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 OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICUS CURIAE* [1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit. It unites the different groups across the Nation that practice before that court, seeking to strengthen and serve the court. The FCBA helps facilitate *pro bono* representation for veterans with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to strengthening the litigation process. Association members who are government attorneys played no role in deciding whether to file this brief or in developing the content of this brief.

Holding that the 120-day time limit for veterans to seek judicial review of the Department of Veterans Affairs' ("VA's") denial of disability benefits is jurisdictional would significantly undermine the FCBA's ability to facilitate meaningful *pro bono* representation for disabled veterans. As petitioner emphasizes, most veterans proceed *pro se* in the non-adversarial administrative process. Pet. Br. 8, 26.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

Moreover, the very service-connected mental illnesses for which veterans seek benefits can impair their ability to comply with the 120-day time limit. *Id.* at 27, 30. Thus, equitable tolling is especially important in this context to permit *pro se* disabled veterans to secure judicial review and potential *pro bono* representation in court.

Jurisdictional treatment of the time limit would also cause many suits to be dismissed even when veterans file notices of appeal before the 120-day window has closed, but misfile them with the VA rather than the Court of Appeals for Veterans Claims ("Veterans Court"). Due to systemic bureaucratic problems at the VA, such misfiling is often fatal: The VA "somewhat routinely" fails to send misfiled appeals to the Veterans Court until after the 120-day window has closed, leading to dismissal when the VA itself bears much of the responsibility for the delay. *Posey v. Shinseki*, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring); *see also infra* at 16 n.3 (collecting cases). Dismissal under these circumstances is inequitable and hinders the FCBA's ability to help veterans receive a meaningful hearing in an independent court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The time limit for commencing a suit for judicial review of the VA's denial of disability benefits is not jurisdictional, and instead is subject to traditional principles of equitable tolling. As petitioner explains, the statutory text, context, and legislative history all confirm that conclusion. This *amicus* brief focuses primarily on the statutory context. Because Congress did not expressly state that 38 U.S.C. § 7266(a) is jurisdictional, the Government's position that the time limit is nonetheless jurisdictional must stand or fall on the statutory context. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247–48 (2010). That context makes it extremely unlikely that Congress intended § 7266(a) to be jurisdictional.

Section 7266 is part of a statutory scheme that embodies our Nation's longstanding commitment to care for veterans who have become disabled in connection with their service to our country. Throughout that scheme, Congress repeatedly provided pro-veteran rules and procedures in order to give veterans the benefit of the doubt. Jurisdictional treatment would clash with this scheme by making § 7266(a) unusually rigid and harsh, and denying some veterans their day in court for wholly inequitable reasons — such as when the very disability that gave rise to a suit causes a *pro se* veteran to miss a filing deadline.

Unlike limitations periods that Congress clearly ranked as jurisdictional, § 7266(a) does not provide an express safety valve to allow extensions when

(1) delay is due to good cause or excusable neglect, such as when an illness or disability causes the delay; (2) the claimant never received actual notice of the adverse decision; or (3) the claimant diligently pursued his rights by filing a timely petition, but addressed his claims to the wrong tribunal. Traditional tolling principles provide the needed safety valve so long as § 7266(a) is not jurisdictional. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). But there would be no safety valve at all if the provision were treated as being jurisdictional. It beggars belief that Congress intended to treat veterans *more* harshly than litigants subject to other time limits that are either expressly jurisdictional with equally express exceptions, or are not jurisdictional and thus subject to equitable tolling. With both of those models to choose from, the notion that Congress would pick and choose the *least* lenient aspects of each model for veterans is implausible.

In this context, moreover, timeliness and finality concerns are at their nadir because multi-year delays by the VA are endemic in this system regardless of whether, for excusable reasons, a veteran misses a filing deadline by a few days or weeks. The VA's high reversal rate on appeal, and its failure to forward *pro se* veterans' notices of appeal to the correct court, also show that the need for judicial review and flexible procedures for seeking that review are both at their zenith in this context. There is no reason Congress would have subjected veterans to unusually unfavorable treatment by making § 7266(a) jurisdictional — and every reason for it to have allowed equitable tolling.

Indeed, the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), resulted from a compromise between competing House and Senate bills, both of which allowed for equitable tolling. There is no indication that, when forging that compromise, Congress chose to depart from its bicameral consensus in favor of equitable tolling.

In light of the overwhelming contextual evidence that Congress did not intend to make § 7266(a) jurisdictional, Congress's use of the bare phrase "notice of appeal" to describe the document that invokes and commences judicial review is hardly clear evidence of a contrary intent. This Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that a notice of appeal that seeks appellate review of a trial court's decision in a civil (though not criminal) action is jurisdictional. *Id.* at 206–07. But this is a different kind of "notice of appeal," because it seeks judicial review of an agency decision. The most likely conclusion is that Congress used the "notice of appeal" label because the Veterans Court's review in some ways resembles an appeal, but did not intend to foreclose the traditional equitable tolling principles that normally apply in the context of judicial review of administrative decisions. *E.g.*, *Irwin*, 498 U.S. at 96; *Bowen v. City of New York*, 476 U.S. 467, 478 (1986).

ARGUMENT

Because Congress did not expressly label the time limit for filing a notice of appeal in the Veterans Court "jurisdictional," the question is whether context clearly indicates that the time limit is nonetheless jurisdictional. *Reed*, 130 S. Ct. at 1247–48. It does not.

I. TREATING § 7266(A)'S TIME LIMIT AS JURISDICTIONAL WOULD BE INCONSISTENT WITH CONGRESS'S PRO-VETERAN SCHEME, BOTH ON ITS FACE AND IN PRACTICE.

A. Jurisdictional Treatment of § 7266(a) Would Conflict with Congress's Uniquely Benevolent Statutory Scheme for Veterans.

Congress has long provided "special solicitude for the veterans' cause," particularly for veterans "who by reason of mental incompetency are unable to protect themselves." *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009); *Spicer v. Smith*, 288 U.S. 430, 435 (1933). As a "means by which the Nation expresses its profound gratitude for the many sacrifices our veterans have made to protect and defend our freedom," Congress has made a profound commitment to provide benefits to veterans who become disabled in connection with their military service. *See* 38 U.S.C. § 1101 *et seq*.; Statement by President Clinton upon Signing H.R. 4864 (Nov. 9, 2000), *reprinted in* 2000 U.S.C.C.A.N. 2017. To honor that commitment, Congress established a "uniquely benevolent statutory framework." *Bailey*

v. West, 160 F.3d 1360, 1369 (Fed. Cir. 1998) (Michel, J., concurring).

Again and again, Congress placed a thumb on the scale in favor of veterans to ensure that they receive all the benefits they have earned through their service to our country. S. Rep. No. 100-418 at 29 (1988). The Secretary of Veterans Affairs must make all "reasonable efforts to assist" a veteran in developing a claim. 38 U.S.C. § 5103A(a). Congress required the Secretary to err on the side of providing too many benefits: whenever "there is an approximate balance of positive and negative evidence," the Secretary "shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b). And Congress established a lopsided scheme for obtaining court review: A veteran can challenge an adverse decision by the VA's Board of Veterans' Appeals ("Board") in the Veterans Court, but the Secretary cannot. 38 U.S.C. § 7252(a).

Treating § 7266(a)'s time limit as jurisdictional would, in jarring contrast, single out veterans for unusually *unfavorable* treatment on that issue. Other time limits that are jurisdictional, including the one at issue in *Bowles*, contain express tolling provisions for good cause, excusable neglect, or lack of notice. *E.g.*, 28 U.S.C. §§ 2107(c), 2101(c). Section 7266(a), however, consists of only a single sentence stating that a veteran seeking to obtain Veterans Court review of an adverse Board decision "shall file" within 120 days. Thus, if § 7266(a) were jurisdictional, it would be an outlier both within the context of veterans' benefits, where Congress has consistently bent over backwards to favor veterans, and within the context of jurisdictional statutes,

which generally confirm their jurisdictional character by including express exceptions to mitigate their harsh effects — even when special solicitude for a group like veterans is *not* at issue. The absence of any written exceptions in § 7266(a) is thus a tipoff that Congress did not intend to make Section 7266(a) jurisdictional.

For example, the statute at issue in *Bowles* generally requires a notice of appeal in a civil case to be filed within 30 days. 28 U.S.C. § 2107(a). But Congress did not leave it at that. Instead, Congress provided two exceptions to the general rule: (1) a district court may extend the time for "excusable neglect or good cause"; and (2) a district court may "reopen" the time for up to 14 days if the party did not receive notice of the judgment. § 2107(c).

Similarly, when Congress imposed a jurisdictional time limit on the filing of a petition for a writ of certiorari in a civil case, Congress made sure to allow a 60-day extension "for good cause shown." 28 U.S.C. § 2101(c). *Bowles* confirms that §§ 2107(c) and 2101(c) are jurisdictional, and thus are not subject to additional, non-statutory exceptions. *Bowles*, 551 U.S. at 212 & n.4. But if § 7266(a) were jurisdictional, it would be much harsher than either §§ 2107(c) or 2101(c) — which govern the vast majority of civil appeals — because its time limit could not be extended or reopened for any reason at all.[2]

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[2] In refusing to craft an exception to the statute's enumerated exceptions, *Bowles* comported with the rule that "the expression of one exception indicates that no other exceptions

Nor does § 7266(a) make any allowance for veterans who misfile notices of appeal in the wrong forum. In contrast, a "notice of appeal" from a district court judgment in a civil case is deemed to have been timely filed in the district court even if it was "mistakenly filed in the court of appeals." Fed. R. App. P. 4(d). A similar rule applies to a complaint that was timely filed in the wrong district court. 28 U.S.C. § 1406(a); *see also* 28 U.S.C. § 1631 (allowing transfer to cure want of jurisdiction). But neither of those provisions applies here, in part because the Veterans Court is an Article I court. *See* 38 U.S.C. § 7251; Fed. R. App. P. 1(a)(1).

If equitable tolling applies to § 7266(a), the absence of any provision for misfilings makes perfect sense, because equitable tolling protects a litigant who timely files in the wrong court. *Irwin*, 498 U.S. at 96 & n.3; *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434–35 (1965); *Jaquay v. Principi*, 304 F.3d 1276, 1288–89 (Fed. Cir. 2002) (en banc). But if § 7266(a) were jurisdictional, equitable tolling would not provide that needed safety valve, and veterans would be singled out for unusually unfavorable treatment. *E.g., Bronson v. Shinseki*, No. 09-3554, 2010 WL 1507648 (Vet. App. Apr. 16, 2010) (dismissing misfiled appeal under jurisdictional reading of § 7266(a)); *see also infra* at 16 n.3 (collecting cases).

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apply." *Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987); *accord* 2A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 47:11 (7th ed. 2007). But this principle does not apply here, because, unlike §§ 2107(c) and 2101(c), § 7266(a) contains no express exceptions at all.

Such a harsh interpretation of § 7266(a) would produce no end of bizarre results. The time limit for challenging the denial of disability benefits would be stricter for veterans than for non-veterans, whose claims under the Social Security Act are eligible for tolling. *Bowen*, 476 U.S. at 478. And the time limit for veterans to seek their *first* day in court would be stricter than the jurisdictional time limit for a civil litigant to appeal to a *second* (appellate) court after a loss at trial because, as discussed above, § 2107(c), but not § 7266(a), contains exceptions for "good cause" and lack of notice. Indeed, a veteran would face stricter limits commencing suit than a criminal seeking to appeal one court's judgment to another court, as the time limit for appeals in criminal cases is not jurisdictional. *Bowles*, 551 U.S. at 212; *Schacht v. United States*, 398 U.S. 58, 64 (1970) (same for certiorari deadline in criminal cases).

Further, a *pro se* veteran who sought his first hearing in court would receive no hearing at all if he filed in the wrong forum, while a counseled party in a civil or criminal case could misfile in the wrong forum without consequence either when initiating suit in the district court or when seeking a second bite at the apple in the Court of Appeals. § 1406(a); Fed. R. App. P. 4(d). And a veteran who misfiled his notice of appeal to the Veterans Court would have his lawsuit dismissed, but a veteran could misfile a subsequent appeal to the Federal Circuit without facing this penalty. Fed. R. App. P. 4(d).

It would be more than passing strange for Congress to single out veterans for such unusually harsh treatment.

B. In Practice, Systemic Problems in the VA's Bureaucracy Underscore and Exacerbate this Inconsistency.

Systemic problems with the VA's bureaucracy, of which Congress was surely aware, make it especially unlikely that Congress would have chosen to erect unusually strict requirements for veterans seeking judicial review of the VA's decisions.

1. The VA's bureaucracy is infamously slow, opaque, and nonresponsive. The VA acknowledges that it has faced a "historical struggle to process claims promptly." VA Office of Inspector General, Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days, at 1 (Sept. 23, 2009) ("OIG Report"), http://www4.va.gov/oig/52/reports/2009/VAOIG-08-03156-227.pdf. News reports have more colorfully described the process as "bureaucratic hell" and "worthy of an infernal ring from Dante." Lawrence Downes, *For Wounded Veterans and Their Families, a Journey Without Maps*, N.Y. Times, Mar. 24, 2008; *Slogging on the Home Front*, Editorial, N.Y. Times, Oct. 6, 2007.

As early as 1978, the General Accounting Office ("GAO") reported to Congress that veterans "generally wait months while VA processes their claims." GAO Report, Veterans Administration Can Reduce the Time Required to Process Veterans' and Survivors' Initial Claims for Benefits at i (Dec. 27, 1978), http://archive.gao.gov/f0302/108464.pdf. In 1987, the year before Congress enacted § 7266(a), Congress held hearings on "widespread problems in VA's claims-processing procedures." GAO Report, Veterans' Benefits: Improvements Needed in

Processing Disability Claims at 2 (June 22, 1989), http://archive.gao.gov/ t2pbat14/139141.pdf.

The VA has made laudable efforts to ameliorate these problems, but they persist. In 2008, the VA had a backlog of 78,000 claims that had been pending for more than 6 months. GAO Report, Veterans Disability Benefits: Preliminary Findings on Claims Processing Trends and Improvement Efforts 6 (July 29, 2009) ("Backlog Report"), http://www.gao.gov/new.items/d09910t.pdf. That does not count the additional 88,000 claims that were pending on appeal to the Board, *id*. at 2, a process that is staggeringly slow. The average appeal takes 1,082 days — nearly three years — 96% of which time is taken up by the VA. Board of Veterans' Appeals, Annual Report of the Chairman at 16 (2009) ("Board Report"), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. And when the Board remands, which it does in 37% of its cases, the remand adds on average another 535 additional days — nearly a year and a half. *Id*. at 16, 21.

As former Secretary Anthony Principi put it, "[s]tuff just goes into a big black hole sometimes." Robert Tomsho & Rachel Zimmerman, *Coming Home: Seeking Benefits, Disabled Soldier Faced New Battle*, Wall St. J., Aug. 12, 2003, at A1. For example, one veteran who sought benefits for post-traumatic stress disorder and an ulcer did not hear back from the VA for 671 days — nearly two years — during the vast majority of which time the VA was doing nothing. OIG Report 8. When the VA finally processed the claim, it retroactively awarded the veteran $19,437 in benefits. *Id*. In another case, a veteran filed a claim for a service-connected back

injury, but the VA lost his file, resulting in 22 months of delay. *Id.* at 14–15; *see also id.* (misplaced files on average caused 224 days of delay).

In this system, where extensive delays by the VA are routine, it is not plausible to assert that an unforgiving and inflexible cutoff for veterans' filings is needed to promote any interest in timeliness or finality. A few days or weeks of excusable delay by a veteran is immaterial in the context of the VA's administrative system.

2. Moreover, systemic failures at the VA contribute not only to delays in processing claims, but also to a high error rate. As petitioner explains, the Veterans Court reverses the VA approximately 80% of the time, and awards attorney's fees because the VA's position was not even substantially justified about half of the time. Pet. Br. 8, 27. That makes it all the more imperative that veterans have effective recourse to judicial review.

The need for flexibility is accentuated by the fact that, consistent with the tradition that the VA's process is "ex parte in nature and non-adversarial," 68% of veterans initiate Veterans Court review without the assistance of counsel. 38 C.F.R. § 20.700(c); U.S. Court of Appeals for Veterans Claims, Annual Report at 1 (2009), http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf. As Judge Dyk emphasized, it is "extremely difficult" for *pro se* veterans with mental disabilities "to navigate the system and meet the statutory deadline" — a concern that is "not merely hypothetical, as [the Federal Circuit's] decisions demonstrate." Pet. App.

44a (Dyk, J., concurring) (citing cases). "Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar." *Id.* at 69a (Mayer, J., dissenting) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982)).

Especially in light of the VA's soaring reversal rate, an inflexible impediment to *pro se* veterans' efforts to secure judicial review would not only deprive many veterans of the procedural right to a day in court. It would also produce substantively unjust outcomes in many cases by depriving veterans of wrongfully denied, and much needed, benefits.

3. Notwithstanding the importance of judicial review, and the VA's statutory obligation to assist veterans, the VA routinely bears a significant amount of the responsibility for a *pro se* veteran's delay in filing a notice of appeal in the correct forum. A number of *pro se* veterans mistakenly file a notice of appeal with the VA or the VA's Board of Veterans' Appeals — which rendered the adverse decision and thus is the ordinary recipient of a notice of appeal — rather than the Veterans Court, as § 7266(a) requires. The 120-day time limit is sufficiently long that, if the VA returned misfiled notices within a reasonable time, or forwarded them to the right place (the Veterans Court), misfiling would rarely result in dismissal under any rule. But the VA "somewhat routinely holds" misfiled notices of appeal until after the 120-day limit has expired, forwards them to the wrong place, or both. *Posey v.*

Shinseki, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring).

For example, in *Bronson v. Shinseki*, No. 09-3554, 2010 WL 1507648 (Vet. App. Apr. 16, 2010), the veteran diligently submitted a notice of appeal a month after an adverse Board decision, but sent it to the Board rather than the Veterans Court. Two months later, the Board forwarded the notice to the VA Regional Office, which waited 75 days before sending the notice to the Veterans Court after the 120-day period had expired. *Id*. at *1. In *Williams v. Shinseki*, No. 07-2548, 2009 WL 4979749 (Vet. App. 2009), various VA offices and the Board sent a diligently submitted but misdirected notice of appeal back and forth for 14 months — far longer than the entire limitations period. *Id*. at *1. In *Rickett v. Shinseki*, 23 Vet. App. 366 (2010), the veteran diligently submitted a notice of appeal to the one person who should certainly know what to do with it: the VA's General Counsel. *Id*. at 367. The General Counsel's Office waited 24 days before forwarding the letter to the wrong place (the Regional Office), which in turn did nothing until the 120-day period had elapsed. *Id*. at 367–68. In all of these cases, the veteran's claim was dismissed for lack of jurisdiction.

The VA's failure to inform veterans that they have misfiled appeals or to forward those appeals to the Veterans Court is hard to square with its statutory obligation to make "reasonable efforts to assist" veterans and give them the "benefit of the doubt." 38 U.S.C. §§ 5103A(a), 5107(b). Yet these

examples are far from isolated; this fact pattern occurs with stunning frequency.[3]

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[3] *E.g.*, *Horne v. Shinseki,* No. 09-2042, 2009 WL 3446348 (Vet. App. Oct. 28, 2009) (Regional Office sat on filing for 217 days); *Pierre v. Shinseki*, No. 09-3182, 2009 WL 4198412 (Vet. App. Nov. 30, 2009) (otherwise timely appeal shuffled between VA offices for 158 days); *Murray v. Shinseki,* No. 06-3271, 2009 WL 3157534 (Vet. App. Sept. 29, 2009) (same for 139 days); *Pandoy v. Shinseki*, No. 07-1563, 2009 WL 1631844 (Vet. App. June 11, 2009) (VA inaction for 125 days); *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524 (Vet. App. Jan. 28, 2010) (same for 116 days, at which point time had expired); *Irwin v. Shinseki*, 23 Vet. App. 128, 128–29 (2009) (same); *Palmer v. Shinseki*, No. 06-952, 2009 WL 3720587 (Vet. App. Nov. 9, 2009) (same for 106 days); *Borgo v. Shinseki*, No. 06-820, 2009 WL 2873736 (Vet. App. Sept. 4, 2009) (same for 66 days); *Garland v. Shinseki*, No. 09-4311, 2010 WL 1231998 (Vet. App. Mar. 31, 2010) (41 days); *Pope v. Shinseki*, No. 07-653, 2009 WL 3493049 (Vet. App. Oct. 30, 2009) (36 days); *Norman v. Shinseki*, No. 08-228, 2010 WL 1710732 (Vet. App. Apr. 28, 2010) (35 days); *Harris v. Shinseki,* No. 09-567, 2010 WL 668926 (Vet. App. Feb. 26, 2010) (VA informed veteran of misfiling four months after 120-day period had expired); *Humphreys v. Shinseki*, No. 08-2633, 2009 WL 3353032 (Vet. App. Oct. 20, 2009) (VA sat on filing for seven months); *Stambush v. Shinseki,* No. 08-2984, 2010 WL 318493 (Vet. App. Jan. 28, 2010) (same for 44 days); *Brown v. Shinseki*, No. 10-1490, 2010 WL 2912290 (Vet. App. July 23, 2010) (otherwise timely appeal dismissed for misfiling); *Ladd v. Shinseki*, No. 09-4787, 2010 WL 2145276 (Vet. App. May 28, 2010) (same); *Henderson v. Shinseki*, No. 09-4785, 2010 WL 1377354 (Vet. App. Apr. 8, 2010); *Mendoza v. Shinseki,* No. 08-3406, 2009 WL 3389907 (Vet. App. Oct. 22, 2009) (same); *Westmoreland v. Shinseki*, No. 09-2298, 2009 WL 3780674 (Vet. App. Nov. 12, 2009) (same); *Hungerford v. Shinseki*, No. 06-3170, 2010 WL 668909 (Vet. App. Feb. 26, 2010) (same), *vacated as moot due to death of appellant*, 2010 WL 1709219 (Vet. App. Apr. 28, 2010).

The Government has no legitimate interest in using the 120-day deadline to require prompt action by a veteran in the many cases where the veteran *does* act promptly but the VA sits on the filing until after the time limit has expired. It is the epitome of unfairness for the Government to play a significant role in causing a filing to be late and then gain dismissal for that reason. If equity did not already have a doctrine for this situation — equitable tolling — it would surely adopt one.

Indeed, the Government's Brief in Opposition failed to identify *any* viable reason why Congress would treat disabled veterans so harshly. Instead, the Government all but admitted there is no such reason by arguing that, if this Court did not reverse the judgment of the Federal Circuit, Congress would likely abrogate it. Br. in Opp. 13–15.

II. IF CONGRESS HAD WANTED TO MAKE SUCH A SHARP DEPARTURE FROM ITS SETTLED PRACTICE OF ACCORDING PREFERENTIAL TREATMENT AND LENIENT PROCEDURES TO VETERANS, IT WOULD HAVE SPOKEN CLEARLY, NOT CRYPTICALLY.

Together with the statutory text and legislative history, the context discussed above confirms that Congress did not express a clear intent to make the time limit jurisdictional. This Court requires a clear statement from Congress to overcome the presumption that statutory requirements are "nonjurisdictional in character." *Reed*, 130 S. Ct. at 1244 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006)). Congress must be even clearer

in this context, as any interpretive doubt in a statute governing veterans benefits "is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994); *see also, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 220–21 n.9 (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

1. When Congress intends to make a requirement jurisdictional, it typically says so expressly or places the requirement in a statute that grants subject-matter jurisdiction. *Arbaugh*, 546 U.S. at 515 & n.11 (collecting citations); *see, e.g.*, 28 U.S.C. § 1331 (presence of a question "arising under" federal law is jurisdictional); § 1332 (diversity of citizenship and the presence of an amount in controversy greater than $75,000 are jurisdictional). Here, Congress did no such thing. Section 7266 does not use the word "jurisdiction" or otherwise confer subject matter jurisdiction. To the contrary, the statute elsewhere addresses the court's jurisdiction, and Congress pointedly left § 7266 out of the Act's "Jurisdiction" subchapter, placing it instead in the "Procedure" subchapter. *See* 38 U.S.C. Part V, Chp. 72, Subchps. I, II.

Moreover, rather than "'speak[ing] to the power of the court'" (*i.e.*, jurisdiction), Section 7266 speaks "'to the rights or obligations of the parties'" (*i.e.*, non-jurisdictional claims-processing requirements). *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). Section 7266(a) dictates what "a

person adversely affected by [an adverse Board] decision" must file, not what a court is empowered to hear. § 7266(a).

Of course, Congress need not use magic words to speak clearly. "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed*, 130 S. Ct. at 1247–48. That follows from the "'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.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). "Ultimately, context determines meaning." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010). *See also King*, 502 U.S. at 221 ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.))).

As set forth above, the broader context overwhelmingly supports the view that Congress did *not* intend the 120-day limit to be jurisdictional. Contrary to Congress's *uniquely benevolent* statutory scheme for veterans, a jurisdictional interpretation of § 7266(a) would be *unusually harsh* both on its face and in practice, causing manifest injustice with stunning frequency and without serving any larger purpose.

2. The drafting and legislative history provide further evidence that Congress did not intend to make § 7266(a) jurisdictional and thereby preclude equitable tolling. The Veterans' Judicial Review Act was enacted after the House and Senate passed competing bills — both of which allowed for equitable tolling — and the Senate and House Committees on Veterans Affairs brokered a compromise between the two. *See* Senate and House Committees on Veterans' Affairs, Explanatory Statement on Compromise Agreement on Division A, 134 Cong. Rec. S 16650 (Oct. 18, 1988) ("Explanatory Statement"), *reprinted in* 1988 U.S.C.C.A.N. 5834. The bill that passed the Senate provided that a veteran could obtain review of an adverse Board decision "in a civil action commenced within 180 days" by filing a "complaint" in the local United States Court of Appeals. S. 11, 100th Cong. § 4025(b)(2), (c), (d). This language is materially identical to language that *Bowen* held to allow tolling and that the Government acknowledges would have allowed tolling here. *Bowen*, 476 U.S. at 478; Br. in Opp. 7–8.

The House took a more aggressive approach to ensuring that veterans would receive a hearing before an independent court, in part by voting to replace the Board with a specialized Article I court named the "Court of Veterans Appeals." H.R. 5288, 100th Cong. §§ 4001, 4002; *see* Explanatory Statement at 5844. This new court's review would be commenced in the same way as the Board review it was supplanting: The veteran would file a "notice of disagreement" with the VA, which would resolve the dispute or mail a "statement of the case" to the veteran, who then had 90 days to "file a formal

appeal." H.R. 5288 § 4015(c), (d)(1); *see also* Explanatory Statement at 5849. The House expressly provided for tolling: The 90-day window could be extended "for good cause shown." H.R. 5288 § 4015(d)(1).

Under a compromise brokered between the Senate and House Committees on Veterans Affairs, Congress charted a middle course on the disputed issues without expressing any intent to depart from *both* Chambers' bills by precluding equitable tolling. As relevant here, Congress established a specialized Article I court (as per the House), but did not eliminate the Board (as per the Senate). 38 U.S.C. §§ 7251, 7252; *see* Explanatory Statement at 5844, 5849. Because Congress agreed to have the new court review the Board's decisions, rather than supplant the Board entirely, Congress did not keep the Board's convoluted "notice of disagreement"/"statement of the case"/"formal appeal" procedure. Instead, Congress simply provided that a veteran should file a "notice of appeal," and did not expressly address equitable tolling. § 7266; *see* Explanatory Statement at 5849.

By far the most logical inference is that, like the Senate bill, the final bill does not include an express "good cause" exception because its time limit is not jurisdictional and thus does not need such an express exception. It would be most odd for a compromise bill to alter a provision upon which there had been no disagreement — that equitable tolling should apply. Moreover, the unusually detailed legislative history makes no reference to such a shift. The 30-page Explanatory Statement marches section by section, explaining "[t]he

difference[s] between [the House and Senate bills] and the provisions of the compromise agreement," excluding only "clerical corrections, conforming changes made necessary by the compromise agreement, and minor drafting, technical, and clarifying changes." *Id.* at 5834. If the Committee had opted to replace mutually agreeable equitable tolling provisions with an unprecedentedly harsh rule of jurisdiction, it is hard to imagine that it would not have prompted a comment in the Explanatory Statement.

On the other hand, the Conference Committee's decisions not to include the House's express "good cause" exception and not to discuss that decision in the detailed explanatory statement are perfectly logical if § 7266(a) is not jurisdictional. Under that interpretation, the final bill, House bill, and Senate bill all allow equitable tolling, and thus there is no "difference" to explain. *Id.* The choice of the label "appeal" follows from the House bill, which used the same label for the filing that ultimately triggered court review. H.R. 5288 § 4015(c). And the absence of an express "good cause" provision follows from the Senate bill, which included no such provision because it would be superfluous. *See Bowen*, 476 U.S. at 478.

3. Against all of the statutory text, context, and legislative history discussed above, the Government relies on Congress's choice of the label "notice of appeal." Br. in Opp. 5. That label cannot bear the weight the Government places upon it. At the outset, "notice of appeal" is not a term of art with an unambiguous meaning as to jurisdictional status:

time limits upon a "notice of appeal" in a criminal case are *not* jurisdictional. *Bowles*, 551 U.S. at 212.

And even though *Bowles* held that notices of appeal seeking appellate review of judicial decisions are generally jurisdictional in civil cases governed by other statutory time periods, this Court does "not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson*, 130 S. Ct. at 1270. No matter how you slice it, Congress used the "notice of appeal" label in a novel way. A "notice of appeal" is ordinarily a document used to obtain a higher court's review of an earlier court's decision. *E.g.*, 28 U.S.C. § 2107; Fed. R. App. P. 4(b)(1); Black's Law Dictionary 1092 (8th ed. 2004) (a "notice of appeal" is "[a] document filed with a court . . . stating an intention to appeal a trial court's judgment or order"). But here, Congress affixed that label to a document used to commence a lawsuit in the first place, in order to give a veteran his first day in court to review the ruling of an administrative agency. Pet. App. 26a (Henderson's appeal "represented the first time he could appear before a court.").

This Court has never addressed the characterization of a "notice of appeal" in this context. Thus, unlike in *Bowles*, there is no longstanding court precedent establishing that § 7266(a) imposes a "type of limitation" that is "properly ranked as jurisdictional [even] absent an express designation." *Reed*, 130 S. Ct. at 1248.

To the contrary, this Court has long cautioned that appellate review of trial court decisions and judicial review of agency decisions are birds of a very

different feather. *E.g., Sims v. Apfel*, 530 U.S. 103, 110 (2000); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940). In the latter, more apposite context — statutory time limitations on commencing judicial review of administrative decisions — this Court has generally allowed equitable tolling. *Bowen*, 476 U.S. at 478; *Irwin*, 498 U.S. at 96; *Zipes*, 455 U.S. at 394; *but cf. Stone v. INS*, 514 U.S. 386, 400 (1995). Unlike in *Bowles*, therefore, there is no longstanding pattern of judicial decisions relating to this "type of limitation" that could provide a sufficiently clear statement of Congress's intent "even absent the jurisdictional label." *Reed*, 130 S. Ct. at 1248. Instead, the context and legislative history discussed above confirm that Congress did not intend to make the time limit jurisdictional without saying so.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Federal Circuit.

RESPECTFULLY SUBMITTED

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