No. 09-1036

IN THE

Supreme Court of the United States

DAVID L. HENDERSON,
Petitioner,

v.

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

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

---

BRIEF FOR THE PETITIONER

THOMAS W. STOEVER, JR.
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4500
Denver, CO 80202
(303) 863-1000

LISA S. BLATT
Counsel of Record
ANTHONY FRANZE
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES, REGULATIONS, AND RULES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 09-1036

DAVID L. HENDERSON,
Petitioner,

v.

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

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 589 F.3d 1201. Pet. App. 1a-73a. The opinion of the Court of Appeals for Veterans Claims ("Veterans Court") dismissing the case for lack of jurisdiction is reported at 22 Vet. App. 217. Pet. App. 74a-92a. The decision of the Board of Veterans' Appeals ("Board") denying petitioner's claim for disability benefits is unreported. *Id.* at 103a-17a.

JURISDICTION

The court of appeals entered judgment on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010, and granted on June 28,

2010. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* 38 U.S.C. § 7292(c).

STATUTORY PROVISIONS INVOLVED

The statutory provision conferring the jurisdiction of the Veterans Court, 38 U.S.C. § 7252(a), states:

> The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

The statutory provision setting forth the time limit for a veteran to seek judicial review in the Veterans Court, 38 U.S.C. § 7266(a), states:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT OF THE CASE

This Nation has always provided care for veterans "who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Congress has passed legislation providing benefits to disabled veterans "after every conflict in which the Nation has been involved." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985); *cf. Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (per curiam)

(noting the Nation's "long tradition of according leniency to veterans in recognition of their service").

The overriding purpose of the laws providing veterans' benefits is, in the words of Abraham Lincoln, "to care for him who shall have borne the battle and for his widow, and his orphan." U.S. Dep't of Veterans Affairs, The Origin of the VA Motto 1; *accord Walters*, 473 U.S. at 309 (quoting same). As the President recently reminded the Nation, "making sure that we honor our commitments to those who have served our country . . . is a sacred trust." President Barack Obama, Remarks in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010).

Today, almost 4 million veterans and their dependents receive benefits from the Department of Veterans Affairs ("VA"). U.S. Dep't of Veterans Affairs, FY 2009 Performance and Accountability Report, Executive Summary I-3 (2009). After nearly a decade of conflict in Iraq and Afghanistan, 5,667 U.S. troops have died, and 39,749 have been wounded in action. U.S. Dep't of Defense, U.S. Casualty Status Report (Sept. 7, 2010), *available at* http://www.defense.gov/news/casualty.pdf. Those wounded soldiers will turn to the VA to provide care for them and their families. Yet experience shows that the VA has improperly denied disability benefits to far too many veterans. Those who are able to navigate the labyrinth of VA processes and obtain judicial review of the VA's denial of benefits in the Veterans Court prevail in roughly 80 percent of cases decided on the merits. *See* U.S. Court of Appeals for Veterans Claims, 2000-2009 Annual Reports 1 [hereinafter Veterans Ct. Rept.].

This case presents the question whether Congress intended to shut the courthouse doors to veterans who, through no fault of their own, miss the 120-day time limit to seek review of an agency denial of benefits in the Veterans Court. As wounded soldiers arrive home in droves from the current conflicts abroad, the United States successfully urged the court of appeals to hold that the 120-day time limit is "jurisdictional" and thus bars equitable tolling under any circumstances.

The circumstances here involve a severely disabled veteran of the Korean conflict. After waiting more than three years for the VA to rule on his disability benefits claim, the petitioner missed the 120-day deadline by 15 days because he was bedridden from the very disability for which he sought benefits. Congress did not intend to deny any court access to petitioner and countless other veterans who have made untold sacrifices to the Nation.

I. The Veterans' Disability Benefits System

a. *The Non-Adversarial Administrative Process*. Veterans who served on active duty in the United States military are entitled to receive benefits for disabilities caused or aggravated by their military service. 38 U.S.C. §§ 1110, 1131. The Department of Veterans Affairs administers the federal program for providing disability benefits to veterans. *Id.* § 5101(a).

Congress designed the VA administrative process as a "non-adversarial" and "completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988). Accor-

dingly, unlike an adversarial court proceeding, "no Government official appears in opposition" to the veteran throughout the administrative process. *Walters*, 473 U.S. at 309-11; *see also* 38 C.F.R. § 3.103(a) ("Proceedings before VA are ex parte in nature.").

Congress also imposed on the VA an affirmative "duty to assist" the veteran in developing his or her claim within the agency. 38 U.S.C. § 5103A. Congress intended the system to be pro-veteran such that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the [VA] shall give the benefit of the doubt to the claimant." *Id.* § 5107(b).

A veteran seeking benefits for a service-connected disability begins the administrative process by filing an application at one of over fifty VA regional offices. *See id.* § 5101(a). The VA regional office must notify the veteran "on a timely basis" of the VA's initial decision whether to provide disability benefits. *Id.* § 5104(a).

If the VA regional office denies benefits, the veteran may "appeal" to the Board of Veterans' Appeals. *Id.* § 7104(a). The Board is an administrative body within the VA that is directly accountable to the Secretary of Veterans Affairs ("Secretary"). *See id.* §§ 7101(a), 7104(c).

To appeal to the Board, the veteran first must file a "notice of disagreement" at the VA regional office within one year after the initial denial of benefits. *Id.* § 7105(b)(1). After receiving a notice of disagreement, the regional office must prepare a "statement of the case" describing the basis for its decision

denying benefits. *Id.* § 7105(d)(1). After the regional office completes the statement of the case, the veteran has sixty days to file at the regional office a "substantive appeal," *id.* § 7105(a), (d)(3), which the regional office certifies and forwards to the Board. 38 C.F.R. § 19.35.

Proceedings before the Board, like those at the VA regional office, are "ex parte in nature and nonadversarial." *Id.* § 20.700(c). A veteran who appeals a regional office's denial of benefits may have an optional "informal" hearing, by phone or in a conference room, concerning his or her claim. U.S. Dep't of Veterans Affairs, How Do I Appeal?, VA Pamphlet 01-02-02A (Apr. 2002), at 9 [hereinafter VA Appeal Pamphlet]. The Board then issues the final decision of the agency on whether to provide the veteran disability benefits. 38 U.S.C. §§ 7102(a), 7104(a).

Until 2006, veterans were substantially restricted from obtaining legal representation at any stage of the administrative process. 38 U.S.C. § 3404(c) (1988) (current version as amended at 38 U.S.C. § 5904); *Walters*, 473 U.S. at 307-08. Congress relaxed this restriction in 2006 to permit a veteran to retain counsel after he or she files a notice of disagreement seeking review by the Board of an adverse initial decision of the VA regional office. Pub. L. No. 109-461, § 101(c)(1), 120 Stat. 3403, 3407 (2006) (codified at 38 U.S.C. § 5904(c)(1)). Nevertheless, the vast majority of veterans today proceed before the Board, as they do at the VA regional office, unrepresented by counsel. *See* U.S. Dep't of Veterans Affairs, Fiscal Year 2009 Report of the Chairman, Board of Veterans' Appeals 21 [hereinafter 2009 Board Rept.].

b. *Judicial Review In The Veterans Court*. For decades, veterans were precluded from obtaining judicial review of Board decisions. 38 U.S.C. § 211(a) (1982) ("no . . . court of the United States shall have power or jurisdiction to review any [VA benefits determination]") (current version as amended at 38 U.S.C. § 511). In 1988, Congress enacted the Veterans' Judicial Review Act, which for the first time authorized courts to consider the claims of veterans seeking disability benefits. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

Congress established a right to judicial review "to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29 (1988). Congress also sought to address the perception among veterans that—because of the restrictions on legal representation and judicial review—"they ha[d] been denied their 'day in court.'" *Id.* at 31.

The 1988 Act created the Court of Appeals for Veterans Claims, an Article I legislative court. 38 U.S.C. § 7251. The Veterans Court has "exclusive jurisdiction to review decisions of the Board" and has the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.* § 7252(a).

To initiate suit, the veteran must file "a notice of appeal" at the Veterans Court within 120 days after the Board's decision denying benefits. *Id.* § 7266(a). This is the first time a veteran seeking benefits becomes adverse to the Secretary. *Compare* 38 C.F.R. § 20.700(c) (Board proceeding is "ex parte in nature and nonadversarial") *with* 38 U.S.C. § 7263(a)

(Secretary is represented in Veterans Court by VA General Counsel).

As with the administrative process, most veterans—between 53 and 70 percent annually since 2000—initiate proceedings before the Veterans Court without legal representation. Veterans Ct. Rept., *supra*, at 1. When the Veterans Court decides cases on the merits, the veteran prevails in roughly 80 percent of cases. *Id.* In the last two years, the Veterans Court has awarded attorneys' fees to the veteran in more than 50 percent of cases because the government's position was not "substantially justified" under 28 U.S.C. § 2412(d)(1)(A). Veterans Ct. Rept., *supra*, at 1.

c. *Appellate Review In The Federal Circuit*. The United States Court of Appeals for the Federal Circuit has "exclusive jurisdiction to review" decisions of the Veterans Court. 38 U.S.C. § 7292(c). The veteran must file "a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* § 7292(a). Thus, as with appeals from a federal district court to a circuit court of appeals, the veteran must file the notice of appeal within 30 days after entry of the Veterans Court's judgment. *See* Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a). The veteran may appeal the Federal Circuit's decision to this Court "upon certiorari." 38 U.S.C. § 7292(c).

II. Proceedings Below

a. Petitioner David L. Henderson joined the military in 1950, the year the United States entered the Korean conflict. Pet. App. 3a. He was discharged while on active duty in 1952 after being diagnosed

with paranoid schizophrenia "for which he has established service connection and currently has a 100% disability rating." *Id.*

In August 2001, petitioner, unrepresented by counsel, applied to a VA regional office for monthly compensation for in-home care. The regional office denied petitioner's claim, and he appealed to the Board. On August 30, 2004, the Board denied petitioner's claim. *Id.*

b. On January 12, 2005, petitioner filed a *pro se* notice of appeal in the Veterans Court. *Id.* Petitioner's notice was filed 15 days after the expiration of the 120-day time limit under 38 U.S.C. § 7266(a). Pet. App. 3a. The Veterans Court ordered petitioner to show cause why his case should not be dismissed as untimely. *Id.* at 4a. Petitioner asked the Veterans Court to excuse his 15-day late filing because the disability for which he sought benefits—his paranoid schizophrenia which rendered him incapable of rational thought—prevented him from timely filing suit. *Id.*

At that time, the Federal Circuit repeatedly had held that Section 7266(a)'s time limit was a "120-day statute of limitations" subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *accord*, *e.g.*, *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). The Federal Circuit also had held that a veteran's mental illness may equitably toll the 120-day time limit. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

In March 2006, the Veterans Court in a single-judge order dismissed petitioner's case. The judge found that petitioner's "mental illness and medical impairments rendered him incapable of rational

thought or deliberate decision making and unable to handle his own affairs or function in society." Pet. App. 101a. The judge nonetheless refused to equitably toll the 120-day time limit on the ground that petitioner did not show his medical condition had directly caused the delay. *Id*.

Soon thereafter, pro bono counsel entered an appearance to represent petitioner and moved for reconsideration of the single-judge order.[1] In October 2006, the Veterans Court granted the motion, revoked the single-judge order, and assigned the matter to a panel for decision. *Id.* at 97a.

While the case was pending, this Court in *Bowles v. Russell*, 551 U.S. 205 (2007), held that the time limits set forth in 28 U.S.C. § 2107 are jurisdictional. The Veterans Court directed the parties to submit supplemental memoranda addressing the effect of *Bowles* on the Federal Circuit's previous decisions allowing equitable tolling under 38 U.S.C. § 7266(a). Pet. App. 94a.

In July 2008, a divided panel of the Veterans Court dismissed the case for lack of jurisdiction. *Id.* at 74a-83a. The majority concluded that under *Bowles*, Section 7266(a)'s 120-day time limit is jurisdictional and thus not subject to equitable tolling. *Id.* at 76a-82a. The majority recognized, however, that "even after *Bowles*, because an appeal to [the Veterans] Court is the first opportunity for an appellant to have his claim considered by a judicial body that is

---

[1] The Veterans Consortium Pro Bono Program (http://www.vetsprobono.org) identified the case and referred it to Arnold & Porter LLP. *See* Pet. App. 4a, 43a n.12; Dkt. entries 03/24/06-10/31/06, Henderson v. Peake, 22 Vet. App. 217 (2008) (No. 05-0090).

independent of the executive agency deciding his claim, one might be tempted to analogize the period provided to file such an appeal to a statute of limitations." *Id.* at 82a.

Judge Schoelen dissented. *Id.* at 84a-92a. Given the overwhelmingly benevolent statutory framework, the dissent rhetorically asked, "did Congress truly intend for this Court's jurisdiction to be limited by a temporal restriction in the face of extraordinary circumstances, in the same way that the Article III courts of appeals' jurisdiction is limited?" *Id.* at 91a.

c. Following argument before a panel of the Court of Appeals for the Federal Circuit, the court of appeals *sua sponte* ordered rehearing en banc "to determine whether, in light of *Bowles*, [the court] should overrule *Bailey* and *Jaquay*." *Id.* at 2a. On December 17, 2009, a divided court answered that question in the affirmative, overturned *Bailey* and *Jaquay*, and affirmed the dismissal of petitioner's suit for lack of jurisdiction. *Id.* at 1a-43a.

The majority relied on this Court's statement in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 25a (quoting *Bowles*, 551 U.S. at 214). Because "§ 7266(a) is a notice of appeal, or time of review, provision in a civil case," the majority reasoned that the provision necessarily is jurisdictional. *Id*.

The majority acknowledged "that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court." *Id.* at 26a. The court nonetheless concluded that the 120-day time limit was not a statute of limitations because proceedings before the Veterans Court share "characteristics of appellate review." *Id*. at 27a. The

majority pointed to Section 7266(a)'s title, "Notice of Appeal," and the fact that the veteran files a "*notice of appeal*" to obtain "*review*" of the agency's denial of benefits. *Id.* at 26a-27a (quoting 38 U.S.C. § 7266(a) (emphasis added by court of appeals)).

Judge Dyk, joined by Judges Gajarsa and Moore, concurred, expressing the view that "the rigid deadline of the existing statute can and does lead to unfairness . . . particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability." *Id.* at 44a.

Judge Mayer, joined by Chief Judge Michel and Judge Newman, vigorously dissented. *Id.* at 46a-73a. The dissent found that "the majority's eradication of equitable tolling before the [Veterans Court] creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 46a. The dissent explained that "the veteran who incurs the most devastating service-connected injury . . . will often be the least able to comply with rigidly enforced filing deadlines." *Id.* "Under the majority's approach, this veteran will be both 'out of luck and out of court.'" *Id.* at 46a-47a. The dissent called that approach "indefensible" and a "heavy blow" that would "prove calamitous for many severely disabled veterans." *Id.* at 68a, 70a, 71a.

The dissent also criticized the majority for improperly "seiz[ing] upon" a single sentence in *Bowles* to set forth the governing framework. *Id.* at 49a. "When read in context . . . this statement means only that the appellate filing deadline set by . . . 28 U.S.C. § 2107(a) is jurisdictional in nature" and "does not

speak to the separate issue of whether equitable tolling applies to judicial review of agency decisions." *Id.* at 49a-50a. The dissent noted that this Court in *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986), had "made clear that time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars." Pet. App. 52a.

The dissent also explained that the "statute at issue in *Bowles* contains an express limit on the power of Article III courts to hear appeals . . . . In contrast, section 7266(a) is not framed as an express limit on the authority of the reviewing tribunal, but instead speaks only to the actions a veteran must take to bring his claim." *Id.* at 59a.

The dissent further reasoned that the legislative backdrop confirmed Congress did not intend to rank the 120-day time limit as jurisdictional. "When it established the Veterans Court, Congress made clear that proceedings before the court were not to be overly 'formalized,' but instead were to be '[a]ccurate, informal, efficient, and fair.'" *Id.* at 68a (quoting H.R. Rep. No. 100-963, at 26). In addition, "[b]ecause 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." *Id.* at 69a. Rather, the dissent noted that Congress repeatedly amended the governing statutes after the Federal Circuit had held that Section 7266(a) was subject to equitable tolling, yet "Congress chose not to disturb established equitable tolling jurisprudence." *Id.* at 69a-70a.

SUMMARY OF ARGUMENT

I. All indicia of congressional intent confirm that Section 7266(a) does not limit the jurisdiction of the Veterans Court.

First, the plain language of Section 7266(a) refutes that Congress intended the 120-day time limit to be a jurisdictional prerequisite to suit. The text does not remotely suggest that the time limit is jurisdictional. Under this Court's decisions, the absence of any textual indication that a provision is jurisdictional is ordinarily dispositive. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244-45 (2010). Indeed, the statutory text confirms a non-jurisdictional reading of Section 7266(a). Congress framed the 120-day time limit as an obligation of the veteran rather than a restriction on the power of the Veterans Court. *See id.* at 1243.

Second, the statutory structure refutes that Congress intended the time limit to be jurisdictional. A separate and distinct provision addresses the jurisdiction of the Veterans Court, 38 U.S.C. § 7252(a), and that provision makes no reference to the 120-day time limit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Moreover, Congress placed Section 7266 in a subchapter relating to matters of procedure, while placing the provision that confers jurisdiction on the Veterans Court, Section 7252(a), in the subchapter relating to the court's jurisdiction.

Third, the history and purposes of the statutory scheme refute a jurisdictional reading of Section 7266(a). Congress established judicial review "to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29 (1988). The decision below

would ensure just the opposite by barring judicial review to countless disabled veterans with meritorious claims.

The overarching thrust of the veterans' disability scheme, moreover, is decisively pro-veteran. It defies credulity that Congress intended to impose an anti-veteran jurisdictional rule in an otherwise pro-veteran scheme. The court of appeals's decision would foreclose judicial review no matter how equitable the circumstances may have been in preventing the veteran from timely seeking review in the Veterans Court. If Congress had intended such harsh results, it had ample opportunity to overrule the Federal Circuit decisions allowing equitable tolling of the 120-day time limit when Congress repeatedly amended the statute. *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009).

Finally, although the above factors alone resolve this case, the pro-veteran canon of statutory construction removes any interpretive doubt. *See Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). The court of appeals's decision forecloses all judicial review to disabled veterans who missed the deadline through no fault of their own. It would turn the pro-veteran canon on its head to conclude that Congress intended to "create[] a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a (Mayer, J., dissenting). To the extent there is any doubt as to congressional intent, this Court should not assume Congress intended a result that would "prove calamitous for many severely disabled veterans." *Id.* at 71a.

II. The analogous social security context confirms that Section 7266(a)'s time limit is not jurisdictional. This Court repeatedly has held that the 60-day time limit for claimants to seek judicial review of an agency denial of social security disability benefits is not jurisdictional but is rather a limitations period. *E.g.*, *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986). Congress could not have intended to treat our Nation's disabled veterans more harshly than social security disability claimants, particularly given the vast similarities in the two benefits programs.

III. *Bowles v. Russell*, 551 U.S. 205 (2007), does not dictate that the time limit in Section 7266(a) is jurisdictional. This case bears no resemblance to *Bowles*, which involved a different statute, a different context, and a century's worth of precedent addressing court-to-court appeals. This Court has recognized that those appeals are fundamentally different from initial judicial review of agency decisions derived from non-adversarial, pro-claimant administrative processes. *See Sims v. Apfel*, 530 U.S. 103, 110-12 (2000).

IV. The government also errs in relying on other dissimilar contexts in which the time to appeal agency orders in the circuit courts of appeals is considered jurisdictional. Br. in Opp. 10. The adversarial immigration context at issue in *Stone v. INS*, 514 U.S. 386 (1995), is not comparable to the veterans context. The government's reliance on the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129, is also misplaced. Unlike here, that Act clearly reflects congressional intent to make the time limit jurisdictional.

ARGUMENT

I. ALL INDICIA OF CONGRESSIONAL INTENT CONFIRM THAT SECTION 7266(a) IS NOT JURISDICTIONAL

Normal principles of statutory construction govern whether a statutory provision is jurisdictional in restricting a court's adjudicatory power. In other words, congressional intent is dispositive. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Discerning congressional intent "depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

The relevant statutory provision, Section 7266(a) of Title 38, U.S.C., states:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a). The Federal Circuit concluded in two previous en banc decisions that Section 7266(a)

is a limitations period and that the government had failed to overcome the presumption of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), that such limitations periods are subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). The government has not disputed that if Section 7266(a) is not jurisdictional, the 120-day time limit is a limitations period subject to equitable tolling. *Cf. Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) ("We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" (quoting *Irwin*, 498 U.S. at 95-96)).

The question before this Court, accordingly, is whether Congress intended the time limit in Section 7266(a) to restrict the jurisdiction of the Veterans Court. The statutory text, structure, history and purposes compel a "no" answer.

A. The Statutory Text Refutes A Jurisdictional Reading

The starting point is, of course, the statutory text. "If the Legislature clearly states that [a limitation] shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Reed Elsevier*, 130 S. Ct. at 1244 (quoting *Arbaugh*, 546 U.S. at 515-16). The converse is equally determinative. "[W]hen Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.*

This Court accordingly has held that provisions lacking such a clear statement are not jurisdictional.

For instance, in finding that the Copyright Act's registration requirement is not jurisdictional, the Court in *Reed Elsevier* inquired "whether [17 U.S.C.] § 411(a) clearly states that its registration requirement is jurisdictional" and concluded "[i]t does not." 130 S. Ct. at 1245 (citations and internal quotation marks omitted). Similarly, in *Arbaugh*, 546 U.S. at 515-16, the Court held that the employee numerosity requirement for Title VII coverage under 42 U.S.C. § 2000e(b) is not jurisdictional because the statute does not "clearly stat[e]" any limit on a district court's jurisdiction. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), the Court likewise held that the time limit for filing an EEOC charge under 42 U.S.C. § 2000e-5(e) is not jurisdictional because that provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."

The plain language of Section 7266(a) contains no statement, much less a clear statement, that the 120-day time limit restricts the jurisdiction of the Veterans Court. To the contrary, the natural reading of the statutory language is that Congress established a limitations period for a veteran to seek review of the VA's denial of disability benefits. Section 7266(a) establishes the time limit for a veteran to *commence* a civil action against the Secretary. A time limit for bringing a court action in the first instance is traditionally viewed as a statute of limitations. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case").

As the Federal Circuit explained in *Jaquay*, "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first

action taken by a veteran in a court of law." 304 F.3d at 1286. The majority below also recognized that petitioner's "appeal to the Veterans Court represented the first time he could appear before a court." Pet. App. 26a. By contrast, "[i]n the veterans' adjudicatory system, an appeal from the Veterans Court to [the Federal Circuit] is the procedural equivalent of an appeal from a district court to a court of appeals." *Id*. at 51a (Mayer, J., dissenting).

Other textual features indicate that the 120-day time limit is not jurisdictional. "[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf v. USI Films Prods.*, 511 U.S. 244, 274 (1994) (quoting *Rep. Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)); *Reed Elsevier*, 130 S. Ct. at 1243 (quoting same). Thus, the Court reasoned that a False Claims Act provision restricting actions based on the public disclosure of allegations or transactions, 31 U.S.C. § 3730(e)(4)(A) (amended 2009), was jurisdictional because the statutory language "sp[oke] to the power of a particular court." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007) (citations and internal quotation marks omitted).

Conversely, when Congress imposes the restriction on the litigant rather than the court, the statute should not be given a jurisdictional meaning. Thus, in *Reed Elsevier*, the government argued that the relevant statutory provision, 17 U.S.C. § 411(a), is not jurisdictional because it "speaks to the obligations of the parties rather than to the power of the court." Brief for the United States as Amicus Curiae at 14-15, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103)

[hereinafter U.S. Br. *Reed*]; *see also Reed Elsevier*, 130 S. Ct. at 1243.

Section 7266(a) likewise speaks to the timely filing obligation of the veteran: "a *person* adversely affected by such decision shall file a notice of appeal with the Court within 120 days." 38 U.S.C. § 7266(a) (emphasis added). There is no textual basis for giving the time limit a jurisdictional gloss.

B. The Statutory Structure Refutes A Jurisdictional Reading

The statutory structure reinforces that Section 7266(a)'s 120-day time limit is not jurisdictional. This Court has recognized that a statutory requirement ordinarily is not jurisdictional when Congress places it in "an entirely separate provision" from the provision conferring jurisdiction. *Zipes*, 455 U.S. at 394. Thus, in *Zipes*, the Court reasoned that "[t]he provision granting district courts jurisdiction under Title VII does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement." *Id.* at 393-94 (citations omitted). Other decisions by this Court are to the same effect. *See Reed Elsevier*, 130 S. Ct. at 1245-46 ("§ 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [infringement actions]"); *Arbaugh*, 546 U.S. at 515-16 ("[T]he 15-employee threshold appears in a separate provision" apart from the provision conferring jurisdiction.).[2]

---

[2] A counter-example is the time limit in 28 U.S.C. § 2107. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003). The Court in *Bowles* did not discuss the statutory structure of Section 2107 but rather relied on its longstanding and settled

The 120-day time limit for disabled veterans to sue is located in a provision separate and apart from the provision that confers jurisdiction on the Veterans Court. The jurisdiction-conferring provision, 38 U.S.C. § 7252(a), is entitled "Jurisdiction; finality of decisions," and provides:

> The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Congress placed Section 7252(a) in the statutory subchapter addressing the Veterans Court's "Organization and Jurisdiction." 38 U.S.C. ch. 72, subch. I; *see also Scarborough v. Principi*, 541 U.S. 401, 413 (2004) (distinguishing Section 7252(a)'s jurisdictional grant from a separate non-jurisdictional provision containing a time limit).

By contrast, Congress placed the 120-day time limit in a subchapter describing "Procedure" for the Veterans Court. 38 U.S.C. ch. 72, subch. II. In addition to the 120-day time limit, that subchapter contains provisions addressing "Rules of practice and procedure," 38 U.S.C. § 7264, and other housekeeping matters. *E.g.*, *id.* §§ 7261-7269. Congress's placement of Section 7266(a) in the subchapter dealing with "procedure" is consistent with the principle that "statutes of limitations" are among the "procedural requirements for triggering the right to an adjudica-

---

precedent holding that the time limit is jurisdictional. *Bowles*, 551 U.S. at 209-11; *see infra* Part III.

tion." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Section 7252 also makes no reference to the 120-day time limit in Section 7266(a). Section 7252 does, however, cross-reference a different provision in the statutory subchapter on "Procedure." Section 7252(b) provides that "[t]he extent of the [Veterans Court's] review shall be limited to the scope provided in section 7261 of this title." 38 U.S.C. § 7252(b); *see id.* § 7261(a) (authorizing Veterans Court to decide questions of law and barring court from reviewing Board's factual findings de novo). Thus, Congress knew how to incorporate rules of procedure into the jurisdiction-conferring provision under Section 7252 but did not do so with respect to the 120-day time limit.

C. The Statutory History And Purposes Refute A Jurisdictional Reading

Congress enacted Section 7266(a) in 1988 as part of the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301(a), 102 Stat. 4105, 4116-17 (1988). There, Congress sought "to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law." S. Rep. No. 100-418, at 31 (1988); *accord id.* at 29; H.R. Rep. No. 100-963, at 13, 26 (1988) (similar). Congress also sought to eliminate the perception among veterans that they had been "denied their 'day in court.'" S. Rep. No. 100-418, at 30-31. A jurisdictional reading of the 120-day time limit would defeat that congressional purpose by depriving disabled veterans of their day in court when they miss the deadline through no fault of their own.

The VA administrative process for veterans' disability benefits is a "completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13. Congress imposed on the VA an affirmative "duty to assist" the veteran in developing his or her benefits claim within the agency. 38 U.S.C. § 5103A. Congress also required the VA in considering a veteran's claim to give "the benefit of the doubt" to the veteran. *Id.* § 5107(b).

The administrative process is entirely non-adversarial with no government official opposing the veterans' request for benefits, even before the Board. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309-11 (1985); 38 C.F.R. §§ 3.103(a); 20.700(c). In that respect, Congress contemplated that the majority of veterans would proceed without the benefit of counsel. Indeed, before 2006, veterans were restricted from obtaining counsel at any stage of the administrative process. *See supra* p. 6.

An inflexible jurisdictional bar to initial court review—one that denies disabled veterans with meritorious claims any opportunity to be heard in any court—would be an anti-veteran rule within an otherwise pro-veteran scheme. It would prevent *all* disabled veterans in *all* cases from obtaining equitable tolling of the 120-day time limit, no matter how equitable the circumstances of an untimely filing.

For instance, imposing a jurisdictional gloss on Section 7266(a) would foreclose judicial review even where, as here, the condition that prevents the veteran from filing within 120 days is the same disability for which the veteran seeks benefits. *See*

also, e.g., *Batten v. Shinseki*, No. 09-1158, 2009 WL 3236275, at *1-3 (Vet. App. Oct. 9, 2009); *Allen v. Shinseki*, No. 06-2574, 2009 WL 1424093, at *1 (Vet. App. May 22, 2009); *Jones v. Peake*, 22 Vet. App. 247, 248 (2008). It would be passing strange to conclude that Congress "create[d] a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a (Mayer, J., dissenting).

A jurisdictional reading similarly would foreclose court access even where the VA affirmatively misleads a seriously disabled veteran as to the filing deadline. *See Bailey*, 160 F.3d at 1361-62. This concern is hardly theoretical. The VA is notorious for mishandling veterans' attempts to seek judicial review of benefit denials. *See, e.g.*, *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524, at *1-2 (Vet. App. Jan. 28, 2010) (where VA regional office accepted veteran's notice of appeal and gave him a date-stamped copy to memorialize filing, court noted that VA's indifference to misfiling "provides sad commentary on the [VA's] interest in assuring that this veteran had the opportunity to have his case heard at the Court"); *Irwin v. Shinseki*, 23 Vet. App. 128, 135 (2009) ("[T]he Court is concerned that the VA had the documents for four months and did nothing."); *Norman v. Shinseki*, No. 08-0228, 2010 WL 1710732, at *1 (Vet. App. Apr. 28, 2010) (similar); *Posey v. Shinseki*, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring) (The "VA somewhat routinely holds correspondence from claimants that it determines sometime after receipt are Notices of Appeal to this Court . . . permitting the Secretary to then move to dismiss the appeals for lack of jurisdiction."); *cf. Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986) (equitable tolling where agency's

secretive conduct prevented disability claimants from discovering unlawful action).

Moreover, "[b]ecause so many veterans must file their petitions without the assistance of counsel, it is highly unlikely Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar." Pet. App. 69a (Mayer, J., dissenting). In analogous contexts, this Court has recognized that inflexible rules are "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes*, 455 U.S. at 397 (citations and internal quotation marks omitted) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite . . . but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *accord Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (permitting untimely verification of EEOC charge to relate back to a timely filed charge because Title VII is "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process" (citations and internal quotation marks omitted)).

The government concedes that a jurisdictional rule would inflict "painful" and "unfair" results based on "circumstances beyond a veteran's control." Br. in Opp. 5, 13. The government nonetheless surmises that Congress might have intended to impose a jurisdictional time bar to further "systemic interests in finality and efficient administration." *Id.* at 5. But the pro-veteran statutory scheme belies that suggestion.

The government's invocation of "finality" and "efficient administration" also is rather curious given the realities of the VA administrative process. That

process now takes on average roughly *three and a half years* from the date of the veteran's application for disability benefits with the regional office until the Board issues the agency's final decision.[3] In more than a third of cases, the Board remands for the regional office to "correct[] procedural errors and obtain[] additional evidence" needed to decide the veteran's claim. 2009 GAO Rept., *supra*, at 10; *see also* 2009 Board Rept., *supra*, at 21. Such a remand typically adds nearly an additional *year and a half* to the administrative process. 2009 Board Rept., *supra*, at 16. Yet the government's proposed rule would foreclose judicial review even if a severely disabled veteran missed the time limit by one day because he was hospitalized by the very disability for which he sought benefits.

Moreover, veterans challenging an administrative decision denying benefits prevail in roughly *80 percent* of cases decided by the Veterans Court on the merits, and have been awarded attorneys' fees in more than *50 percent* of cases over the past two years. Veterans Court Rept., *supra*, at 1. Thus, the government has long been criticized for its own delay and mishandling of veterans' disability claims, causing "too many cases to stay open and to recycle back through the regional offices and the [Board], only then to recycle back" to the Veterans Court. James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide*

[3] *See* U.S. Gov't Accountability Office, GAO-09-910T, Veterans' Disability Benefits: Preliminary Findings on Claims Processing Trends and Improvement Efforts 7 (2009) [hereinafter 2009 GAO Rept.]; 2009 Board Rept., *supra*, at 16.

Fairness to Claimants, 53 Admin. L. Rev. 223, 229 (2001).[4]

Before the decision below, the Federal Circuit, beginning in 1998, consistently had treated the 120-day limit as a statute of limitations subject to equitable tolling. *See, e.g.*, *Jaquay*, 304 F.3d at 1286; *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005); *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004); *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-98 (Fed. Cir. 2002); *Bailey*, 160 F.3d at 1368. Given the history of the VA's mishandling of claims and appeals, as well as the unfortunate reality that many veterans suffer severe disabilities that prevent a timely filing, it is hardly surprising that Congress left that line of precedent undisturbed.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Congress repeatedly has

---

[4] *See also id.* at 229 ("The veterans' benefits decisional process . . . is only a carousel of remand, mishandling, rehearing, remand, and so on. Many of the longest riders on the carousel are World War II veterans who are dying of old age while they await their benefits."); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 129-31, 136-37 (2009) (noting that VA's poor record-keeping and understaffing and the Board's failure to explain its decisions contribute to Veterans Court's remand rate).

amended provisions of Title 38, Chapter 72 of the United States Code, without eliminating equitable tolling under Section 7266(a). *See* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, §§ 601-605, 122 Stat. 4145, 4176-80; Veterans Benefits Act of 2002, Pub. L. No. 107-330, §§ 401-402, 116 Stat. 2820, 2832; Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, §§ 507, 601-605, 115 Stat. 976, 997-1000; Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, §§ 1001-1036, 113 Stat. 1545, 1587-95 (1999).

In 2001, Congress amended Section 7266 itself. But rather than preclude equitable tolling, Congress eased the procedure for a veteran to file in the Veterans Court by striking a previous requirement that the veteran serve the Secretary with his or her notice of appeal. *See* Pub. L. No. 107-103, § 507, 115 Stat. at 997. In short, "[i]n the eleven years since *Bailey*, Congress has had ample opportunity to overturn the application of tolling in Veterans Court proceedings, but has declined to do so." Pet. App. 69a (Mayer, J., dissenting).

D. The Pro-Veteran Canon Of Statutory Construction Removes Any Doubt As To Congressional Intent

The foregoing discussion demonstrates that Congress did not intend to impose a jurisdictional deadline for veterans to seek judicial review. But any doubt on this score is removed by the pro-veteran canon of statutory construction. This Court has long recognized the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v.*

Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 285 (1946)). Thus, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) ("[W]e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* 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").

As discussed, the plain text of Section 7266(a) contains no language whatsoever that the 120-day time limit restricts the jurisdiction of the Veterans Court. Several other features of the pro-veteran statutory scheme point away from a jurisdictional reading. Under these circumstances, it would turn the pro-veteran canon on its head to conclude that Congress intended that a disabled veteran "will be both 'out of luck and out of court'" if he misses the deadline based on the very disability for which he seeks benefits. Pet. App. 46a-47a (Mayer, J., dissenting). That "calamitous" result, *id.* at 71a, is "the antithesis of what Congress intended." *Id.* at 68a.

II. THE TIME LIMIT TO SEEK JUDICIAL REVIEW IN A CLOSELY ANALOGOUS DISABILITY CONTEXT IS NOT JURISDICTIONAL

A. The Time Limit To Seek Judicial Review Of Social Security Benefit Denials Is Not Jurisdictional

In *Bowen v. City of New York*, 476 U.S. 467, 478-82 (1986), this Court unanimously held that the 60-day time limit for a claimant to seek judicial review of an agency decision denying social security disability ben-

efits under 42 U.S.C. § 405(g) is not jurisdictional and is subject to equitable tolling. The Court rejected the government's argument that the 60-day time limit under Section 405(g) "sets the bounds of the [reviewing court's] jurisdiction" and therefore bars application of the doctrine of equitable tolling. *Bowen*, 476 U.S. at 478. The Court explained that the government's argument was foreclosed by two of its previous decisions recognizing that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)).

Bowen further concluded that equitable tolling is available under Section 405(g). The Court observed that the time limit "is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Id.* at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

It would be exceedingly anomalous to conclude that Congress intended to treat the Nation's disabled veterans more harshly than social security claimants. If anything, Congress surely intended to give even greater protection to veterans who were disabled in the line of duty. The government offers no persuasive reason why Congress would want to allow equitable tolling for social security claimants but not for veterans who likewise seek disability benefits. The evidence indeed is to the contrary. Congress established judicial review for veterans specifically to eliminate "unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies." S. Rep. No. 100-418, at 31.

B. The Social Security And Veterans' Disability Contexts Are Indistinguishable In The Relevant Respects

"If there is a system in the federal judiciary closely analogous to veterans law, it is the social security disability system." Ridgway, *supra*, at 162; *see also McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (noting that social security and veterans' disability benefits programs share a "marked similarity"). The government itself has argued that "[t]here is no reason to apply a different rule" for veterans and social security claimants. Brief for the United States at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (rule of prejudicial error).

As particularly relevant here, the time limit for social security disability claimants to seek judicial review is functionally identical to the time limit for veterans to seek judicial review. Section 405(g) states:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . 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 Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added); *compare* 38 U.S.C. § 7266(a) ("In order to *obtain review* . . . a person adversely affected by [the Board's] decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." (emphasis added)).

Both provisions impose a timely filing obligation on the claimant, rather than a limit on the power of the reviewing court. Congress also placed both time limits in statutory provisions addressed to "procedure." *Compare* 42 U.S.C. § 405 (entitled "Evidence, procedure, and certification for payments") *with* 38 U.S.C. § 7266 (appearing in statutory subchapter governing Veterans Court "Procedure"). And both administrative processes are unusually non-adversarial and pro-claimant. *See Sims v. Apfel*, 530 U.S. 103, 111 (2000) ("[T]he SSA 'conduct[s] the administrative review process in an informal, nonadversary manner.'" (quoting 20 C.F.R. § 404.900(b) (1999))).

Section 405(g) and Section 7266(a) are both "time of review provision[s]." Pet. App. 25a. In other words, both disability contexts impose a time limit for seeking judicial review for the first time in a court. Both disability contexts require that court to apply a deferential standard of appellate review to the agency's decision. *See infra* p. 48. The social security disability context thus directly refutes the majority's holding that "because § 7266(a) is a time of review provision, it is jurisdictional." Pet. App. 25a.

The government casts the social security context aside by asserting that a social security claimant "commences" a "new civil action" in district court under Section 405(g), whereas a veteran under Section 7266(a) seeks judicial review "in *an existing case*." Br. in Opp. 8 (emphasis added). The government is just wrong.

The proceedings before the Board and the Veterans Court represent different cases with distinct case numbers. *Compare* Pet. App. 103a (Board proceeding captioned "In the Appeal of David L. Henderson, Docket No. 03-24 052") *with id.* at 74a (Veterans

Court proceeding captioned "Henderson v. Peake," "No. 05-0090"). Just like the social security system, the first time two adversarial parties appear in a caption is when the veteran first institutes suit in the Veterans Court. Or in the government's words, under Section 7266(a) the veteran "commences" a "new civil action." *See also* Pet. App. 26a, 74a, 103a (relying on the fact that the veteran's suit in Veterans Court is a "civil action").

III. *BOWLES* IS INAPPOSITE IN THE VETERANS CONTEXT

This Court in *Bowles* held that the time limits under 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4 for a party to appeal a district court judgment to a circuit court of appeals are "jurisdictional." 551 U.S. at 206. In *Bowles*, the district court granted a state prisoner's motion to reopen the appeal period under Section 2107(c) and Rule 4(a)(6), but the court gave the prisoner 17 days, rather the statutorily prescribed 14 days, to file his notice of appeal. *Bowles*, 551 U.S. at 207. The prisoner filed the notice outside the 14-day window but within the time designated by the court. *Id.*

In holding that those equitable circumstances could not cure the untimely appeal, *Bowles* overruled two of the Court's prior decisions to the extent they had endorsed a "unique circumstances" doctrine for extending the time limit to appeal. *Id*. at 214 (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam)). In stressing that courts lack the power to make equitable exceptions to the time limit, *Bowles* stated that "[t]oday we make clear that the timely filing of a

notice of appeal in a civil case is a jurisdictional requirement." *Id*. at 214.

Seizing on the quoted passage from *Bowles*, the majority below syllogistically reasoned that (1) a veteran files a notice of appeal (2) in a case that is civil, and thus (3) the 120-day time limit for a veteran to seek judicial review of a benefit denial is jurisdictional. Pet. App. 25a-28a. The government repeatedly echoes that logic. Br. in Opp. 6-8, 12.

The majority's approach erroneously presumed that *Bowles* altered the relevant inquiry that looks to the traditional indicia of congressional intent, including the statutory text, structure, history and purposes. *Bowles* did not. *See Reed Elsevier*, 130 S. Ct. at 1248 ("*Bowles* . . . is thus consistent with the *Arbaugh* framework."). The court of appeals wrenched the quoted sentence from *Bowles* out of context and woodenly extended it to the veterans context as if the sentence were a statute. But this Court does not "parse the text" of its opinions "as though that were itself the governing statute." *Comm'r of Internal Revenue v. Bollinger*, 485 U.S. 340, 349 (1988); *see also Nevada v. Hicks*, 533 U.S. 353, 372 (2001). As this Court recently made clear, "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247-48. A comparison between the court-to-court appeal context of *Bowles* and the veterans context shows that the majority's syllogism is fatally flawed on multiple levels.

A. Unlike The Statute In *Bowles*, Section 7266(a) Speaks To The Obligation Of A Litigant, Not The Power Of The Court

Section 7266(a)'s text materially differs from Section 2107. Whereas Section 7266(a) speaks to the timely filing obligation of a veteran, Section 2107(a) is framed as a limitation on the power of the court of appeals to hear a case:

> Except as otherwise provided in this section, *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); *see also id.* § 2107(c). As the government has argued, this provision "speaks 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." U.S. Br. *Reed*, *supra*, at 16 n.7.

The court below acknowledged that "§ 2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, [while] § 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 found this of no moment because Section 7266(a) "states that the notice of appeal '*shall*' be filed with the Veterans Court within 120-days," and *Bowles* gave "jurisdictional significance" to the fact that a time limit is imposed in a statute "as opposed to in a court-promulgated rule." *Id.* at 39a-40a.

Neither explanation justifies treating the 120-day time limit as jurisdictional. *Reed Elsevier* squarely

rejected the proposition that *Bowles* "hold[s] that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247. This Court elsewhere has "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh*, 546 U.S. at 510 (citations and internal quotation marks omitted); *see* U.S. Br. *Reed*, *supra*, at 15 ("Section 411(a) states the registration requirement in 'emphatic' terms, but that does not suggest that the provision is jurisdictional."); *cf. Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) (noting that use of "shall" in statute does not necessarily restrict the power of a court to take action).

Moreover, unlike Section 7266(a), Section 2107(c) specifies the precise amount of time a court may extend the filing deadline. "Because Congress specifically 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.'" *Bowles*, 551 U.S. at 213.

B. There Is No Settled Tradition Of Treating Time Limits In The Veterans Context As Jurisdictional

1. *Bowles* relied on "a long line of this Court's decisions left undisturbed by Congress" that had recognized that the time period for a court-to-court appeal was jurisdictional. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 597 (2009); *accord Reed Elsevier*, 130 S. Ct. at 1251 (Ginsburg, J., concurring) (same). Thus, the Court explained that it repeatedly had described the time limits set forth in Section 2107 as "mandatory and jurisdictional." *Bowles*, 551 U.S. at 209; *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (simi-

larly relying on *stare decisis* to hold that time limit for filing suit in Court of Federal Claims is jurisdictional).

Bowles also explained that, "[r]eflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals [under Section 2107] for lack of jurisdiction." *Bowles*, 551 U.S. at 210. And citing decisions interpreting Section 2107's historic predecessors, *Bowles* recognized that "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* A contrary interpretation of Section 2107 thus would "require the repudiation of a century's worth of precedent and practice in American courts." *Id.* at 209 n.2.

The cornerstone of *Bowles*—a century of this Court's precedents—is glaringly absent here. At the time Congress established judicial review for disabled veterans, *Bowen*, *Weinberger v. Salfi*, and *Mathews v. Eldridge* had held that "time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars." Pet. App. 52a (Mayer, J., dissenting); *see supra* pp. 30-31. The lower courts also have not "routinely and uniformly" dismissed untimely veterans' claims under Section 7266(a) for lack of jurisdiction. *Bowles*, 551 U.S. at 210. To the contrary, the Federal Circuit had held that Section 7266(a) is a statute of limitations subject to equitable tolling, and Congress repeatedly amended the statute leaving those precedents undisturbed. *See supra* pp. 28-29.

2. Further, unlike *Bowles*, application of equitable tolling of the 120-day time limit under Section 7266(a) by an Article I court does not implicate

the separation of powers concerns implicit in the federal courts' interpretation of statutes establishing their own jurisdiction. *See Bowles*, 551 U.S. at 212-13 (stating that the Court's decision "follows naturally" from the principle that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider").

Because Congress established the Veterans Court in 1988 as an Article I court, there is no risk of an Article III court overstepping its own bounds by allowing equity to increase the cases that the Veterans Court can hear. To the contrary, depriving the Veterans Court of the power to apply equitable tolling would defeat Congress's pro-veteran purpose in creating the Veterans Court.

C. The Veterans Context Fundamentally Differs From The Court-to-Court Context Of *Bowles*

1. *The government's proposed jurisdictional rule is anti-veteran*

Bowles establishes an even-handed time limit for *all* civil litigants, including the government, to appeal an Article III district court's judgment to a court of appeals. *See, e.g.*, *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096-1101 (9th Cir. 2008) (dismissing the government's appeal as untimely under *Bowles*). *Bowles*'s jurisdictional rule may produce unjust or unattractive results in some cases, but the rule will not systematically damage the interests of a class of litigants for which Congress was solicitous in passing legislation. The rule the government advances, however, would apply only to veterans. *See* 38 U.S.C. § 7252(a) (barring the Secretary from seeking judicial review of a Board decision).

A jurisdictional reading of the 120-day time limit thus would harm only disabled veterans.

It would be rather peculiar to conclude that Congress enacted a jurisdictional time limit that would systematically harm veterans who have the worst injuries or who are most abused by the VA bureaucracy. Such a rule would turn the informal, non-adversarial nature of VA proceedings against disabled veterans and prevent those veterans who most need review beyond the VA stage from getting it, contrary to the very purposes for which Congress established judicial review of veterans' claims. Holding that the time limit is jurisdictional would create a harsh divide between the agency and the courts that many veterans would fail to cross, and veterans would be all the more unwary because of the non-adversarial, pro-claimant, informal nature of the VA proceedings. That regime would leave veterans, many of whom are unrepresented by counsel and return from the battlefield with devastating injuries, ill-prepared for the rigid formality of the appeal process as envisioned by the government.

2. *The non-adversarial nature of VA proceedings distinguishes the veterans context from* Bowles

This Court has specifically "warned against reflexively 'assimilating the relation of administrative bodies and the courts to the relationship between lower and upper courts.'" *Sims*, 530 U.S. at 110 (citations, internal quotation marks, and alterations omitted). "[I]t is well settled that there are wide differences between administrative agencies and courts." *Id.* (citations and internal quotation marks omitted). Given these differences, the Court in *Sims* declined to extend a waiver rule applicable in court-

to-court appeals to social security claimants seeking district court review of an agency denial of disability benefits. *Id.* at 112. The Court reasoned that "the analogy to normal adversarial litigation" is "at its weakest" where the administrative process is "informal" and "not adversarial," and it is the agency's "duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 109-12.

It would be equally wrong to equate a disabled veteran's initial action seeking judicial review in the first instance to a court-to-court appeal. The Board is not a court and does not function like a court. The entire VA administrative process, at the Board and the VA regional office, is a "non-adversarial" and "completely ex-parte system of adjudication." H.R. Rep. No. 100-963, at 13; *accord Walters*, 473 U.S. at 309-12; 38 C.F.R. §§ 3.103(a), 20.700(c).

Far from opposing the veteran, the Secretary is required by statute to "assist" the veteran in developing his or her claim within the agency. 38 U.S.C. § 5103A. As the VA advises veterans, while the Board may hold an optional "hearing," *id.* § 7107(b), this is "not like the courtroom hearings you see on TV or in trials." VA Appeal Pamphlet, *supra*, at 9. A veteran meets with one Board member in a conference room or by videoconference. *Id*. (showing pictures).

Members of the Board, moreover, are not like the district court judges whose decisions are appealed under Section 2107 to a circuit court of appeals. The majority of Board members are VA employees designated by the Chairman to serve only temporarily. 2009 Board Rept., *supra*, at 17; *see* 38 U.S.C. § 7101(c)(1)(A). The Secretary appoints all Board

members except the Chairman, 38 U.S.C. § 7101A(a)(1), and the Secretary can remove members for poor "job performance" or "any other reason as determined by the Secretary." *Id.* § 7101A(e)(1). Even the Chairman can be removed for "inefficiency." *Id.* § 7101(b)(2). And the Board is "bound in its decisions by," among other things, "instructions of the Secretary." *Id.* § 7104(c).

3. *Unlike* Bowles, *the veteran seeks judicial review for the first time*

Unlike with an appeal of a district court decision to a court of appeals, the veteran who commences a suit in the Veterans Court appears for the first time in court. By contrast, in a court-to-court appeal the appellant has already had his day in court. Pet. App. 72a-73a (Mayer, J., dissenting) ("So while Bowles, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.").

The procedure for a disabled veteran to seek judicial review reflects the substantive reality that the veteran initiates suit for the first time. Just like a complaint filed in a district court, the notice of appeal to challenge a Board decision under Section 7266(a) is filed at the Veterans Court. 38 U.S.C. § 7266(a). And, like a district court, the Veterans Court may certify substantial questions of law for "interlocutory appeal" to the Federal Circuit. 38 U.S.C. § 7292(b); *cf.* 28 U.S.C. § 1292(b) (procedure for interlocutory appeal from district court to circuit court of appeals).

At the same time, the review performed by the Veterans Court materially differs from the review performed by Article III courts of appeals. Unlike the tradition of having a panel of three appellate

judges—which dates back to the Judiciary Act of 1789—Congress permitted the Veterans Court to decide cases by a single judge. *Compare* 38 U.S.C. § 7254(b) (permitting Veterans Court review by single judge) *with* 28 U.S.C. § 46(b) (circuit court appeal must be decided by panel of at least three judges); *see also* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 (1789).

The results of Veterans Court review also dramatically differ from those of the Article III courts of appeals. As discussed, veterans prevail in roughly 80 percent of cases decided by the Veterans Court on the merits. Veterans Ct. Rept., *supra*, at 1. Those figures are markedly higher than the roughly 11 to 16 percent reversal and remand rate for litigants appealing district court orders to the regional circuit courts of appeals. *See* Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts, Table B-5 (2000-2009 reports). The Veterans Court statistics more closely resemble district court reversal rates in appeals of agency decisions denying social security benefits.[5]

[5] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 Admin. L. Rev. 731, 741 (2003) ("District courts have long reversed and remanded disability cases on a greater than 50 percent basis, although these rates vary greatly among judicial districts."); Ridgway, *supra*, at 164-65 (arguing that Veterans Court reversal and remand rate, while unlike rates for court-to-court appeals, is comparable to rates for district court review in social security appeals).

D. The Appellate Review Performed By The Veterans Court Does Not Mean That The Time Limit Is Jurisdictional

1. With *Bowles* as the definitive guidepost, the majority below and the government place talismanic significance on the phrase "notice of appeal" in the text and title of Section 7266(a). Pet App. 26a-27a; Br. in Opp. 7. But Congress did not use the phrase "notice of appeal" in Section 7266(a) as a jurisdictional term of art against the backdrop of *Bowles*. The Court decided *Bowles* almost two decades after Congress enacted Section 7266(a). To the extent there was any background rule when Congress enacted Section 7266(a), it would not be the rule from this Court's precedents involving *court-to-court* appeals. Rather, when faced with an analogous context, this Court repeatedly had held that the time limit for a social security disability claimant to seek judicial review is a non-jurisdictional limitations period. *See supra* pp. 30-31.

Bowles, moreover, did not turn on the name of the form that the litigant files to initiate court action. Rather, *Bowles* held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," 551 U.S. at 214, to make clear that Article III courts could not make equitable exceptions to the deadline for a court-to-court appeal *under 28 U.S.C. § 2107*. There was nothing magical in the phrase "notice of appeal." The Court relied on its previous decisions involving "writs of error" as well as petitions for writs of certiorari. *Bowles*, 514 U.S. at 210-12. All the decisions discussed in *Bowles* exclusively involved *court-to-court* appeals.

This Court does "not assume that a statutory word is used as a term of art where that meaning does not

fit. Ultimately, context determines meaning." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010); *see also, e.g.*, *Deal* v. *United States* 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."). Nothing in the text, structure, history or purposes of the veterans context suggests that Congress employed the phrase "notice of appeal" to convey that the time limit for seeking judicial review is jurisdictional. Pet. App. 62a-63a (Mayer, J., dissenting) ("There is not a scintilla of evidence in the legislative history to indicate that Congress used the term 'notice of appeal' in Section 7266(a) . . . to equate the filing a veteran makes at the Veterans Court with the filing a litigant makes to appeal a final district court judgment.").

Read in context, Congress employed the phrase "notice of appeal" in Section 7266(a) to describe the veteran's request to challenge the Board's decision. Congress thus used the terms "notice," "appeal," "appellate review," and "appellant" to refer to a veteran's request for further agency review in the administrative process. *See, e.g.*, 38 U.S.C. §§ 7104(a) (Board hears "appeals" of regional office decisions); 7105(a) (veteran files a "substantive appeal" to initiate "appellate review" before Board); 7105(b)(1) (veteran files "notice of disagreement" with the regional office); 7106 ("right of review on appeal" before Board); 7107(d)(1) (veteran is "appellant" before Board even though Secretary does not appear); 7108 (referring to an "application for review on appeal" before Board). Congress did not use the word appeal in this non-adversarial, pro-claimant administrative context to convey a rigid jurisdictional deadline. *See Percy v. Shinseki*, 23 Vet. App. 37, 42-44 (2009) (holding that statutory 60-day time limit

under 38 U.S.C. § 7105(d)(3) "to file the formal appeal" to the Board is not jurisdictional).

When Congress wanted to treat a veteran's notice of appeal like the notice under Section 2107 to take a court-to-court appeal, Congress explicitly expressed that intent. The provision that confers jurisdiction on the Federal Circuit to review decisions of the Veterans Court, Section 7292(a), thus states that the veteran must file "a notice of appeal with [the Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." 38 U.S.C. § 7292(a).

Section 7266(a) makes no similar reference to the time limit for appealing a district court's judgment to a circuit court of appeals. Thus, the presumption that a given term means the same thing throughout a statute is inapposite. That presumption "yields readily to indications that the same phrase . . . means different things, particularly where the phrase is one that speakers can easily use in different ways without the risk of confusion." *Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010). As discussed, all indicia of congressional intent point away from a jurisdictional reading of the 120-day time limit, and the pro-veteran canon of statutory construction removes any doubt as to Congress's intent.

2. The majority also reasoned that a proceeding in the Veterans Court has "characteristics of appellate review," such as a deferential standard of review that includes the rule of prejudicial error. Pet. App. 27a. The majority noted the government's related view that Section 7266(a) "is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the *lower court or tribunal* ends and

that of the appellate court begins." Pet. App. 23a-24a (quoting government's brief) (emphasis added).

As discussed, Congress did not intend to equate the Board with a lower court. Congress decisively rejected an adversarial court-like model in establishing the Board. Thus, the government errs in relying on the fact that the Board is a "tribunal" that performs "an adjudicative function." Br. in Opp. 9. The salient fact is that the Board is neither a court nor a tribunal *that adjudicates a dispute between two adversarial parties*. The VA's non-adversarial, ex parte administrative process simply culminates in a final agency decision that a disabled veteran may challenge in court. The Board is thus no different than the "tribunal(s)" of the Social Security Administration's Appeals Council or an Administrative Law Judge that perform "an adjudicative function," *id.*, in deciding social security disability claims. *See Sims*, 530 U.S. at 104-05. The disability claimants in both contexts have a time limit in which they may appeal the agency's decision, but that time limit is not jurisdictional.

The government also ignores that the appellate features of a Veterans Court proceeding are virtually identical to the social security context. "[T]he federal district court serves an appellate function in SSA disability review." Verkuil & Lubbers, *supra*, at 738; *see also, e.g.*, *Torres v. Barnhart*, 417 F.3d 276, 283 (2d Cir. 2005) (noting that an "appeal of Commissioner's final decision must be filed within 60 days"); *Traylor v. Astrue*, 668 F. Supp. 2d 624, 625 (D. Del. 2009) ("before the Court is an appeal" under Section 405(g)); *DiBlasi v. Comm'r of Social Security*, 660 F. Supp. 2d 401, 406 (N.D.N.Y. 2009) (hearing an "appeal" of an Appeals Council benefit denial); *Snyder v.*

Barnhart, 212 F. Supp. 2d 172, 174 (W.D.N.Y. 2002) ("This is an action brought pursuant to 42 U.S.C. § 405(g) in appeal of the [Commissioner's] final decision.").

The district court in the social security context, like the veterans context, thus:

- "review[s]" the agency's denial of disability benefits, 42 U.S.C. § 405(g);
- defers to the agency's factual findings, *id.* ("findings of the [agency] as to any fact, if supported by substantial evidence, shall be conclusive");
- applies the rule of prejudicial error, Brief for the United States at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (citing cases);
- may "enter . . . a judgment affirming, modifying, or reversing the decision" of the agency, or may "remand" the case to the agency, 42 U.S.C. § 405(g); and
- is limited to "the pleadings and transcript of the record" before the agency. *Id.*

A timely filing under 42 U.S.C. § 405(g) also divests the agency of jurisdiction over the claimant's case. *Doctors Nursing & Rehab. Ctr. v. Sebelius*, --- F.3d ---, 2010 WL 2788564, at *3 (7th Cir. July 16, 2010) (holding that a Section 405(g) suit transfers jurisdiction over the case from the agency to the district court consistent with "normal procedures of appellate review").

IV. THE GOVERNMENT'S RELIANCE ON OTHER DISSIMILAR CONTEXTS IS MISPLACED

The government also relies on two dissimilar contexts in which the deadline for seeking judicial review of an agency order in a circuit court of appeals has been held to be jurisdictional. Neither context bears resemblance to the veterans context.

A. The Immigration Context Is Inapposite

The government, echoing the court of appeals, Pet. App. 14a, 26a, relies on this Court's decision in *Stone v. INS*, 514 U.S. 386 (1995). *See* Br. in Opp. 10. In *Stone*, the Court held that an alien's motion for reconsideration at the agency did not toll the 90-day time limit for the alien to seek judicial review of a deportation order in a circuit court of appeals. *Stone*, 514 U.S. at 394. The Court relied on a statute providing that "[w]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." *Id.* at 393-94 (quoting 8 U.S.C. § 1105a(a)(6) (1988) (current version at 8 U.S.C. § 1252(b)(6)). The Court found that provision "reflects Congress' understanding that a deportation order is final, and reviewable, when issued," and "[i]ts finality is not affected by the subsequent filing of a motion to reconsider." *Id.* at 405.

At the end of its opinion, the Court stated that the 90-day time limit for aliens to petition for review is "jurisdictional." *Id.* As support for that proposition, the Court cited *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), which addressed the timeliness of a petition for a writ of certiorari, and Federal Rule of Appellate

Procedure 26(b), which bars the circuit courts of appeals from equitably tolling the time to petition for review of agency orders.

Stone does not dictate imposing a jurisdictional gloss on Section 7266(a). A veteran does not challenge the agency's decision in an Article III court of appeals but does so in the Veterans Court, which is then subject to further review by an Article III court of appeals. Further, the immigration administrative scheme is imbued with adversarial, court-like characteristics. *See, e.g.*, 8 U.S.C. § 1229(a) (government's proceeding is "against the alien"); *id.* § 1229a(b)(4) (alien "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"); *id.* § 1229a(c)(3) (government's burden is by "clear and convincing evidence"). And, the veterans context, like the social security context, involves an agency's denial of disability benefits. Congress could not plausibly have intended to treat severely disabled veterans seeking benefits like undocumented aliens subject to deportation. *See* Pet. App. 53a-54a (Mayer, J., dissenting).

The Court's reasoning in *Stone* further refutes the government's strained analogy to this case. In holding that a motion for reconsideration does not toll the 90-day time period to seek review of a deportation order, *Stone* emphasized Congress's "principal purpose" "to expedite petitions [by aliens] for review and to redress the related problem of successive and frivolous administrative appeals and motions." 514 U.S. at 400; *see Foti v. INS*, 375 U.S. 217, 224 (1963)

(describing Congress's purpose to eliminate "dilatory tactics in the courts" by aliens facing deportation). Those circumstances sharply differ from the veterans context; veterans' disability claims are overwhelmingly meritorious, and the government is the source of delay. *See supra* pp. 26-27.

B. The Hobbs Act Context Is Inapposite

The government also erroneously relies on the fact that the lower courts have treated as jurisdictional the 60-day time limit that private parties have to file a petition for review of certain agency orders under the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129 (codified as amended at 28 U.S.C. §§ 2341-2351). Br. in Opp. 10. The Hobbs Act context, however, significantly differs from the veterans context. A petition for review is filed directly in the circuit court of appeals. And the agency proceedings governed by the Hobbs Act, *see* 28 U.S.C. § 2342(1)-(7), are not comparable to the pro-claimant, non-adversarial disability claims process before the VA.

Moreover, the text of the Hobbs Act contains a clear statement of congressional intent to impose a jurisdictional time deadline. Section 2342 of the Hobbs Act provides the regional courts of appeals with "exclusive jurisdiction" to review specified agency orders. 28 U.S.C. § 2342. Section 2342 states that "[j]urisdiction is invoked by filing a petition *as provided by section 2344 of this title*." *Id.* (emphasis added). Section 2344 in turn imposes the 60-day limit. *Id.* § 2344.

There is no comparable clear statement of a jurisdictional limitation in the veterans context. As discussed, the statute conferring jurisdiction on the

Veterans Court, 38 U.S.C. § 7252(a), incorporates other procedural provisions but makes no reference whatsoever to the time limit contained in Section 7266(a).

* * *

For veterans returning home from a military conflict after being severely wounded or disabled, benefits are a crucial stepping-stone on the road to resuming a normal life. Congress did not intend to shut the courthouse doors to these deserving men and women where circumstances beyond their control prevent a timely filing in the Veterans Court.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

THOMAS W. STOEVER, JR.
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4500
Denver, CO 80202
(303) 863-1000

LISA S. BLATT
Counsel of Record
ANTHONY FRANZE
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioner