No. 09-1036

IN THE

Supreme Court of the United States

DORETHA H. HENDERSON,
AUTHORIZED REPRESENTATIVE OF
DAVID L. HENDERSON, DECEASED,
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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES AND MATERIALS

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The government implausibly submits that Congress intended to shut the courthouse doors to countless disabled veterans who miss Section 7266(a)'s 120-day deadline through no fault of their own. Echoing the majority below, the government argues that (1) statutory time limits for initiating an appeal are jurisdictional, U.S. Br. 6-13, 25-26; (2) this case involves an appeal, *id*. at 13-24; and, therefore (3) the deadline here is jurisdictional. That wooden syllogism is followed by the government's repeated

* David L. Henderson died on October 24, 2010. On November 15, 2010, this Court substituted Doretha H. Henderson, the authorized representative of Mr. Henderson, as petitioner.

statement that petitioner has not identified a decision of this Court that has treated as *non*-jurisdictional a statutory deadline for initiating review in an appellate court. *Id.* at 14-15, 18, 26-27.

The first problem with that position is that the government identifies no decision of this Court that has held that *all* statutory deadlines for an appeal are jurisdictional, even if the statutory text, structure, and history at issue indicate that the deadline is not jurisdictional; even if there is no longstanding tradition of treating that deadline as jurisdictional; even if the deadline does not involve a court-to-court appeal but represents the first time the litigant appears in court; even if the deadline follows a pro-claimant, non-adversarial administrative scheme; even if the deadline looks, smells, feels, and acts like the *non*-jurisdictional deadline in the social security disability context; even if a pro-veteran canon of statutory construction resolves ambiguity in favor of the veteran; even if the result would bar disabled soldiers who have risked their lives for the Nation from access to any judicial review; and even if the government urges that Congress should and likely would overrule the decision below if this Court does not.

Another problem with the government's position is that this case is about 38 U.S.C. § 7266(a). Yet the government's reasoning is glued to *Bowles v. Russell*, 551 U.S. 205 (2007), as if that decision were a statute. But *Bowles*, a case decided two decades after the enactment of Section 7266(a), sets forth the rule for a deadline under an unrelated provision of the U.S. Code, 28 U.S.C. § 2107. *Bowles* also relies on a century of jurisprudence that treated appeals under Section 2107 and other deadlines for *court-to-court*

appeals as jurisdictional. *Bowles* does not purport to create a blanket, all-encompassing rule regardless of context. "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247-48 (2010). The relevant starting and ending point in this case is Section 7266(a), and that provision's text, structure, and history refute that Congress intended the 120-day deadline to limit the Veterans Court's jurisdiction.

Yet another problem with the government's position is that it is unfathomable Congress intended to impose an inflexible jurisdictional bar on veterans who seek benefits from disabilities resulting from their military service, who are typically unrepresented by counsel, and who may miss the deadline because of the very disabilities for which they seek benefits. Congress could not have intended to treat the Nation's veterans worse than criminals whose appeal deadline is not jurisdictional; worse than social security disability claimants whose appeal deadline is not jurisdictional; and worse than general litigants whose appeal deadline *is* jurisdictional but can be extended by the district court and whose mistaken filing in the wrong forum does not bar access to judicial review. Those anomalous results alone create the kind of ambiguity that triggers the pro-veteran canon of statutory construction.

The tragic consequences that would result from the decision below highlight the final problem with the government's position. Many veterans have debilitating mental and physical disabilities that prevent them from filing a timely notice of appeal in the Veterans Court. The VA's bureaucracy is marred by extraordinary delay, by a shocking rate of erroneous

disability benefit denials, and by the VA's routinely failing to advise a veteran until after the expiration of the 120-day deadline that the veteran mistakenly filed the notice of appeal with the VA instead of the Veterans Court. The government calls those considerations "overstated," U.S. Br. 8, but fails to even acknowledge the *amici* briefs filed by six eminent veteran organizations that represent millions of veterans and their families. These organizations have expressed the view that the Federal Circuit's decision would have devastating effects on the most severely disabled veterans and their families who have made the greatest of sacrifices to preserve the Nation's security and its most sacred values.

The government responds that "policy arguments" should be directed at Congress and not this Court. *Id.* at 30. But if the result of a lower court's statutory interpretation would depart so far from what the legislature could have intended, and the statutory language, structure, and history do not come close to compelling the arbitrary and tragic results that would flow from that interpretation, perhaps the lower court's decision is just wrong.

A. *Bowles* Does Not Bear The Dispositive Weight The Government Places On It

1. The government devotes most of its brief to arguing that this case involves an appeal. U.S. Br. 13-24. The relevant issue, however, is not whether Section 7266(a) specifies a time limit for an appeal, but whether the government can point to clear congressional intent to treat Section 7266(a) as jurisdictional. Pet. Br. 17-30. Absent such showing, the provision is not jurisdictional. *Id*. at 18-19.

Instead of showing Congress intended in Section 7266(a) to impose an unyielding jurisdictional deadline, the government tries to extract a categorical principle from *Bowles* that any deadline to file an appeal—regardless of statutory language, history, or context—is jurisdictional. *Bowles* does not "hold that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247. *Bowles* construes a particular statute that governs court-to-court civil appeals, 28 U.S.C. § 2107, and *all* of the historic precedents discussed in *Bowles* involve court-to-court civil appeals. *Bowles*, 551 U.S. at 209-10; Pet. Br. 37-38. A non-jurisdictional reading of Section 2107 would have repudiated "a century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2.

Here, the most relevant analog is a *non*-jurisdictional one. When Congress passed Section 7266(a), this Court repeatedly had held that the statutory deadline for a social security disability claimant to seek judicial review of an agency's denial of benefits is *not* jurisdictional and is subject to equitable tolling. Pet. Br. 30-31, 38 (discussing *Bowen v. City of New York*, 476 U.S. 467 (1986), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975)).

Bowles does not mention those decisions because *Bowles* does not address any statutory deadline for an appeal of agency action. To the extent that *Bowles* discusses an appeal other than one under Section 2107 or a petition for a writ of certiorari under 28 U.S.C. § 2101, *Bowles* observed that an appeal in a criminal case is *not* jurisdictional. 551 U.S. at 212. *Bowles* may establish a categorical rule for statutory deadlines with respect to Article III court-to-court

appeals in civil cases, but there is no justification for reading *Bowles* to establish a categorical rule that applies to the unique veterans context presented here.

2. The government also ignores the principle recognized in *Sims v. Apfel*, 530 U.S. 103, 110 (2000), that the relationship of lower courts to upper courts should not be reflexively equated to the relationship of administrative bodies to a reviewing court. The government thus disregards all the ways in which a proceeding before the Veterans Court fundamentally differs from the court-to-court context and all the ways in which the proceeding is functionally identical to a social security disability claimant's appeal of an agency's denial of disability benefits in a district court.

A Board-to-Veterans Court proceeding differs from the court-to-court context in that:

- The proceeding before the Board is unusually pro-claimant, *ex parte*, and exceedingly informal;
- The proceeding before the Board is non-adversarial;
- The proceeding in the Veterans Court is the first time that the veteran appears in a judicial forum;
- The proceeding in the Veterans Court is the first time that the veteran and the Secretary are adversaries; and
- The proceeding in the Veterans Court is subject to a court-to-court appeal to the Federal Circuit.

Pet. Br. 40-43.

The government also misperceives the implications of the status of the Veterans Court as an Article I court. U.S. Br. 27. The rule recognized in *Bowles* is driven in part by the separation-of-powers concerns implicated when Article III courts enlarge their own jurisdiction. *Bowles*, 551 U.S. at 212-13; Pet. Br. 38-39; Brief of Allan G. Halseth as *Amicus Curiae* ("Halseth Br.") 28-30. A non-jurisdictional reading of Section 7266(a) does not expand the power of the judiciary contrary to congressional intent. Rather, a non-jurisdictional reading would ensure that the Veterans Court is available for the reason that Congress created it: to give veterans their day in court.

The government also does not dispute that the Veterans Court proceeding is functionally identical to the social security context under 42 U.S.C. § 405(g) in that:

- Section 405(g), like Section 7266(a), sets forth the time limit for disability claimants to seek judicial review of the agency's denial of disability benefits;
- The district court under Section 405(g), like the Veterans Court, performs an *appellate* function under a deferential standard of review based on the administrative record;
- The social security scheme, like the veterans scheme, is non-adversarial and unusually pro-claimant; and
- A timely filing under Section 405(g) transfers jurisdiction from the agency to the court.

Pet. Br. 30-33, 47-48.

The government observes that a social security claimant files a "complaint" rather than a "notice of appeal." U.S. Br. 17. The government does not explain why, however, that difference should matter. The two are functionally equivalent in initiating suit for the first time against the agency in a court that then performs an appellate function based on the record before the agency.

3. The government also relies on this Court's statement in *Griggs v. Provident Consumer Disc. Co.* that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." 459 U.S. 56, 58 (1982) (per curiam); *see* U.S. Br. 11. But *Griggs* was discussing Federal Rule of Appellate Procedure 4(a) and thus a court-to-court appeal. In any event, the *Griggs* sentence cannot be interpreted to mean all appeal deadlines are jurisdictional. As the government does not contest, a timely challenge to a denial of social security disability benefits under 42 U.S.C. § 405(g) divests the agency of jurisdiction over the claimant's case and transfers jurisdiction to the district court, Pet. Br. 48, and that statutory deadline nonetheless is subject to equitable tolling.

The government's transfer-of-jurisdiction principle, moreover, reflects the rule that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs*, 459 U.S. at 58. That rule does not address whether the *deadline* for transferring an action from the agency to a court is itself jurisdictional. If Section 7266(a) sets forth a deadline that may be equitably tolled, the filing of the notice of

appeal still marks the point at which the Veterans Court acquires jurisdiction over the case.

4. The government also relies on the fact that the Veterans Court *exclusively* hears appeals. The government thus equates the deadline in Section 7266(a) with the jurisdictional deadline at issue in *Stone v. INS*, 514 U.S. 386 (1995), for a convicted alien to file a petition for review of an immigration removal order in a circuit court of appeals. U.S. Br. 18. Thus, the government submits that "[t]aken together," *Bowen*, *Bowles*, and *Stone* "make clear" that the time limit for seeking judicial review of agency action in *district court* is presumptively non-jurisdictional, while the time limit for an appeal and for seeking judicial review of agency action in any type of *appellate court* is jurisdictional. *Id*.

That gerrymandering of precedent ignores what this Court's cases actually hold and implausibly assumes Congress intended to treat a disabled veteran more harshly than a social security claimant who appeals a disability benefit denial and more like the convicted alien who challenges a removal order following a highly adversarial administrative proceeding. *Bowen*, *Bowles*, and *Stone* are not based on some overarching one-size-fits-all rule. Rather, each of those decisions construes congressional intent in light of the specific statutory context at issue. Pet. Br. 49-51 (discussing *Stone*).

Section 7266(a) involves a particular statutory context that does not remotely resemble the judicial review schemes at issue in *Bowles* and *Stone*. A non-jurisdictional reading of Section 7266(a) accordingly does not, as the government suggests, U.S. Br. 18, undermine the principle of *Bowles* or mean that all

deadlines for seeking initial judicial review of agency action are not jurisdictional. Context matters.

B. The Text And Structure Of Section 7266(a) Refute A Jurisdictional Reading

1. Section 7266(a)'s plain language does not purport to limit the Veterans Court's jurisdiction. Rather, Congress established a traditional limitations period for a veteran to challenge a final decision by the Secretary rejecting a veteran's claim for disability benefits. Pet. Br. 19-20.

That reading is supported by Section 7266(a)'s direction that the *veteran* take action within 120 days. The government responds that "*Bowles* did not suggest . . . that a statutory deadline for the initiation of an appeal can be treated as nonjurisdictional simply because it is phrased as a directive to the litigant rather than to the court." U.S. Br. 26. *Bowles*, however, did not instruct courts to ignore such an indication of legislative intent when it does exist. And the government itself urged that this factor distinguished the statute at issue in *Reed Elsevier* from the one in *Bowles*. Section 7266(a), like the statute in *Reed Elsevier*, "speaks to the obligations of the parties rather than the power of the court." Brief for the United States as *Amicus Curiae* 14-15, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103); *see also* Halseth Br. 11-15.

The government cites two examples of jurisdictional deadlines that do not expressly limit the court's power to act. U.S. Br. 26 (citing 28 U.S.C. § 2101(c) and 8 U.S.C. § 1105a(a)(1) (Supp. V 1993)). Neither, however, mentions the litigant. Here, Section 7266(a) explicitly directs the deadline to the

veteran without purporting to restrict the Veterans Court's jurisdiction.

2. The government further argues that Section 7266(a)'s plain language mandates a jurisdictional reading because the veteran files a "notice of appeal." U.S. Br. 13 (quoting 38 U.S.C. § 7266(a)). This Court does "not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010). An appeal is not an inherently jurisdictional word. And in any event, even if the term "appeal" presumptively carries with it a jurisdictional meaning, that meaning does not fit the unique veterans context. Congress repeatedly used the terms "notice," "appeal," "appellate review," and "appellant" in a broader, *non-jurisdictional* sense to refer to a veteran's challenge of a VA regional office's denial of benefits before the Board. 38 U.S.C. §§ 7104-7108; Pet. Br. 45-46.

For the same reason, the government errs in relying on the phrase "notice of appeal" in the title of Section 7266(a). U.S. Br. 13. To the extent that titles matter, the title of the provision defining the Veterans Court's jurisdiction, Section 7252(a), is "*Jurisdiction*; finality of decisions." 38 U.S.C. § 7252(a) (emphasis added). Section 7252(a) is contained in a subchapter also entitled "Organization and Jurisdiction." 38 U.S.C. ch. 72, subch. I. And although Section 7252(a) cross-references provisions in other statutory sections, it does *not* refer to the 120-day deadline in Section 7266(a). *See* Pet. Br. 22. By contrast, Congress placed the 120-day deadline in a subchapter entitled "Procedure." 38 U.S.C. ch. 72, subch. II.

The government observes that the jurisdictional deadline in *Bowles* appears in a "provision separate

from the statute conferring jurisdiction on the appellate court." U.S. Br. 25. That observation merely shows that "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, *while others are not*." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003) (emphasis added and internal citations omitted). This Court often has held that the placement of a requirement in "an entirely separate provision" from the provision addressing the court's jurisdiction suggests that the requirement is not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *see also Reed Elsevier*, 130 S. Ct. at 1245-46; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). The variation in outcomes only underscores that each statute must be judged on its own terms, not by some blanket rule applied devoid of all context.

3. The government's jurisdictional reading of the text assumes that Congress simultaneously created a right for disabled veterans to seek judicial review but eliminated that right when the very disability for which a veteran seeks benefits prevents the veteran from meeting the 120-day deadline. The government's reading defies common sense and "would produce no end of bizarre results" by treating the Nation's veterans more harshly than most litigants in our federal system. Brief of the Federal Circuit Bar Association as *Amicus Curiae* ("FCBA Br.") 10. In settings where time limits *are* jurisdictional, Congress typically includes language authorizing courts to extend the deadline for good cause, excusable neglect, or if a party lacks adequate notice of an adverse judgment. 28 U.S.C. §§ 2101(c), 2107(c). Federal Rule of Appellate Procedure 4(d) also treats a timely notice of appeal that is mistakenly filed in the

court of appeals as if it were correctly filed in the district court.

Under the Kafkaesque regime adopted below, Pet. App. 46a (Mayer, J., dissenting), a veteran would face stricter limits in filing his initial suit against the Secretary in Veterans Court than if he appeals an adverse Veterans Court decision to the Federal Circuit under 28 U.S.C. § 2107, or if he seeks review of the Federal Circuit's decision in this Court under 28 U.S.C. § 2101. Nothing in Section 7266(a)'s text or structure suggests that Congress intended to produce these anomalous results and to erect an unforgiving, rigid jurisdictional deadline at the first opportunity the veteran has to seek judicial review.

C. Section 7266(a)'s History And Purpose Refute A Jurisdictional Reading

1. The Veterans' Judicial Review Act's history shows that Congress intended to "finally provide veterans their day in court." 134 Cong. Rec. 31,459 (1988) (statement of Sen. Mitchell); *see also id*. at 31,460 ("It is time to open the courthouse doors to American's 28 million veterans and their families."); *id*. (statement of Sen. Matsunaga) ("[The bill] provides many veterans what they have been seeking all along: the opportunity for true judicial review of claims."). In short, the Act was designed to treat veterans with "compassion" and "fairness," and to provide them with "fundamental justice." S. Rep. No. 100-418, at 31, 50 (1988). The history provides no suggestion that Congress intended the 120-day deadline to restrict the Veterans Court's jurisdiction.

The government argues that the history of the Veterans' Judicial Review Act "makes clear that Congress regarded review in the Veterans Court as

an appeal." U.S. Br. 19. The government again focuses on the wrong question to reach its desired result. The question is not whether Congress intended review in the Veterans Court to constitute an "appeal," but whether Congress intended the 120-day deadline to be jurisdictional.

The floor statement of Senator Cranston relied upon by the government, U.S. Br. 21, reflects Congress's intent to *ease* the veteran's burden in seeking judicial review by allowing the veteran to file a form notice of appeal rather than a full complaint. 134 Cong. Rec. at 31,470 ("[T]he amount of activity that would have to be accomplished to file the appeal under the compromise agreement is also reduced."). The trade-off for a simpler form to initiate review was a shorter time limit (180 days reduced to 120 days), not the preclusion of judicial review if a veteran missed the deadline for reasons beyond his control. *Id*.

Nothing in Senator Cranston's statement suggests he, or any legislator, understood that the 120-day deadline would constitute a rigid jurisdictional rule. To the contrary, in the same floor statement, Senator Cranston stated that the Act would place veterans on equal footing with social security disability claimants. The Senator explained that the VA's disability benefits system is "directly analogous" to and "resemble[s] most closely" the social security disability scheme. 134 Cong. Rec. at 31,466.

The government's speculation over the meaning of Section 7266(a)—based on three bills never enacted—is likewise unavailing. U.S. Br. 19-23. The report reconciling the three bills refers to the original Senate bill, in which the veteran would "commence[]" a "civil action," as setting up a process for an

"Appeal." 134 Cong. Rec. at 31,479. The drafters of the compromise bill that became Section 7266(a) thus used the term "appeal" to describe a veteran's request for judicial review, not because that term carried with it any jurisdictional significance. Pet. Br. 45-46; FCBA Br. 22-24.

2. The government also observes that one of the bills had a good cause exception to the deadline, which was not included in Section 7266(a). U.S. Br. 23. The presence *vel non* of a good cause exception, however, has no independent jurisdictional significance. Some deadlines providing good cause extensions are jurisdictional, *see* 28 U.S.C. § 2107 (civil court-to-court appeals); 28 U.S.C. § 2101(c) (petition for a writ of certiorari), while others are not, *see* Fed. R. App. P. 4(b)(4) (criminal court-to-court appeals); 42 U.S.C. § 405(g) (permitting "such further time as the Commissioner of Social Security may allow").

Similarly without merit is the government's reliance on the good cause exception to the deadline for administrative appeals to the Board under Section 7105(d)(3). U.S. Br. 23. Congress passed Section 7105(d)(3) in 1962—*i.e.*, 26 years before it enacted Section 7266(a). Pub. L. No. 87-666, sec. 1, § 4005(d)(3), 76 Stat. 553, 553-54 (1962). Decisions of the 87th Congress hardly illuminate the intent of the 100th. *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (inclusion of language in one provision does not mean deliberate exclusion elsewhere when "the two relevant provisions were not considered or enacted together").

If anything, Congress's exclusion of any cause exception in Section 7266(a) reflects that Congress presumed that equitable tolling would apply and that a good cause exception was therefore unnecessary.

Cf. United States v. Brockamp, 519 U.S. 347, 350 (1997) ("Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception."). By contrast, the inference urged by the government presupposes that Congress intended to treat veterans more harshly than civil appellants, criminal appellants, and social security disability appellants. If Congress really intended to fashion a Draconian jurisdictional limit in 7266(a)—in the midst of an unequivocally pro-veteran statute—it presumably would have used express language as it had in the statute that the 1988 Act repealed. *See* 38 U.S.C. § 211(a) (1982) ("no . . . court of the United States shall have the power or jurisdiction to review any [VA benefits determination]"). At a minimum, Congress would have included *some* mechanism to allow an extension where manifest justice demanded it.

D. The Pro-Veteran Canon Of Statutory Construction Applies In This Case

1. As one of the *amici* aptly stated, "[t]he canon requiring courts to construe veterans statutes liberally and compassionately in favor of veterans reflects a principle almost as old as government and war—that the body politic for whom the soldier risks life and limb should exhibit a spirit of gratitude and generosity for those sacrifices." Halseth Br. 16-17. That principle manifests itself in the canon that any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see* Pet. Br. 29-30.

The government sweeps the canon aside, arguing that any ambiguity is dispelled by "'the longstanding treatment of statutory time limits for taking an appeal as jurisdictional.'" U.S. Br. 29 (quoting

Bowles, 551 U.S. at 210). That argument, however, is erroneously premised on a non-existent rule that any deadline for an "appeal" is jurisdictional without regard to the actual statute at issue. This Court discerns Congress's intent by "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006), not by a myopic focus on judicial precedent that interprets different statutes in different contexts.

Properly framed, the pro-veteran canon is triggered if this Court has any reason to doubt that Congress intended to foreclose all access to judicial review when a veteran misses the 120-day deadline through no fault of his own. Such reasons abound. The text of Section 7266(a) contains no language framing the time limit as a jurisdictional restriction on the Veterans Court. The deadline is not contained in the provision or subchapter of the Act that addresses the Veterans Court's jurisdiction. A jurisdictional reading would conflict with the Act's history and its paramount purpose to ensure that veterans have their day in court. And a jurisdictional reading would put disabled veterans in an inferior position to other litigants with no apparent purpose.

2. The government also argues that *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), establishes that the pro-veteran canon does not justify the creation of "special rules" for veterans. U.S. Br. 28. That argument is again premised on the misassumption that all statutory appeal deadlines are jurisdictional, regardless of the statute at issue. There is nothing "special" about a non-jurisdictional reading of Section 7266(a) if this Court concludes that it is implausible

that Congress intended to bar, without exception, any judicial review by a veteran who misses the deadline through no fault of his own.

Moreover, unlike the "prejudicial error" provision at issue in *Sanders*, 129 S. Ct. at 1704, which was borrowed verbatim from, and hence intended to be interpreted coextensively with, the Administrative Procedure Act, Section 7266(a) is not comparably worded to an analogous jurisdictional deadline. Section 7266(a) neither looks nor functions like the statutes at issue in *Bowles* or *Stone*.

E. The Possibility That Congress May Overrule The Decision Below Is No Reason To Affirm

The government argues that Congress may overrule the decision below and notes that legislation has been proposed to that effect. U.S. Br. 35-36. These observations are hardly a basis for affirming an erroneous decision of a lower court.

1. As a threshold matter, the government states that the adverse consequences of a jurisdictional deadline are "overstated." U.S. Br. 8. That view, however, leaves some question as to why the government has urged Congress to overrule the decision below. *Id*. at 35.

In any event, the government does not mention, much less respond to, the *amici* briefs filed by six prominent veterans organizations representing disabled veterans and their families. Those briefs show that "hundreds of thousands" of veterans of past and present wars "have severe physical and mental disabilities that affect their ability to prosecute their claims and protect their rights." Brief for *Amici Curiae* Paralyzed Veterans of America *et al.*

("PVA Br.") 16; *accord* Brief *Amicus Curiae* of the America Legion ("AL Br.") 2-9; Brief of the *Amici Curiae* National Organization of Veterans' Advocates, Inc. *et al.* ("NOVA Br.") 6-9, 21-22; Brief of the National Veterans Legal Services Program as *Amicus Curiae* ("NVLSP Br.") 14-18.

Those briefs also show that the sustained military conflicts in Afghanistan and Iraq have led to a proliferation of claims for benefits that are critical to a veteran's transition from military to civilian life and to meeting the daily needs of veterans and their families. NOVA Br. 6-10; PVA Br. 8-10. And the briefs disturbingly show that the government all too often erroneously denies disability benefit claims after the veteran has spent years navigating the labyrinth of the VA bureaucracy. NOVA Br. 13; NVLSP Br. 10-12; *accord* Pet. Br. 43.

As to the startling statistic that veterans prevail in roughly 80% of cases decided by the Veterans Court on the merits, the government responds that the figure is "technically accurate." U.S. Br. 31. The government nonetheless parses the percentage by excluding certain remands to argue that the Board is wholly or partially reversed on the merits in only 61% of the cases. *Id*. Thus, even by the government's calculation, 6 in 10 veterans prevail in part when they seek relief in the Veterans Court. *See* NVLSP Br. 10-11 (analyzing statistics).

The government also observes that non-attorney representatives who assist veterans before the Board can "inform [veterans] about their appeal rights." U.S. Br. 33. But the government does not dispute that up to 70% of veterans, like Mr. Henderson, initiate proceedings before the Veterans Court unrepresented. Pet. Br. 8; PVA Br. 36; FCBA Br. 13;

NOVA Br. 18; *see* NVLSP Br. 19 (observing that many veterans assistance organizations "do not litigate in the Veterans Court"); Brief of *Amicus Curiae* United Spinal Association ("USA Br.") 8 & n.3 ("[O]f the 133 claimants whose cases have been dismissed as untimely filed since the Federal Circuit's decision, 109 were self-represented.").

Nor does the government contest that (1) notwithstanding any assistance veterans may receive before the Board and from the VA's form notices, veterans routinely *timely* file the notice of appeal but do so in the wrong forum; (2) the VA routinely does not notify the veteran of the misfiling until after the deadline has passed; and (3) on occasion the VA misinforms the veteran in the appeal process. Pet. Br. 25; PVA Br. 23-26; NOVA Br. 20, 22-23; FCBA Br. 14-16 & n.3; *see also* NVLSP Br. 19 ("It has been commonplace for veterans (even when assisted by service organizations) to file in the wrong venue.").

The importance of judicial review is not dissipated by existing administrative mechanisms for reopening, collateral attack, or Board reconsideration. U.S. Br. 34, 35. The first two procedures are subject to a threshold requirement of "new and material evidence," 38 U.S.C. § 5108, or "clear and unmistakable error," 38 U.S.C. §§ 5109A & 7111. Moreover, unlike the Veterans Court, the Board is powerless to diverge from VA regulations, Secretarial instructions, and General Counsel opinions on issues of law. *Compare* 38 U.S.C. § 7104(c), *with* 38 U.S.C. § 7261(a)(1)-(3). Thus, putting aside the years such proceedings could add to the veteran's effort to obtain benefits, *see* NOVA Br. 13, those alternatives are no substitute for the *de novo*, independent judicial

review that Congress intended to provide veterans when it created the Veterans Court.

2. The potentially tragic consequences of the Federal Circuit's decision are not, as the government argues, U.S. Br. 35, the result of the statute Congress enacted but the result of the Federal Circuit's over-reading of this Court's decision in *Bowles*. As discussed, the decision below applied a non-existent categorical rule as to when statutory deadlines are jurisdictional that makes no sense in light of the context of Section 7266(a).

Similarly, there is no reason to affirm the decision below based on the government's speculation that Congress may overrule the decision below. U.S. Br. 35-36. In any case involving statutory interpretation, Congress may address the question presented.

Moreover, the bill that the VA has proposed, U.S. Br. 35, would apply only prospectively and thus would not apply to petitioner or the hundreds of veterans already adversely affected by the lower court's rule. Cert. Reply 6; USA Br. 7 (noting dismissals based on decision below at "a rate of over three dismissals per week"). Likewise the Senate bill identified by the government, U.S. Br. 35, would only "apply with respect to notices of appeal filed on or after the date of the enactment of this Act." S. 3517, 111th Cong. § 212 (2010). And although the House has passed a bill containing a good cause exception that would apply retroactively, H.R. 6132, 111th Cong. § 4 (as passed by House, Sept. 28, 2010), the VA has opposed an identically worded bill, H.R. 5064, 111th Cong. (introduced Apr. 16, 2010), based, *inter alia*, on the bill's retroactivity. *See* Hearing Before Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs, 111th

Cong. (July 1, 2010) (statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin., United States Dep't of Veterans Affairs).

At bottom, the government's position that Congress could, should, and likely would overrule the outcome of the Federal Circuit's decision only prompts the question: could Congress have intended that outcome in the first instance?

CONCLUSION

Based on the foregoing reasons and the reasons stated in petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

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