

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 VETERAN 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 THE *AMICI CURIAE* NATIONAL  
ORGANIZATION OF VETERANS'  
ADVOCATES, INC.; THE FEDERAL BAR  
ASSOCIATION, VETERANS LAW SECTION;  
AND VETERANS FOR COMMON SENSE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the National Organization of Veterans' Advocates, Inc., The Federal Bar Association, Veterans Law Section, and Veterans for Common Sense.<sup>1</sup> These groups have extensive experience in assisting veterans in navigating the complex and vitally important veterans' disability benefits system and have a direct interest in the important question presented by this case.

The National Organization of Veterans' Advocates, Inc. ("NOVA") is a not for profit section 501(c)(6) educational organization incorporated in 1993. It is dedicated to training and assisting attorneys and non-attorney practitioners who represent veterans, their surviving spouses, and their dependants, before the Veterans Administration, the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims ("Veterans Court"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and this Honorable Court.

The Federal Bar Association ("FBA") is a tax exempt, 501(c)(6) organization, founded in 1920. The purposes of the FBA include: serving as the national representative of the Federal legal profession; promoting the sound administration of justice;

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. A letter of consent from counsel for respondent has been filed with the Clerk. Counsel for petitioner filed a blanket letter of consent to the filing of *amicus* briefs in this case with the Clerk on September 2, 2010.

enhancing the professional growth and development of members of the Federal legal profession; promoting high standards of professional competence and ethical conduct in the Federal legal profession; promoting the welfare of attorneys and judges employed by the Government of the United States; providing meaningful service for the welfare and benefit of the members of the Association; providing quality education programs to the Federal legal profession and the public; and keeping members informed of developments in their respective fields of interest.

The Veterans Law Section of The Federal Bar Association promotes and monitors the development of Veterans Law, adopts public positions on matters affecting veterans' status and dispute resolution, offers services, programs, and publications to persons in the legal profession with respect to Veterans Law, and promotes high standards of professional competence and ethical conduct in matters affecting veterans. The views expressed in this brief do not necessarily reflect those of The Federal Bar Association as a whole.

Veterans for Common Sense ("VCS") was formed in August 2002 as a non profit 501(c)(3) organization by war veterans who believe that the people of America are most secure when their country is free, strong, and responsibly engaged with the world. VCS's central mission is to raise the unique and powerful voices of veterans so that the nation's military, veterans, freedom, and national security are protected and enhanced for this generation and future generations.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This is a critical time for the nation's military and its veterans. For nearly a decade, millions of brave

American men and women have been fighting simultaneous wars in Iraq and Afghanistan. These wars have lasted two to three times as long as American involvement in World War II, and they have not been without cost to the roughly two million Americans who have served there. Thousands have died for their country, and many thousands more have suffered serious injury, in places with names like Basra, Fallujah, Kandahar, Khanjar, Mazar-i-Sharif, Tikrit, and Tora Bora. The bravery and feats of these men and women are already the stuff of legend. See, e.g., Marcus Luttrell, *The Lone Survivor: The Eyewitness Account of Operation Redwing and the Lost Heroes of SEAL Team 10* (2007). And far from winding down military operations, the nation's armed forces this past spring embarked on a new surge in Afghanistan—calling on some 30,000 additional troops to do battle against the nation's sworn enemies, including those who are responsible for, or who aided those responsible for, the vicious September 11 attacks.

To the thousands of injured veterans who return home from the fighting abroad, the VA claims system can at times seem as foreign and foreboding as the far away lands in which they have recently fought for their country. Instead of gratitude for their military service and care for their combat-related injuries, these men and women are too often greeted by their government with red tape, delay, and opposition to their disability claims. And as the facts of this case illustrate, the nation's veterans are often forced to attempt to navigate a Byzantine veterans' claims process without the benefit of counsel and even while encumbered by the very disabilities—including mental health injuries—for which they are seeking benefits. The

decision below eliminates a critical safeguard for veterans confronting that bureaucratic process—the equitable tolling doctrine long used to excuse claims filed outside the 120-day deadline imposed by 38 U.S.C. § 7266(a), such as where, as in this case, a veteran’s own disability accounts for a missed deadline.

*Amici* agree with petitioner that the Federal Circuit’s decision not only does an injustice to 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), but is wrong on the merits. The Court’s intervening decision in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), underscores that the Federal Circuit erred in concluding that its decision was compelled by *Bowles v. Russell*, 551 U.S. 205 (2007). But *amici*’s central submission to this Court is that the interests of the nation’s veterans are profoundly disserved by the decision below—a result that Congress could not have intended by passing a pro-veteran statute designed to ensure that every veteran received their “day in court.” S. Rep. No. 100-418, at 31 (1988).

The wars in Iraq and Afghanistan have led to a spike in veterans’ disability claims. In 2009 alone, more than a million new claims were filed with the VA. The rulings in this case—which eliminate the equitable tolling doctrine that has governed claims under Section 7266(a)—already have resulted in the dismissal of *hundreds* of veterans’ claims. Unless that decision is corrected by this Court, these claims will be permanently extinguished. The gravity of that wrong is underscored by the fact that veterans routinely prevail when they are afforded an opportunity to challenge the denial of disability benefits—in roughly

80% of the cases challenging a final agency action denying benefits. In other words, the rule at issue is not simply leading to the dismissal of veterans' disability claims, it is in all likelihood sanctioning the dismissal of *meritorious* veterans' claims.

This nation has long abided by President Lincoln's admonition, in the Second Inaugural, "to care for him who shall have borne the battle and for his widow and orphan." And Congress has long appreciated that important responsibility, passing legislation providing benefits to disabled veterans "after every conflict in which the Nation has been involved." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Particularly in the context of Congress's longstanding recognition of this nation's obligation to its veterans, it is unthinkable that Congress would have intended that veterans could lose meritorious disability benefits claims because of a missed deadline under Section 7266(a) through no fault of their own. And there is no reason for the Court to reach that remarkable conclusion in this case.

## ARGUMENT

### I. DISABILITY CLAIMS ARE BEING WRONGFULLY EXTINGUISHED AT A TIME OF GREAT NEED FOR THE NATION'S MILITARY VETERANS

In every VA office is found the statement of General Omar Bradley that "[w]e are dealing with veterans, not procedures." U.S. Dep't of Veterans Affairs, *Leadership Covenant of the Veterans Benefits Administration* (June 28, 2002), available at <http://www.vba.va.gov/VBA/about.asp>. Yet, sadly, the VA claims process has become a procedural morass,

cutting off veterans—particularly those whose ability to navigate the system is limited *because* of their disabilities—from the critical disability benefits needed to regain stable footing in civilian life. The bureaucratic quagmire only has been exacerbated by the spike in disability claims as veterans return home from the ongoing conflicts abroad.

**A. Disability Benefits Provide A Vital Safety Net For Veterans Returning Home**

America has achieved great military success in Iraq and Afghanistan. But that success has come at a cost. Over 30,000 personnel have been wounded in action in Iraq since 2003, and nearly 8,000 in Afghanistan since 2001.<sup>2</sup> The most common disabilities for veterans who began receiving compensation for disabilities during fiscal year 2009 were physical, including tinnitus or hearing loss, and knee or back ailments. Veterans Benefits Administration, *Annual Benefits Report: Fiscal Year 2009* at 5, [http://www.vba.va.gov/REPORTS/abr/2009\\_abr.pdf](http://www.vba.va.gov/REPORTS/abr/2009_abr.pdf) (“FY 2009 Annual Benefits Report”). But due to the unconventional nature of these conflicts, combat-related brain injuries and incidences of post-traumatic stress disorder similar to that suffered by the petitioner in this case (in connection with the Korean War) have proliferated. See Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for US Veterans of the Iraq and Afghanistan Wars*, 11 DePaul J. Health Care L. 327, 328-29 (2008).

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<sup>2</sup> See DoD Personnel & Procurement Statistics, *Military Casualty Information*, <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm> (last visited Mar. 25, 2010).

As the Commander in Chief has acknowledged, traumatic brain injury is “one of the signature injuries of these wars.”<sup>3</sup> Indeed, it was estimated in 2008 that over *three hundred thousand* veterans received traumatic brain injuries during their deployments.<sup>4</sup> Moreover, “[a]pproximately 300,000 veterans of the Iraq and Afghanistan wars—nearly 20% of the returning forces—are likely to suffer from either PTSD or major depression, and these numbers continue to climb.” See Vietnam Veterans of America & Veterans of Modern Warfare, *Veterans Fact Sheet* at 2 (2010), available at <http://www.veteransnewsroom.com/files/press/VETERANS-Fact-Sheet-Veterans.pdf>.

These often harder-to-see or treat injuries can significantly impact many veterans’ jobs, relationships, or home life—and make it difficult or impossible for veterans to navigate the complex disability claims process. See *infra* at 17-24. Indeed, army researchers have found the rate of “serious functional impairment” from PTSD among American soldiers returning from service in Iraq to be as high as 14%. See Caroline Cassels, *High Rates of Severe Functional Impairment Found in Returning Soldiers Due to PTSD, Depression*, Medscape Medical News, June 15, 2010, <http://www.medscape.com/viewarticle/723550>. Female veterans are at even higher risk of PTSD. American Psychological Association, *Addressing the Mental and Behavioral Health Needs of Our Nation’s Service*

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<sup>3</sup> The White House, *Veterans*, available at <http://www.whitehouse.gov/issues/veterans> (last visited Sept. 15, 2010).

<sup>4</sup> RAND Center for Military Health Policy Research, *Invisible Wounds: Mental Health and Cognitive Care Needs of America’s Returning Veterans*, at 2 (Apr. 17, 2008).

*Members*, available at <http://www.apa.org/about/gr/issues/military/need.aspx> (estimating that at least 20-25% of women who served in Iraq will develop PTSD). In fact, according to recent VA statistics, PTSD and depression are the top disability claims among female veterans. Terry Gildea, *Combat Vet Says Gender Bias Led To Untreated PTSD*, Nat'l Pub. Radio, Mar. 21, 2010, <http://www.npr.org/templates/story/story.php?storyID=124500733>. Yet disturbingly, these women have faced particular challenges in obtaining care from the VA. *See id.*; Susan Donaldson James, *Traumatized Female Vets Face Uphill Battle*, ABCNews.com, Mar. 2, 2010, <http://abcnews.go.com/Health/female-veterans-traumatized-war-fight-battle-va-healthcare/story?id=9979866>.

The “victims” of mental health-related disabilities are not only veterans, but their families, as the VA’s motto—“To care for him who shall have borne the battle and for his widow, and his orphan”—has long recognized.<sup>5</sup> Returning veterans’ service-related PTSD can substantially impact their relationships with spouses, children, or other loved ones, creating a “secondary traumatization ... within combat veterans’ families.”<sup>6</sup> The stressors of “combat, long separations, and difficulty readjusting to family life” has caused divorce rates for America’s soldiers to rise sharply

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<sup>5</sup> See U.S. Dep’t of Veterans Affairs, *The Origin of the VA Motto: Lincoln’s Second Inaugural Address*, available at <http://www1.va.gov/opa/publications/celebrate/vamotto.pdf>.

<sup>6</sup> Tara Galovski & Judith A. Lyons, *Psychological sequelae of combat violence: A review of the impact of PTSD on the veteran’s family and possible interventions*, 9 *Aggression and Violent Behavior* 477 (Aug. 2004) (Abstract).

since the beginning of the War on Terror. Gregg Zoroya, *Soldiers' Divorce Rates Up Sharply*, USA Today, June 7, 2005. Moreover, researchers have found that veterans diagnosed with PTSD are “significantly more likely to perpetrate violence toward their partners” upon return from combat. Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. Times, Feb. 15, 2008 (quoting 2006 study in the *Journal of Marital and Family Therapy*).

The readjustment challenges facing veterans and their families are exacerbated when veterans cannot obtain the disability benefits that they are rightfully due upon their return to the United States. One out of every four veterans disabled during the current conflict face an impairment to their earnings capacity of 60% or more, creating intense economic stress to go along with physical or psychological challenges. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Situation of Veterans Summary*, Mar. 12, 2010, available at <http://www.bls.gov/news.release/vet.nr0.htm> (“Employment Situation of Veterans Summary”) (describing number of veterans with disability ratings of 60 or higher). And a veteran's spouse or children may depend on the VA's proper resolution of the veteran's disability claim in order to obtain needed health insurance.<sup>7</sup>

Veterans of the current conflict, and their families, are not alone in relying upon the VA's claims process for assistance. In 2009, over three million veterans

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<sup>7</sup> Dep't of Veterans Affairs Health Administration Center: CHAMPVA, <http://www.va.gov/hac/forbeneficiaries/champva/champva.asp> (last visited Sept. 14, 2010).

received assistance from the VA, including roughly a million veterans each from the Vietnam War and the Gulf War Eras, as well as approximately 250,000 from World War II, 150,000 from the Korean War, and 600,000 from peacetime. FY 2009 Annual Benefits Report at 5. As illustrated by this case, the VA continues to handle new claims for assistance from veterans of all eras and ages as veterans' disabilities (and their need for assistance) evolve over time.

The lifeline provided by VA assistance has only become more important during the nation's current economic situation. In April 2010, government statistics found that the unemployment rate for veterans of the Iraq and Afghanistan wars reached a staggering 14.7%, over double what it was only in 2007. Laurie Ure, *Unemployment on the Rise for Veterans of Current Wars*, CNN, Apr. 2, 2010, <http://news.blogs.cnn.com/2010/04/02/unemployment-on-the-rise-for-veterans-of-current-wars/>. Disabled veterans of these current conflicts, and all conflicts, are less likely to be employed than their non-disabled peers. Employment Situation of Veterans Summary. "Mortgage foreclosure rates around military bases [are] four times the average." Ed O'Keefe & Garance Franke-Ruta, *Shinseki cites plight, plan to help homeless veterans*, Nov. 4, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/03/AR2009110303615.html> (quoting executive director of Iraq and Afghanistan Veterans of America). And often due in part to their disabilities, thousands of veterans of Iraq and Afghanistan are already homeless. *Id.*

### **B. The Veterans' Disability Claims Process Is Broken And Only Getting Worse**

Despite the imperative need for veterans to receive benefits quickly and accurately, the claims process often produces just the opposite results, prompting even the VA to admit that “[t]he current [claims processing] system is broken ... and it can’t be fixed.” Craig Roberts, *VA: Broken Claims System Can’t Be Fixed*, The American Legion, Mar. 22, 2010, available at <http://www.legion.org/veteransbenefits/9488/va-broken-claims-system-can-t-be-fixed>.

Not surprisingly, veterans’ disability claims historically have spiked during wartime, and Congress has repeatedly emphasized the importance of timely and fair compensation for disabled veterans returning home from combat. Veterans’ benefits expanded greatly with the G.I. Bill of Rights passed after World War II to provide disability, unemployment, education funding, and other benefits to veterans. Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. And not content with the process afforded to veterans whose claims were dismissed by the VA, Congress enacted the Veterans’ Judicial Review Act to create the Court of Appeals for Veterans Claims in 1988. *See* Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in scattered sections of 38 U.S.C.).<sup>8</sup>

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<sup>8</sup> Subsequent congressional enactments have been designed to assist—rather than to impede—veterans navigating a complex disability benefits system. *E.g.*, Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096; Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315; *see Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) (“Congress has expressed special solicitude for the veterans’ cause.”). And this Court itself has long recognized the “canon that provisions for

When the Act was passed in 1988, Congress expressed concern that there was “a significant opportunity for some injustices to occur,” citing the “tremendous volume of applications for benefits that are processed annually by the VA”—then resulting in almost 40,000 appeals. S. Rep. No. 100-418, at 30. By fiscal year 2008, however, the number of appeals had more than *doubled*, to 88,000.<sup>9</sup> In fiscal year 2008 alone, VA completed 729,000 claims, nearly 66% more than it completed in fiscal year 2000.<sup>10</sup> And by 2009 the VA was receiving more than *one million* claims for disability benefits.<sup>11</sup> These added claims raised the total number of veterans receiving VA disability compensation to 3.16 million as of June 30, 2010.<sup>12</sup> This

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benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

<sup>9</sup> See GAO 09-910T, *Veterans’ Disability Benefits, Preliminary Findings on Claims Processing Trends and Improvement Efforts* at 8 (July 2009), available at <http://www.gao.gov/new.items/d09910t.pdf>.

<sup>10</sup> See GAO 10-213, *Veterans’ Disability Benefits: Further Evaluation of Ongoing Initiatives Could Help Identify Effective Approaches for Improving Claims Processing* 6 (Jan. 2010), available at <http://www.gao.gov/new.items/d10213.pdf> (“GAO 10-213”).

<sup>11</sup> See U.S. Dep’t of Veterans Affairs, *FY 2009 Performance and Accountability Report, Executive Summary* at I-3, available at [http://www.va.gov/budget/docs/report/FY2009-VAPAR\\_Executive\\_Summary.pdf](http://www.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf).

<sup>12</sup> See Nat’l Center for Veterans Analysis & Statistics, *VA Benefits & Health Care Utilization*, [http://www1.va.gov/VETDATA/Pocket-Card/4X6\\_summer10\\_sharepoint.pdf](http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf) (last visited Sept. 14, 2010).

upsurge in claims has only increased the risk that America's servicemen and women will be subject to "injustices" as a result of a system stretched to—and, indeed, beyond—the breaking point.

The VA's disability benefits claim processing system is mired in inefficiency and inaccuracy. Veterans today suffer significant delays in processing their claims. A recent GAO report found that in fiscal year 2008, "VA took on average 776 days to process appeals; 78 days longer than in fiscal year 2004." GAO 10-213, at Highlights. If a veteran seeks review of a denied claim with the Veterans Court, he or she must wait almost a year on average for a decision.<sup>13</sup> Delays and wrongfully denied claims take a substantial toll on veterans, their families, and other dependants, and the problem is getting worse, not better.<sup>14</sup> If a veteran cannot prove his or her claim, the entitlement is gone forever. 38 U.S.C. § 7104(b).

Worse still, a startling number of disability claims are wrongfully denied by the VA. Since 2001, veterans on average have prevailed in whole or in part in roughly 80% of the cases decided by the Veterans

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<sup>13</sup> See United States Court of Appeals for Veterans Claims, *Annual Reports*, [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_FY\\_2009\\_October\\_1\\_2008\\_to\\_September\\_30\\_2009.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf) ("Veterans Court Annual Report").

<sup>14</sup> See, e.g., Lindsay Wise, *VA claims backlog grows at a record pace in Houston: Money, staff fail to stop VA backlog growth*, *Houston Chron.*, Sept. 11, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/7195563.html>; Michael B. Farrell, *Wounds of Iraq war: US struggles with surge of returning veterans*, *Christian Sci. Monitor*, Aug. 16, 2010, available at <http://www.csmonitor.com/USA/Military/2010/0816/Wounds-of-Iraq-war-US-struggles-with-surge-of-returning-veterans>.

Court on the merits. *See* Pet. 14 & n.7. And although “the government’s interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them,” *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (citation omitted), the government told this Court only months ago that in a shocking 50 to 60 percent of cases before that Court, the government takes a position *against veterans* which is “substantially *unjustified*.” Tr. of Oral Argument 52, *Astrue v. Ratcliff*, 130 S. Ct. 2521 (2010) (No. 08-1322) (emphasis added); *see Astrue*, 130 S. Ct. at 2531 n.2; Pet. Br. 27 (veterans challenging administrative denial of disability benefits have been awarded attorney’s fees in 50 percent of cases over past two years).

These astonishing statistics underscore the need for appellate review of agency decisions denying disability benefits claims. The decision below nevertheless eliminates the equitable tolling doctrine that has long governed the timeliness of such appeals, including in instances when, as here, the failure to timely file a notice of appeal is attributable to a veteran’s combat-related mental illnesses. *See Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004); Pet. App. 4a (deciding case based on premise that “failure to timely appeal was a direct result of [petitioner’s] illness”); *id.* at 44a-45a & n.1 (Dyk, J., joined by Gajarsa and Moore, JJ., concurring) (citing additional examples).

The rule adopted by the courts below in this case has had an immediate and profound impact on claims before the Veterans Court, leading to ongoing and regular refusals to consider arguments for equitable tolling. In the first three months of 2010 alone, the Veterans Court has denied 36 appeals for failure to

timely file, notwithstanding the underlying reasons causing delay,<sup>15</sup> and *hundreds* of claims have been dismissed since the Veterans Court first issued its decision in this case. Pet. 15-16. As more soldiers return from the wars in Iraq and Afghanistan and new claims for disability benefits inevitably are filed, the negative impact of the decision below will only increase in its severity. See GAO 10-213 at 7-8 (documenting upward trends in claims received, completed, and pending from fiscal years 2000 to 2008).

The loss of even a single meritorious combat-related veterans' disability claim as a result of an erroneous ruling on the time limit for filing an appeal is a tragedy. Disability benefits can make the difference for veterans seeking to re-find their footing in everyday American life, not to mention a difference in the lives of their families as well. Yet the decision below places hundreds if not thousands of such claims at risk.

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<sup>15</sup> Based on its earlier disposition in the present case, the Veterans Court dismissed appeals in the following 2010 cases, as of March 29, 2010: Nos. 09-2493, 08-3698, 09-4011, 09-0567, 06-3170, 09-3495, 09-3091, 09-3465, 09-4255, 09-4094, 07-1923, 09-4149, 09-3851, 08-1468, 07-2008, 09-3242, 09-3216, 09-4030, 09-3832, 09-2241, 09-3076, 09-3787, 09-4743, 09-4308, 09-4508, 09-3566, 09-4027, 09-4600, 09-4261, 09-4663, 09-3758, 08-2910, 09-3253, 09-3199, 08-2984, 09-3710.

## II. EQUITABLE TOLLING IS A VITAL SAFEGUARD IN A VETERANS' BENEFITS SYSTEM THAT ALREADY POSES SUBSTANTIAL AND UNWARRANTED BURDENS ON THE NATION'S VETERANS

The veterans benefits statutes and procedures are designed to be “distinctly advantageous to the veteran claimant.” *See Bailey v. West*, 160 F.3d 1360, 1369 (Fed. Cir. 1998) (Michel, J., concurring), *overruled on other grounds*, *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009); *see also* Pet. 13 & n.2. The Veterans Court was set in place to provide greater due process protection for disabled veterans. *See, e.g., S. 11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 1 (1988) (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs) (“I want to be clear that my motivation in continuing the push for judicial review is the belief that it is a fundamental right which should be afforded to all veterans.”). The fact that the VA is prohibited from pursuing review of claim *approvals* favorable to veterans, as well as the court's historically high reversal rate of VA decisions, underscore that this mechanism was designed to serve veterans, not to hinder them. *See* 38 U.S.C. § 7252(a) (“The Secretary may not seek review of any such decision.”); Veterans Court Annual Report (documenting the number of merits decisions resulting in reversal and remand).

Yet veterans who enter the VA claims process often feel as though the deck is stacked against them. The disability evaluation process is arduous and often

simply results in uncertainty regarding the status of their benefits, especially as veterans transition from the armed services to the VA. Moreover, veterans face a morass of rules and hurdles governing access to benefits and then review of claims denied by the VA, with bottlenecks at almost every step. *See generally* Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 *Widener L.J.* 57, 97 (2009) (“[T]he VA system itself suffers from a number of built-in, procedural choke points that clog the system and turn it into the equivalent of the Dan Ryan Expressway at rush hour.”). Sadly, many a veteran has had to learn first hand that agencies tend to “fall into grooves ... and when they get into grooves, then God save you to get them out.” Henry J. Friendly, *Benchmarks* 106 (1967) (quoting *Hearings to Study Senate Concurrent Resolution 21 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 82d Cong. 224 (1951) (statement of Judge Learned Hand)) (internal quotation marks omitted).

A veteran initiates the process by filing a claim at one of fifty-seven Veterans Affairs Regional Offices (“ROs”) located across (and in one case, outside) the country, which take an average time of 196 days to resolve a claim. *See* GAO 10-213 at 2, 9. These regional offices are notorious for being error-prone. Recent inspections by the VA Office of Inspector General to the VA Regional Offices in Baltimore, Anchorage, and

Albuquerque, for instance, uncovered error rates of 38%, 29%, and 36% in claims processed.<sup>16</sup>

Faced with an adverse agency decision on his claim, a veteran may appeal to the Board of Veterans' Appeals ("BVA") within one year of the disability rating decision by filing a notice of disagreement with the RO. *See* 38 U.S.C. § 7105(b)(1). In fiscal year 2008, the BVA took on average 776 days to process appeals. *See* GAO 10-213 at 15. And again—as illustrated by the fact that the BVA's decision has been set aside in a stunning near 80% of cases considered by the Veterans Court, the risk of error is high. If a veteran receives a negative BVA decision, he must file a notice of appeal with the Veterans Court—not the RO or BVA—within 120 days. *See* 38 U.S.C. § 7266(a). The Veterans Court averaged 344 days from filing to disposition in 2009. *See* Veterans Court Annual Report.

Veterans are not trained to navigate the procedural minefields of the VA claims process. And at a time when much attention has been paid to the legal representation received by the *captured combatants* in the ongoing conflicts, it is sobering to learn that most of our veterans are forced to proceed *pro se* in seeking disability benefits from their own government. Veterans routinely represent themselves *pro se* before the Veterans Court. In 2009, 68% of the new cases filed in that court were self-represented, and 28% were self-represented at closure. *See* Veterans Court

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<sup>16</sup> *See* VA Office of Inspector General, Inspection of the VA Regional Office, Baltimore, MD, Report No. 09-01993-29 at 2 (Nov. 19, 2009); Anchorage, AK, Report No. 09-01998-42 at 1 (Dec. 7, 2009); Albuquerque, NM, Report No. 10-00935-156 at 2 (May 20, 2010) (all available at <http://www.va.gov/oig/publications/reports-list.asp>).

Annual Report; *see also Sanders*, 129 S. Ct. at 1707 (taking note that “the veteran is often unrepresented during the claims proceedings”). Removing equitable tolling increases the risk that veterans, particularly those who cannot afford their own counsel, will lose their claims. *See, e.g., Tiller v. Shinseki*, No. 09-3242, 2010 WL 675577, at \*1 (Vet. App. Feb. 26, 2010) (denying petitioner’s motion for reconsideration even though the veteran “did not have proper counsel” and received faulty advice from his local VA).

The notice of appeal marks the first instance in which veterans are required to interact with the separate and distinct Veterans Court, and the time for appealing often comes after years of pursuing a disability claim through their local VA. All too often veterans mistakenly believe that filing a notice of appeal with their local VA is sufficient, either through their own mistake or even, in some cases, through erroneous advice provided by VA employees. *See, e.g., Tiller*, 2010 WL 675577, at \*1; *Green v. Shinseki*, No. 07-1923, 2010 WL 337329, at \*2 (Vet. App. Feb. 1, 2010) (“Here, the appellant filed his [notice of appeal] with the RO instead of the Court, and the time to file his [notice of appeal] has long since passed.”); *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524, at \*2 (Vet. App. Jan. 28, 2010) (dismissing a pro se veteran’s claim as untimely even though “[a]t the time the appellant submitted his [notice of appeal] to the RO, he had 54 days before his 120-day appeal period expired”).

The VA often exacerbates this problem by holding onto correspondence from veterans intended as notices of appeal to the Veterans Court, but sent to the RO or some other incorrect recipient as a result of the veteran’s understandable confusion about the process.

The perception that the VA might even be intentionally “running out the clock,” on veterans, *Posey v. Shinseki*, 23 Vet. App. 406, 415 (2010) (Lance, J., concurring), has led Veterans Court Judges to sharply criticize “the inherent unfairness to claimants that is created by VA’s actions or lack thereof,” question whether VA’s actions are “more conscious thought than administrative oversight,” *id.* at 412-13 (Hagel, J., concurring), and conclude from “[t]he frequency of the problem ... that there may be confusion in instructions given to veterans.” *Id.* at \*8 (Lance, J., concurring).

That is just one of the many possible missteps that could cost a veteran his disability benefits for a combat-related injury under the decision below. Yet this problem alone has reached such epidemic proportions that the Veterans Court recently issued an Order directing that where “a self-represented party has misdirected to the Secretary a brief, or any other document required to be filed with the Court, the Secretary will promptly provide the Court with notice, and a copy of” the misdirected document. CAVC Misc. Order No. 03-10, *In Re: Self-Represented Parties’ Misdirected Brief and Other Required Documents* (Apr. 2, 2010), available at [http://www.uscourts.cavc.gov/documents/2010-03\\_Self\\_Represented\\_Parties.pdf](http://www.uscourts.cavc.gov/documents/2010-03_Self_Represented_Parties.pdf). It remains to be seen whether that order will be regularly carried out.

Equally troubling, many veterans seeking benefits are often encumbered by the very combat-related injuries for which they are seeking benefits, particularly where, as in this case, the injuries are mental in nature. As the dissent below observed, the “eradication of equitable tolling in proceedings 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,” since “[i]t is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines.” Pet. App. 46a (Mayer, J., joined by Michel and Newman, JJ., dissenting); *see id.* at 44a (Dyk, J., joined by Gajarsa and Moore, JJ., concurring) (VA claims process can be “extremely difficult ... to navigate,” particularly where the veteran “is suffering from a mental disability”).

Illustrative are the hundreds of thousands of cases involving veterans with traumatic brain injuries or PTSD. Ten to fifteen percent of those with mild TBI report ongoing cognitive difficulties for years, post injury.<sup>17</sup> Many patients continue to have significant disabilities for years *after* initial inpatient rehabilitation.<sup>18</sup> And the cognitive impairments experienced by veterans with TBI can seriously compromise their ability to navigate the claims process on their own. As the VA has acknowledged, veterans with TBI may experience “[d]ifficulty with executive

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<sup>17</sup> Heather G. Belanger et al., *The Veterans Health Administration System of Care for Mild Traumatic Brain Injury: Costs, Benefits and Controversies*, 24(1) J. Head Trauma Rehabil. 4 (Jan.-Feb. 2009).

<sup>18</sup> VA Office of Inspector General, *Follow-up Health Care Inspection VA’s Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation*, Report No. 08-01023-119 at i (May 1, 2008), available at <http://www.va.gov/oig/54/reports/VAOIG-08-01023-119.pdf>.

functions” such as “speed of information processing, goal setting, planning, organizing, prioritizing, self-monitoring, problem solving, judgment, decision making, spontaneity, and flexibility in changing actions when they are not productive.”<sup>19</sup> But of course, these are precisely the capabilities that a layperson would need to navigate the confusing labyrinth that is the claims process.

What is more, a veteran’s disability often may worsen during the *years* during which she may wait to receive benefits she should have received up front. It is no wonder then that some veterans have ascribed a new motto to describe the VA’s modus operandi: “Delay, Deny, and Hope That I Die.” 60 Minutes, *Why the VA Frustrates Veterans: Two Wars Are Slowing the Large Bureaucracy, Delaying Benefits*, CBS News, Jan. 3, 2010, <http://www.cbsnews.com/stories/2010/01/01/60minutes/main6045148.shtml>.<sup>20</sup>

“Kafkaesque” is an apt description for one recent case in which a veteran’s claim was dismissed solely on the basis of the decision below. The veteran promptly submitted paperwork to his local RO after waiting *four*

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<sup>19</sup> Dep’t of Veterans Affairs, *Disability Examination Worksheets: Traumatic Brain Injury*, <http://www.vba.va.gov/bln/21/benefits/exams/disexm58.htm> (reviewed/updated Dec. 15, 2008).

<sup>20</sup> No living generation of veterans—including the Greatest—has been spared this unending procedural nightmare. As one commentator has observed, “[t]he 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 T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, 229 (2001).

*years* for a final decision by the BVA denying his disability claim. The RO took the paperwork and told him that the veteran service officer (“VSO”) helping him on the case was on vacation, but as the veteran later learned, the VSO had resigned *four months* earlier. Veteran’s Response to Court Order Dated January 21, 2010, *Havlik v. Shinseki*, No. 09-4743 (Vet. App. Feb. 18, 2010). When the veteran learned this, he did not know how to proceed because no one had gone over the paperwork with him. The veteran nevertheless filed his notice of appeal, but it arrived at the court three days late. *Havlik v. Shinseki*, No. 09-4743, 2010 WL 890886, at \*1 (Vet. App. Mar. 15, 2010). Ordered to show cause why his appeal should not be dismissed, the veteran explained that he had been in and out of the hospital during this period and had recently learned that he had three months to live, that his caregiver too had been ill and required surgery during this period, and that he was misled by his local RO as to how his case was being handled. Veteran’s Response to Court Order. In a one page order, the Veterans Court summarily dismissed his appeal as untimely, citing the Federal Circuit’s decision in this case. *Havlik*, 2010 WL 890886, at \*1.

The equitable tolling doctrine that has been applied by the Veterans Court for two decades provides a critical safeguard to protect veterans in these circumstances and ensure that claims are not lost as a result of excusable neglect or even no fault on the part of the veteran in missing the deadline for an appeal. Equitable tolling is a common-sense and long accepted doctrine. See *Young v. United States*, 535 U.S. 43, 49 (2002) (explaining that 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” (citations omitted)). Thus, as this Court reiterated last Term, “a nonjurisdictional federal statute of limitations is normally subject to a ‘rebuttable presumption’ in favor ‘of equitable tolling.’” *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

Nothing in Section 7266(a)—the statute of limitation at issue—explicitly rules out equitable tolling. There is no reason to believe that Congress would enact a veterans’ claims process without the protection customarily afforded by the equitable tolling doctrine and put the men and women who have served our nation at risk of losing meritorious disability claims as a result of excusable neglect or even through no fault of their own. And if there were any doubt about whether the nation’s elected representatives—many of whom are themselves military veterans—would have intended such an *anti*-veteran scheme, the *pro*-veteran canon of construction that ordinarily governs the statutory claims process, *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991), would require giving the benefit of any such doubt to the nation’s veterans.

### III. THE DECISION BELOW FINDS NO SUPPORT IN THIS COURT’S PRECEDENT

As petitioner has explained, Section 7266(a) is properly read in light of its text, structure, and purpose to incorporate the doctrine of equitable tolling. Pet. Br. 18-32. Moreover, Section 7266(a) is analogous to the statutory deadline in the social security disability context, which this Court held was subject to equitable tolling in *Bowen v. City of New York*, 476 U.S. 467 (1986). See Pet. Br. 17-32. Indeed, like the statutory

provision in *Bowen*, Section 7266(a) imposes a time limit on disability plaintiffs for seeking review in a court *for the first time*. And as veterans well know, proceedings before the VA and before the Veterans Court are fundamentally different—with different rules, different players, and different results. Indeed, underscoring the distinct systems, in the past decade, veterans on average have prevailed in roughly 80% of the cases decided by the Veterans Court on the merits. *See supra* at 13. Likewise, as was true for the deadline in *Bowen*, the deadline provision in this case is “contained in a statute that Congress designed to be ‘unusually protective’ of claimants.” 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).<sup>21</sup>

The Federal Circuit held—and the government contends—that this case is governed by *Bowles v. Russell*, 551 U.S. 205 (2007), and that equitable tolling is therefore unavailable under Section 7266(a). But *Bowles* cannot bear the weight of that argument. As this Court stressed last Term, *Bowles* did not “hold that all statutory conditions imposing a time limit should be considered jurisdictional,” and thus not subject to equitable tolling. *Reed Elsevier*, 130 S. Ct. at 1247. Instead, the Court explained, “*Bowles* stands for the proposition that context, including this Court’s interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.” *Id.* at 1247-48. In *Bowles*, this Court

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<sup>21</sup> The fact that the Veterans Court affords deference to findings of fact made during the VA’s adjudicatory process does not distinguish this case from a court’s review of social security benefits decisions, as described in *Bowen*. *See* 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive ....”).

emphasized that it had long held in construing similar statutory provisions to the one at issue in *Bowles* that “the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’” 551 U.S. at 209 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)). Here, however, there is no comparable backdrop. Rather, as discussed, in the closest precedential analogue (*i.e.*, *Bowen*), this Court held that the statutory deadline was *not* jurisdictional.

Moreover, the statutory deadline in this case, is much closer to the one held *non-jurisdictional* in *Reed Elsevier* than the one held jurisdictional in *Bowles*. *Reed Elsevier* concerned whether the Copyright Act’s requirement that copyright holders register their works before suing for copyright infringement erects a jurisdictional limit on the federal courts. In answering that question in the negative, the Court held that the Copyright Act merely “imposes a precondition to filing a claim” because it is “not clearly labeled jurisdictional” and “is not located in a jurisdiction-granting provision.” 130 S. Ct. at 1247 (citing 17 U.S.C. § 411(a)). The same goes for Section 7266(a). *See* Pet. Br. 18-23.

The statutory deadline at issue in this case also has an element that the provision in *Bowles* and, for that matter, *Reed Elsevier*, lacked: it was passed as part of a statute designed “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. Construing Section 7266(a) as imposing a jurisdictional requirement would fly in the face of that congressional purpose, not to mention this Court’s own precedent

holding that “provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *King*, 502 U.S. at 220 n.9. At least without a great deal more, there is no reason to ascribe to Congress the unfathomable intent to deprive the nation’s veterans of disability benefits on the basis of a filing deadline missed due to the very disability for which they are seeking benefits, or any other factor that would be excused under the time-honored equitable tolling doctrine.<sup>22</sup>

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Few actions say more about our government—and our nation—than the way in which we treat the men and women who have voluntarily placed themselves in harm’s way to serve their country and protect and defend the liberty and principles that Americans too

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<sup>22</sup> In *Kirkendall v. Department of Army*, the Federal Circuit held that equitable tolling was available under 5 U.S.C. § 3330a(d), a statutory time limit to file a veterans-preference claim with the Merit Systems Protection Board (“MSPB”) under the Veterans Employment Opportunities Act of 1998 (“VEOA”). 479 F.3d 830, 834 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007). The VEOA provides that “*in no event* may any such appeal be brought ... later than 15 days after the date on which the complainant receives written notification from the Secretary.” 5 U.S.C. § 3330a(d) (emphasis added). Yet, in *Kirkendall*, the Federal Circuit concluded that even this “unusually emphatic” phrasing did not amount to sufficient evidence of congressional intent to rebut the *Irwin* presumption that equitable tolling is available. 479 F.3d at 839 (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)). Section 7266(a), by contrast, lacks this “in no event” language and merely states that “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). The ordinary rule that Congress intends a statutory deadline to allow for equitable tolling unless it says otherwise therefore plainly governs as to Section 7266(a).

often take for granted. Indeed, many of the troops that are returning from Iraq and Afghanistan with combat-related disabilities today are the men and women who rose to defend the nation in one of its darkest hours—in the wake of the September 11 attacks. The decision below improperly places those veterans—as well as those such as petitioner, who served in prior conflicts—at risk of losing meritorious disability claims through no fault of their own. The Court should reverse that decision and hold that Section 7266(a) is subject to the customary equitable tolling rule.

### CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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