III authority. It would provide for further review by the Executive Branch. There is thus no concern about one branch aggrandizing power at the expense of another.

Citing *United States v. Denedo*, 129 S. Ct. 2213 (2009), the Federal Circuit insisted that *Bowles* applies here with *greater force* because it involved an appeal to an Article I tribunal. Pet. App. 37a-38a. In *Denedo*, this Court reaffirmed that “it is for Congress to determine the subject-matter jurisdiction of federal courts.” 129 S. Ct. at 2221. And it stated that “[t]his rule applies with added force to Article I tribunals.” *Ibid.* But that merely reflects the unexceptional truism that, while Congress has broad (but constitutionally defined) authority to determine the scope of federal court jurisdiction, it has even greater control over the scope of authority of the quasi-judicial bodies it creates within the Executive Branch, since those tribunals “owe their existence to Congress’

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cifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple ‘claim-processing rule.’”).

authority to enact legislation pursuant to Art. I, § 8 of the Constitution.” *Ibid.* It does not and logically cannot mean that a decision construing a statute that regulates authority within the Executive Branch is more fraught with separation-of-powers peril than a decision that could have the effect of shifting power from the Executive to the Judiciary.

In any event, when Congress wants the Veterans Court to treat veterans the same as other litigants, it expressly says so. For example, this Court has recently concluded that “the same kind of ‘harmless-error’ rule that courts ordinarily apply in civil cases” applies to the Veterans Court as well. *Sanders*, 129 S. Ct. at 1704. But that holding resulted from Congress’s choice to “use[] the same words in the Administrative Procedure Act,” which governs harmless error in administrative law cases, as in the statute governing harmless error in the Veterans Court. *Ibid.* Moreover, “[l]egislative history confirm[ed] that Congress intended the Veterans Court ‘prejudicial error’ statute to ‘incorporate a reference’ to the APA’s approach.” *Ibid.* Because there was “no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases,” this Court applied “general case law governing application of the harmless-error standard.” *Ibid.*

Here, however, Congress did not “use[] the same words” in § 7266(a) that it previously used in the provisions at issue in *Bowles*. It used quite different language that addressed what veterans must do and when. And there is absolutely nothing in the legislative history of the Veterans Judicial Review Act to indicate that Congress intended to preclude equitable tolling. For that reason too, § 7266(a) is non-jurisdictional.

3. Finally, the reasons for making the deadlines for ordinary civil appeals jurisdictional simply have no application here. In ordinary civil litigation, strict deadlines protect a party's reasonable expectations of repose and prevent it from operating in the shadow of uncertainty. Finality serves "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

By contrast, in the veterans benefits context, Congress has given finality a diminished role. For example, "[n]o statute of limitations bars the filing of an application for benefits, and the denial of an application has no formal *res judicata* effect." *Gambill v. Shinseki*, 576 F.3d 1307, 1315 (Fed. Cir. 2009) (citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). And if the Board denies a benefit, the veteran may ask, *at any time*, for it to reconsider. 38 C.F.R. §§20.1000-1001. It is highly improbable that Congress chose to allow a veteran to seek benefits over half a century after his time in uniform has ended, or seek reconsideration of a decision a decade after it was issued, but sought to make the 120-day limit for seeking review so inflexible as to deny the veteran his day in court if he misses the deadline by a single day because of the severe impairments that led the veteran to seek benefits in the first place. Yet that is the precise effect the decision below would have.

### CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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