No. 09-1036

In the
Supreme Court of the United States

DAVID L. HENDERSON,
Petitioner,
v.
ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* PARALYZED VETERANS OF AMERICA AND AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Paralyzed Veterans of America and AARP join to file this amicus brief in support of Mr. Henderson. Paralyzed Veterans of America is a non-profit veterans service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111 (2006). The organization has more than 15,000 members; each is a veteran of the Armed Forces of the United States who suffers from an injury or disease of the spinal cord. Paralyzed Veterans of America's statutory purposes include: acquainting the public with the needs and problems of paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for paraplegics. *Id*.

Paralyzed Veterans of America carries out its statutory purposes by operating various beneficial programs, such as providing free representation before the Department of Veterans Affairs (VA or agency) to its members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the consent of the parties have been filed with the Clerk.

Paralyzed Veterans of America also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions.

AARP is a national nonpartisan, nonprofit organization that helps people fifty and older maintain independence, choice and control in ways that are beneficial and affordable to them and to society as a whole. In representing the interests of its members, and to promote social welfare, AARP seeks to enhance the quality of life and to promote independence, dignity, and purpose for individuals as they grow older. Assuring that older people receive the government benefits they are entitled to is a top priority for AARP. There are approximately 17,000,000 veterans age 50 and older in the United States. *See* Veteran Population 2007, DEP'T OF VETERANS AFFAIRS, *available at* http://www1.va.gov/VETDATA/Demographics/Demographics.asp. Over half of the veterans with service-related disabilities are older than 55. *See id.* at 41. In 2000, of the veterans with service-related disabilities, Vietnam War veterans comprised the largest group, followed by peacetime veterans, World War II veterans, Gulf War veterans, and veterans of the Korean War. *See id.* Since many veterans rely upon their monthly veterans benefits to meet their basic needs, and their needs frequently change as they grow older, AARP is deeply concerned that older veterans like Mr. Henderson receive the veterans benefits to which they are entitled.

Because the United States Court of Appeals for the Federal Circuit's decision in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*), results in the denial of judicial review of agency benefit decisions that affect the members of each organization, Paralyzed Veterans of America and AARP have a strong interest in seeking to have this Court reverse the *Henderson* decision.

SUMMARY OF ARGUMENT

The Federal Circuit's decision is inconsistent with Congress's intent, harms veterans, and should not stand. Petitioner Mr. Henderson and the dissent in the Federal Circuit's *en banc* decision have eloquently explained the legal errors in the decision below, *Henderson,* 589 F.3d at 1221-33; this Court's recent decision in *Reed Elsevier* further illustrates the error in the Federal Circuit's analysis. *See Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010). Amici write to support Mr. Henderson and to further argue that Congress did not and could not have intended the interpretation of 38 U.S.C. § 7266 (2006) adopted by the Federal Circuit or the consequences that result from the interpretation.

These consequences may be dire for certain veterans. Many veterans with severe disabilities, such as the members of Paralyzed Veterans of America, are prevented by those disabilities from participating in the normal activities of daily life for long periods of time. A disabled veteran may be hospitalized and rehabilitating for well more than 120 days, without regular access to mail, and may

unknowingly lose appeal rights as a result. When appeal rights are lost, so are any chances of the earliest possible effective date for the assignment of benefits – benefits that include medical care that may be essential to the veteran.

The Federal Circuit's decision has already had the effect of rewarding VA for thwarting veterans' attempts to appeal. Using *Henderson,* the Court of Appeals for Veterans Claims has dismissed appeals where VA held or misdirected a veteran's appeal-related correspondence, causing the veteran to lose his appeal rights. Under prior case law, the veteran's misdirected pleading could be construed as timely filed, but now the veteran has no recourse in this situation except to start the VA's lengthy claims process anew. Congress did not intend this result when making judicial review available to veterans.

Paralyzed Veterans of America and AARP believe that *Henderson* harms their members and all veterans and ask that this Court reverse the Federal Circuit's decision.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO SETTLED LAW AND HARMS DISABLED VETERANS.

The Federal Circuit departed from settled law when it decided *Henderson,* relying on *Bowles v. Russell,* 551 U.S. 205 (2007), rather than *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96

(1990), to determine that 38 U.S.C § 7266 is a jurisdictional "time of review" provision and that, therefore, equitable tolling is not available to veterans seeking judicial review of VA decisions. *Henderson,* 589 F.3d at 1220. The court erred in presuming that *Bowles* somehow undermined or diminished *Irwin*. *Henderson,* 589 F.3d at 1212-13. This is simply not the case; *Irwin* was, and still is, the relevant precedent. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) ("Courts do not normally overturn a long line of earlier cases without mentioning the matter," referring to *Irwin*); *Bowles,* 127 S.Ct. at 2369 (Souter dissenting)*; see also Reed Elsevier,* 130 S.Ct. at 1245, 1247-48.

Prior to *Henderson,* and based upon *Irwin*, the Federal Circuit had developed significant jurisprudence on the applicability of equitable tolling to veterans' claims. *See, e.g.*, *Bailey v. West,* 160 F.3d 1360 (Fed. Cir. 1998) (*en banc*); *Jaquay v. Principi,* 304 F.3d 1276 (Fed. Cir. 2002) (*en banc*) (veteran misfiled reconsideration); *Santana-Venegas v. Principi,* 314 F.3d 1293 (Fed. Cir. 2002) (veteran misfiled at VA Regional Office), *Barrett v. Principi,* 363 F.3d 1316 (Fed. Cir. 2004) (mental illness may have prevented timely filing); *Arbas v. Nicholson,* 403 F.3d 1379 (Fed. Cir. 2005) (heart condition may have prevented timely filing). These cases fell roughly into two categories, one in which a veteran attempted to protect his rights by filing some indication of an intent to appeal but fell short or was impeded by his litigation adversary, and another in which the veteran's disability prevented him from

even protecting his rights. These distinctions were based in part on this Court's decision in *Irwin,* in which this Court stated that equitable tolling is available (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. This rubric permitted the necessary flexibility both for veterans to have their errors assessed fairly and for the Court of Appeals for Veterans Claims to protect its jurisdiction on a case-by-case basis. 38 U.S.C. § 7266.

With *Henderson*, the Federal Circuit has replaced flexibility with a rigid, unyielding rule. This inflexibility has caused actual harm to disabled veterans claiming benefits. These veterans, who may have either misfiled a notice of appeal with the VA or the agency's Board of Veterans' Appeals (Board)[2] or filed the notice late because of their disability, as Mr. Henderson did, had no idea that their minor errors would have significant, fatal consequences to their claims. This Court should reverse *Henderson* and restore the prior line of cases.

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[2] The Board is a subpart of the VA responsible for handling appeals of benefits claims within the agency. *See*, *e.g.*, 38 U.S.C. §§ 7101-7105 (2006). The Board is a nonadversarial forum, but the time for appeal to the Court of Appeals for Veterans Claims begins to run upon issuance of the Board's decision. 38 U.S.C. § 7266 (2006).

A. Who are the veteran claimants affected by this decision?

For the insidious effect of *Henderson* to be understood, the nature of the population seeking VA benefits must be understood as well. Currently, VA serves more than 23 million veterans. 2010 Organizational Briefing Book (June 2010) DEP'T OF VETERANS AFFAIRS, at 2, *available at* http://www4.va.gov/ofcadmin/docs/vaorgbb.pdf. The median age is 61; more than 9 million veterans are over 65 years old. *Id*.

More than 3 million veterans receive disability compensation, and of those, nearly 290,000 are rated 100 percent disabled.[3] VA Stats at a Glance, DEP'T OF VETERANS AFFAIRS, updated July 30, 2010, http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf. An additional 270,402 receive "individual unemployability" benefits, which are paid at the 100 percent rate. *Id*. Under 38 C.F.R. § 4.16 (2009), a veteran may be eligible for these benefits if his or her service-

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[3] VA ratings are made in increments of 10 and expressed in percentages ranging from 0 to 100; they represent the average impairment of earning capacity. 38 C.F.R. § 4.1 (2009). While "special monthly compensation" may increase a veteran's benefits payment, *see* 38 C.F.R. § 3.350 (2009), for most veterans 100 percent is the highest rating. A 100 percent rating can be assigned for a single disability, for example paraplegia, 38 C.F.R. § 4.71a (2009), severe mental disorders, 38 C.F.R. § 4.130 (2009), or anatomical loss of both eyes, 38 C.F.R. § 4.79 (2009). A 100 percent rating can also be reached through a combination of disabilities. 38 C.F.R. § 4.25 (2009).

connected disabilities do not combine to 100 percent yet those disabilities render the veteran unable to maintain employment. Thus, at the moment, more than half a million severely disabled veterans receive compensation at the 100 percent rate, and VA has noted that, while the average disability rating was 41 percent in 2009, the percentages of veterans in the two highest disability levels were growing at the fastest rates. Strategic Plan FY 2010-2014, DEP'T OF VETERANS AFFAIRS, at 13, June 2010, *available at* http://www1.va.gov/op3/Docs/StrategicPlanning/VA_2010_2014_Strategic_Plan.pdf (hereinafter "VA Strategic Plan").

This VA Strategic Plan recognizes that increased disability levels, the changing nature of the disabilities veterans are experiencing, and an aging veteran population presents challenges:

> Disability compensation has changed in recent years as the nature of combat related wounds and service-connected injuries has changed. Many of the disabilities that are increasing most rapidly in the Veteran population are those that are difficult to rate, such as PTSD. For example, new linkages to Agent Orange – specifically, prostate cancer discovered in 1996 and Type II diabetes discovered in 2001 – have contributed to the upward trend of disability ratings. . . .

The aging of America's citizens will affect VA. . . . Overall, the number of aging Veterans who may need extended care is growing rapidly: the number of enrolled Veterans 85 or older is projected to increase 32 percent from 601,202 to 792,498 between 2009 and 2018. This group accounts for the highest usage of long-term care services. Though not all aging Veterans will require our care, the growth in this population is highly likely to increase the demand for the extended and specialized services the elderly require. . . .

In addition to changes in the Veteran population, Veterans – and VA – face an uncertain external environment. For example, Veterans face unique challenges as part of their reentry into the workforce. Economic conditions are having a significant negative impact on Veterans and a disproportionate impact on recently-separated Veterans compared to the average American. Veterans continue to suffer disproportionately high homeless rates compared to the general population. On any given night in 2008, an estimated 131,000 Veterans were homeless, representing every war and generation including current OEF/OIF

> [Operation Enduring Freedom/ Operation Iraqi Freedom] operations.

Id. at 12-14. Thus, VA is well aware that veterans are increasingly relying more and more upon the agency.

Paralyzed veterans are likely to have a complex disability profile, and they rely heavily – and uniquely – on VA for help. The VA assists between 9,000 and 15,000 veterans with spinal cord injuries, disease and disorders ("SCI/D") on a yearly basis. *See* Sherri Lavela et al., *Disease Prevalence and Use of Preventative Services: Comparison of Female Veterans in General and Those with Spinal Cord Injuries and Disorders*, 15. J. WOMEN'S HEALTH 301, 302 (2006). This makes the VA the largest single provider of care for individuals with spinal cord injury in the United States. *See id*.

Individuals with spinal cord injury or disease are disproportionately affected by chronic health conditions and other serious illnesses. *See id.* In a study conducted on secondary conditions in veterans with SCI/D, the researchers found that "serious . . . secondary conditions are common and take an important toll on people living with SCI/D." Geoffrey M. Prysak, *Prevalence of Secondary Conditions in Veterans with Spinal Cord Injury and Their Interference with Life Activities*, TOPICS IN SPINAL CORD INJURY REHAB., Summer 2000, at 39. Of all the participants in this study, 37.4% had arthritis or rheumatism, 30.8% had hypertension,

26.4% had lung/respiratory problems, and 23.1% had a hearing impairment. *See id.* at 38.

What is most striking about this study is that the researchers demonstrated that these secondary conditions significantly interfere with the daily living activities of veterans with spinal cord injury. *See id.* at 39. Of the participants in the study:

- 74.7% reported that they needed help to get across a small room,
- 49.5% reported that they needed help to enter and exit their homes,
- 45.1% reported that they needed help to bathe,
- 38.5% reported that they needed help to dress,
- 19.8% reported that they needed help to eat, and
- 16.5% reported that they needed help with personal grooming.

See id. at 38. The study also revealed the "troubling" prevalence of psychological symptoms among the participants. *See id.* at 40. All of these limitations affect a person's ability to conduct personal business and meet deadlines.

In another study, "reports of the mean number of physical health and mental health days that were 'not good' were nearly double among women with SCI/D over women in general." Lavela, *supra*, at 305. In addition, in a study where over half of the participants were veterans with SCI/D, researchers found that "the experience of a life-

threatening trauma such as a spinal cord injury may cause fears about death to surface" and that "death anxiety predicts a significant amount of the total levels of posttraumatic stress reactions." Erin Martz, *Death Anxiety as a Predictor of Posttraumatic Stress Levels Among Individuals with Spinal Cord Injuries*, 28 DEATH STUDIES 1, 14-15 (2004). In fact, yet another study indicated that those "veterans with paraplegia are at a substantial risk for PTSD" since the study determined that 25% of the participants met criteria for current PTSD and 47% met criteria for lifetime PTSD. *See* Cynthia L. Radnitz, *Posttraumatic Stress Disorder in Veterans with Spinal Cord Injury: Trauma-related Risk Factors*, 11 J. TRAUMATIC STRESS 505, 517 (1998). And, "[d]epression is found two or three times more often among people who are paralyzed than among the nondisabled." Depression, CHRISTOPHER AND DANA REEVE FOUND., http://www.christopherreeve.org/site/c.mtKZKgMWKwG/b.5016279/k.1FD9/Depression.htm#. These studies and statistics demonstrate that spinal cord injury and the companion complications among paralyzed veterans could easily interfere with a veteran's ability to comply with a strict statutory deadline.

Likewise, studies have shown that older veterans are especially susceptible to certain health issues, making it more difficult to comply with a strict filing deadline. Depression, in particular, is an enormous problem for elderly veterans. *See* Leonard E. Egede & Ralph H. Johnson, Telepsychology-Service Delivery for Depressed Elderly Veterans, http://www.hsrd.research.va.gov/research/abstracts.c

fm?Project_ID=2141696588. A recent study of nearly 300,000 veterans age 55 and older revealed that older veterans with depression were twice as likely to develop dementia compared to those without depression. *See* Amy L. Byers, *The Impact of Dysthymia and Depression on Risk of Dementia and Mortality Among Older Veterans*, 6 ALZHEIMER'S & DEMENTIA S464 (2010). The most prevalent service-connected condition among older veterans in 2009 was defective hearing, s*ee* Veterans Benefits Administration Annual Benefits Report Fiscal Year 2009, DEP'T. OF VETERANS AFFAIRS, at 17, May 2010, *available at* http://www.vba.va.gov/REPORTS/abr/2009_abr.pdf, and research indicates that there is a significant correlation between defective hearing and depression. *See* Francisco Panza et al., *The Relationship Between Hearing Impairment and Depression in Older Veterans*, 54 J. AM. GERIATRICS SOC'Y 1475, 1476 (2006).

Additionally, the reactivation of PTSD among older veterans including World War II, Korean War, and Vietnam era veterans has become frighteningly more frequent. One study found that 15% of Vietnam veterans currently have PTSD. *See* Roger J. Sherwood et al., *The Aging Veteran: Re-Emergence of Trauma Issues*, 40 J. GERONTOLOGICAL SOC. WORK 73, 75 (2003). According to Dr. Roger Sherwood and other researchers:

> [A]s [veterans] begin to experience the changes and losses associated with aging, traumatic memories and delayed stress reactions are not uncommon.

> The aging process itself brings with it a multitude of physiological, psychological and social adjustments. Aging may be considered a risk factor for previously traumatized individuals [citation omitted]. Late onset PTSD may be triggered by developmental tasks of later life while existing PTSD symptoms may be exacerbated by the aging process. . . . The veteran with PTSD may find that a current loss triggers intrusive thoughts from the past and with it the experience of unresolved feelings. It is not uncommon to see a previously functional individual become symptomatic following real and perceived losses such as: retirement, moving, debilitating illness in self or spouse or death of a loved one.

Id. at 77-78. Another study revealed preliminary evidence of a phenomenon similar to (though distinct in many ways) late-onset PTSD – late-onset stress symptomatology ("LOSS") – among older veterans. *See* Eve H. Davison, *Late-Life Emergence of Early-Life Trauma*, 28 RESEARCH ON AGING 84, 108 (2006). LOSS is

> a phenomenon among older veterans who (a) were exposed to highly stressful combat conditions in their early adult years; (b) have functioned successfully over the course of their lives, with no

> histories of chronic stress-related disorders; but (c) begin to register increased combat-related thoughts, feelings, reminiscences, memories, or symptoms commensurate with changes of the aging process 30, 40, or even 50 years after their combat experiences.

Id. at 87. Approximately 85% of veterans in the study "reported increased thoughts and memories of their time in the war" while many of the veterans "described having sudden, unwanted, and intrusive memories related to their wartime experiences." *Id.* at 97.

It is worth taking special note of PTSD and traumatic brain injury (TBI), two disabilities that affect veterans in disproportionate numbers and can have an effect on a veteran's cognitive abilities. 38 C.F.R. §§ 4.124a, 4.130 (2009). Nearly 400,000 veterans receive disability compensation for PTSD. VA Stats at a Glance. Numbers on compensation for TBI are harder to come by, as it is often associated with other injuries, 38 C.F.R. § 4.124a, but the Department of Defense reports just under 179,000 diagnoses of TBI among members of all the military branches since 2000. Department of Defense Numbers for Traumatic Brain Injury, http://www.health.mil/Research/TBI-Numbers.aspx. Veterans with these cognitive impairments may have difficulty understanding and meeting statutory filing deadlines.

Finally, the newest veterans are filing claims in high numbers, but with difficulty. VA has stated that "of the 1.1 million OEF/OIF Veterans released from service between 2001 and 2009, more than 37 percent, or approximately 405,000, have filed for disability benefits. Of those, almost 50 percent have filed with incomplete information." VA Strategic Plan at 16. Claims such as these often end up in the appeals process.

Thus, millions of veterans utilize the VA claims process, and hundreds of thousands of these veterans have severe physical and mental disabilities that affect their ability to prosecute their claims and protect their rights. These are the people that Congress intended to provide for in creating judicial review of agency decisions. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) (VJRA). These are the people who are also adversely affected by *Henderson*.

B. **Did Congress intend that this group be unknowingly deprived of appeal rights**?

The answer must be no. It is inconceivable that Congress would create a system in which disabled veterans could seek redress against VA when their benefit claims are denied, and then punish those same veterans for being disabled and unable to protect their rights.

It is well known that the VA has a backlog of cases and that a veteran may wait years for a decision on his claim. It is also well known that the VA claims system is ex parte and nonadversarial. This Court has long recognized that the character of the veteran's benefits statutory scheme is strongly and uniquely pro-claimant. *See, e.g., Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (veterans statutes must be liberally construed for the benefit of the returning veteran (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (noting that, where statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor" (citing *Brown v. Gardner*, 513 U.S. 115, 118, (1994))). Because this nonadversarial system imposes no time requirements upon the VA or Board in which to render a decision, the veteran cannot control when the 120-day appeal period in § 7266(a) may begin to run. A veteran could file a "substantive appeal," the last step he is responsible for in the agency process when appealing to the Board, 38 U.S.C. § 7105(b)(2); 38 C.F.R. § 20.202 (2009), and a year or two later a Board decision may simply appear in his mailbox one day. This aspect of the "nonadversarial" VA system cannot be emphasized enough: there are no time limits on VA, at any point in the process. A veteran has no way to know when his appeal period will begin to run.

This unpredictability can result in a heavy burden on veterans with severe disabilities such as those described in the previous section, who may not understand the significance of this seemingly

random piece of mail. Additionally, for veterans whose conditions and complications from those conditions may require lengthy hospitalization and rehabilitation, a jurisdiction-preserving action may be required of them when they are in no position to give it thoughtful attention.

For paralyzed veterans, this is not a theoretical possibility, it is a fact of daily life. Homer S. Townsend, executive director of Paralyzed Veterans of America, is a long-time member and a seasoned, sophisticated executive. On January 25, 2010, he was hospitalized for a pressure ulcer.[4] Surgery was required, there were complications, and he has been hospitalized four times for weeks at a time or under home care since January; he expects to be released from medical oversight in September 2010. Telephone Interview with Homer S. Townsend, Executive Dir., Paralyzed Veterans of America in D.C. (Sept. 8, 2010). Even though Mr. Townsend has had assistance to keep up with personal and business affairs, he said that deadlines and payments could be easily missed, especially during hospital stays. *Id.*

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[4] Pressure ulcers are one of the most common health risks for paralyzed people and can turn into life-threatening infections; surgical care of a pressure ulcer may require "lengthy hospitalization." Pressure Ulcer Treatment, NW REG'L SPINAL CORD INJURY SYS., *http://sci.washington. edu/info/newsletters /articles/05fall_pressureulcers.asp*; *see also* Medical Services Program, PARALYZED VETERANS OF AMERICA, *http://www. pva.org/site/PageServer ?pagename=benefits_medical_ commoncomplications*.

Even though he did not have a VA claim pending this time, "I know how to advocate for myself," Mr. Townsend, a former service officer, said. "But for veterans who don't," there can be missed deadlines or misunderstandings about what they are required to do in the VA process. Additionally, he noted that medical issues can arise suddenly for veterans with serious disabilities. "A [Paralyzed Veterans] member can go in for his annual check up, and if the doctor finds something that's a concern, the veteran can end up in the hospital for two or three months, far from home," he said.

Veterans end up "far from home" because, while the VA has more than 900 clinics and facilities nationwide, *see* 2010 Organizational Briefing Book at 1, the agency has only 24 "SCI Centers" that specialize in treating veterans with spinal cord injury and disease. *See* SCI Centers, DEP'T OF VETERANS AFFAIRS, *http://www.sci.va.gov/sci_centers.asp*. SCI centers may treat all eligible SCI veterans. 38 U.S.C. § 1705(a)(4) (2006); 38 U.S.C. § 1710 (2006). A disabled veteran such as a Paralyzed Veterans of America member who requires extensive hospitalization and surgical intervention may find himself tens or hundreds of miles from home, even at the nearest SCI Center. It is not difficult to imagine that a person's daily business, such as answering the mail, might be disrupted in this situation.

That is precisely what happened to another long-time Paralyzed Veterans member and executive. Like Mr. Townsend, Richard L. Glotfelty has recently experienced a lengthy hospital stay

because of complications from his spinal cord injury. Telephone interview with Richard L. Glotfelty, Vice Pres., Paralyzed Veterans of America in D.C. (Sept. 9, 2010). Mr. Glotfelty had a cardiac condition that required surgical intervention. While most people might have been released from the hospital in a week or two, Mr. Glotfelty's SCI condition required that he be in an SCI Center about 100 miles from his home for nearly four months. Even though he is a sophisticated patient, he found that keeping on top of personal and business matters from the hospital was difficult, and even though he had help at home, certain payments were missed in his absence.

Mr. Townsend and Mr. Glotfelty are capable professionals who, even with assistance, found it a challenge to manage their personal affairs while being treated away from home. Most disabled veterans are not in the same position. Under the Federal Circuit's decision, a paralyzed veteran seeking VA benefits may well lose his appeal rights if he is receiving treatment for his disability at the same time the Board just happens to issue a decision in his case. He may be nowhere near his mailbox when the Board decision arrives, much less be in any position to appreciate the jurisdictional significance of the postmark on that envelope.

There is no evidence in 38 U.S.C. § 7266, or in any of chapter 72 for that matter, that Congress intended such a result. The Federal Circuit erred in imposing this burden, and the Court should reverse.

C. Congress intended that veterans jurisdictional statutes be liberally construed to allow equitable tolling.

In *Barrett*, the Federal Circuit noted, "It would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." *Barrett*, 363 F.3d at 1320; *see Arbas,* 403 F.3d at 1381[5]; *see also Coffy v. Republic Steel*, 447 U.S. at 196 (statutes benefiting veterans should be liberally construed). In *Henderson,* however, the Federal Circuit has essentially found that Congress did

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[5] In *Arbas,* the Federal Circuit considered the effects of physical disabilities:

> There are a myriad of physical illnesses or conditions that impair cognitive function or the ability to communicate. Solely by way of example, while a stroke victim does not suffer from a mental illness, it would be manifestly unjust to refuse tolling if the stroke were sufficiently incapacitating. The same could be true of one who has suffered severe head trauma or a heart attack. In other cases, one may retain full consciousness but still be unable to speak or communicate effectively, as may be the case for those in extreme pain or who have been immobilized. These examples are not intended as an exhaustive list of conditions that warrant tolling.

Arbas, 403 F.3d at 1381.

intend to treat veterans in an ironic, inhumane manner through rigidly interpreting § 7266. *See Henderson,* 589 F.3d at 1220-21 (concurring judges agreeing that the "rigid deadline of the existing statute can and does lead to unfairness.") There is no evidence, however, that Congress intended the result reached in *Henderson*.

As discussed *supra*, the Federal Circuit carefully crafted a line of cases, beginning with *Bailey,* 160 F.3d 1360, that led to *Barrett* and *Arbas.* Since this Court's decision in *Irwin* and the Federal Circuit's decision in *Bailey,* Congress has taken no action that would indicate dissatisfaction with equitable tolling being available to veterans. In fact, § 7266(a) remains largely unchanged since *Bailey*. The predecessor statute was passed as part of the VJRA. *Irwin* was decided in 1990; Congress amended the statute in 1994. Veterans Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4670 (Nov. 2, 1994). *Bailey* was decided on November 8, 1998, and Congress amended 38 U.S.C. § 7266 on November 11, 1998. Veterans Programs Enhancements Act of 1998, Pub. L. No. 105-368, 111 Stat. 3315 (Nov. 11, 1998). Congress last amended § 7266 in 2001, repealing a provision that had required a veteran to serve a notice of appeal on the VA. Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (Dec. 27, 2001).

When Congress amended § 7266(a) in 1994, it is presumed to have done so with full knowledge of *Irwin's* settled holding that equitable tolling is

available in suits against the federal government. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When Congress again amended the section in November 1998 and December 2001, it is presumed to have been fully aware of both *Irwin* and *Bailey*. Yet, no change was made that would indicate Congress wanted to restrict the results of *Bailey* or otherwise limit the availability of equitable tolling to veterans, and the only reasonable conclusion is that Congress authorized the use of equitable tolling under § 7266(a). *Compare Bailey,* 160 F.3d at 1365, *with United States v. Brockamp,* 519 U.S. 347, 350 (1997) (*Irwin* presumption can be rebutted if there is a "good reason" to believe Congress did not want equitable tolling to apply.)

II. THE FEDERAL CIRCUIT'S DECISION REWARDS VA FOR THWARTING VETERANS' ATTEMPTS TO APPEAL.

For veterans who may have misdirected their appeal-related filings to VA instead of the Court of Appeals for Veterans Claims, *Henderson* has already produced harsh results. An unhappy byproduct of the case has been decisions such as *Irwin v. Shinseki*, 23 Vet. App. 128 (2009). In *Irwin v. Shinseki*, the veteran mailed his notice of appeal one week after the Board decision, but misdirected the

notice to the Board, rather than to the court. The Board ultimately forwarded it to the court more than four months later, past the 120-day appeal period. Based on *Bowles* and *Henderson,* the Court of Appeals for Veterans Claims dismissed, finding the attempt to file insufficient and the Board's inaction irrelevant. *Irwin*, 23 Vet.App. at 131. Since *Irwin v. Shinseki* was decided, the court has issued at least 30 similar decisions according to a Westlaw search.[6] Overall, the Court of Appeals for Veterans Claims has dismissed more than 330 appeals based on *Henderson* and *Irwin.*

Cases such as *Rickett v. Shinse*ki, 23 Vet.App. 366 (2010) (appeal docketed May 27, 2010, at 2010-7093), are particularly noteworthy. In *Rickett*, the veteran attempted to file his notice of appeal but

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[6] Most of these decisions are single-judge memoranda, simply applying *Henderson* and *Irwin v. Shinseki. See, e.g., Harris v. Shinseki,* 2010 WL 668926 (Feb. 26, 2010). In some instances, the judges struggle with the fact that VA inaction was fatal to the veteran's claim, but then dismiss nonetheless. *See Stambush v. Shinseki*, 2010 WL 318493 (Jan. 28, 2010) (Judge Moorman:

> The Court notes the failure of the Board to determine that the appellant's August 2008 document that, in the first line of the correspondence, stated that the appellant wished 'to appeal the [B]oard decision' was a misdirected NOA, and the Board mailed the correspondence to the RO rather than to this Court. The Court takes no pleasure in granting the Secretary's motion to dismiss under such circumstances. Unfortunately, without congressional authority, the Court lacks the jurisdiction to impose a remedy in this appeal.")

mistakenly mailed it to VA's Office of General Counsel. At the time, the veteran had roughly 50 days remaining in his appeal period. One might expect VA's attorneys to recognize the significance of a notice of appeal, but no one in the VA Office of General Counsel acted upon Mr. Rickett's notice for several weeks, and then it was to forward it to the VA Regional Office in Waco, Texas. *Id.* The appeal period expired before the veteran knew about his error. The Court of Appeals for Veterans Claims dismissed, stating "This matter is firmly controlled by *Irwin* and *Henderson*." *Id.* at 368.

The problem presented in cases like *Irwin v. Shinseki* is not new; the Federal Circuit has dealt with many cases with similar facts. *See, e.g., Brandenburg v. Principi*, 371 F.3d 1362 (Fed. Cir. 2004) (misfiled at Board); *Santana-Venegas v. Principi,* 314 F.3d 1293 (Fed. Cir. 2002) (misfiled at Regional Office); *Santoro v. Principi,* 274 F.3d 1366 (Fed. Cir. 2001) (misaddressed appeal); *see also Henderson,* 589 F.3d at 1220-21 (concurrence, noting that difficulties in navigating the system "are not merely hypothetical.") In each case, a veteran misdirected a filing intended for the Court of Appeals for Veterans Claims to the VA, and in each case the VA either lost or held the jurisdictionally significant document until it was too late for the veteran to appeal. Under the Federal Circuit's prior case law, however, these cases could be dealt with and a fair result obtained. *See Henderson,* 589 F.3d at 1208 (discussing prior cases).

What is new, and what *Rickett* makes so clear, is that under the sweeping interpretation of *Henderson*, now VA may act (or fail to act) with impunity, no matter whether its actions are intentional or accidental. *See Posey v. Shinseki,* 23 Vet.App. 406, 409-11 (2010) (describing and questioning VA's mail handling procedure). There is no penalty on VA, and no mechanism for a veteran to regain the lost opportunity to appeal.

Congress did not intend this result, and the Court should take this opportunity to correct the Federal Circuit's interpretation.

III. THE ANALYSIS IN *REED ELSEVIER, INC. V. MUCHNICK* ALSO POINTS TO THE RESULT THAT 38 U.S.C. § 7266 IS NOT JURISDICTIONAL.

The Federal Circuit reached the incorrect result in *Henderson* because it chose the path of *Bowles* rather than *Irwin.* Recent guidance from this Court provides additional support for finding that the Federal Circuit, in effect, made a wrong turn. This Court recently clarified that its decision in *Bowles* "did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier,* 130 S.Ct. at 1247.

The Court counseled that the correct approach is to utilize the analysis set forth in *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 515-16 (2006), and first determine whether Congress has clearly stated that " 'a threshold limitation on a statute's scope shall count as jurisdictional.' " *Reed Elsevier* at 1244 (quoting *Arbaugh*, 546 U.S. at 515-16). If Congress has not made a clear statement, then the Court "must focus on the 'legal character' of the requirement . . . by looking into the condition's text, context, and relevant historical treatment." *Id.* at 1246 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

Applying this analysis here, the starting point is the statutory language in Chapter 72: United States Court of Appeals for Veterans Claims, Subchapter II: Procedure, Section 7266: Notice of Appeal –

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

> delivering or mailing notice to the Court.
>
> (c) A notice of appeal shall be deemed to be received by the Court as follows:
>
> (1) On the date of receipt by the Court, if the notice is delivered.
>
> (2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.
>
> (d) For a notice of appeal to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the corner in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

38 U.S.C. § 7266. This section does not use the word "jurisdiction" nor does it fall under the subchapter of jurisdiction.

There is good reason for this: Congress enacted a specific jurisdictional section. It is

Chapter 72: United States Court of Appeals for Veterans Claims, *Subchapter I: Organization and Jurisdiction*, Section 7252: *Jurisdiction*; Finality of decisions –

> (a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.
>
> (b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of such review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.
>
> (c) Decisions by the Court are subject to review as provided in section 7292 of this title.

38 U.S.C. § 7252 (2006). This section not only falls under the subchapter of jurisdiction, but is appropriately named "Jurisdiction" and describes

both the Court's subject matter jurisdiction and personal jurisdiction in the first subsection.

Comparing the two, it is clear that Congress did not explicitly state that § 7266 was jurisdictional. *See Reed Elsevier*, 130 S.Ct. at 1244. Therefore, compliance with § 7266 "is not *automatically* 'a jurisdictional prerequisite to suit,' " but rather must be analyzed for the " 'legal character' of the requirement" that a veteran claimant file a notice of appeal within 120 days of a Board decision. *Id.* at 1246 (quoting *Zipes*, 455 U.S. at 393, 395) (emphasis added). This analysis considers the "text, context, and relevant historical treatment" of the statute. *Id.*

As noted above, § 7252, not § 7266, is labeled "jurisdiction." Only § 7252, not § 7266, names " 'the classes of cases' " that can be brought before the Court of Appeals for Veterans Claims or those parties who can bring such actions, *Reed Elsevier*, 130 S.Ct.. at 1243 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)); it states the "class of case" – review of Board decisions – and the party that can bring suit – the claimant, not the Secretary. 38 U.S.C. § 7252(a). Thus, the text does not "demonstrate that Congress 'ranked' the requirements [in § 7266] as jurisdictional." *Id.* at 1244 (quoting *Arbaugh*, 546 U.S. at 513-16).

Additionally, the context of the section does not indicate that Congress " 'ranked' the requirements as jurisdictional." *Reed Elsevier*, 130 S.Ct. at 1244. Similar to the provision in *Arbaugh*,

§ 7266 is located in an entirely separate subchapter from § 7252. *Compare* Subchapter I: Organization and Jurisdiction *with* Subchapter II: Procedure. The names of the subchapters also imply that Congress understood there was a distinction to be made between jurisdiction and "claim-processing requirements." *See Eberhart v. United States*, 546 U.S. 12, 15-16 (2005) (acknowledging that claims-processing rules are nonjurisdictional).

Finally, the historical treatment of § 7266 does not indicate that it should be treated as jurisdictional, to overcome the other two analytical factors. *See Reed Elsevier*, 130 S.Ct. at 1248. While the *Bowles* Court highlighted that the Court had a long history of regarding "statutory limitations on the timing of appeals as limitations" on a court's jurisdiction, *see Bowles*, 551 U.S. at 210 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), *United States v. Curry*, 6 How. 106, 113 (1848)), this history has nothing to do with the Court of Appeals of Veterans for Claims. Rather, the Court was focusing on appeals to Article III circuit courts from trial courts, not appeals to Article I courts from agency decisions.

The brief, recent history of the Court of Appeals for Veterans Claims is quite different. For much of that history, 38 U.S.C. § 7266 was not considered jurisdictional and equitable tolling was available to veterans. *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998); *see, e.g., Menominee Indian Tribe of Wisc. v. United States*, ___ F.3d ___, 2010 WL 2977225 (D.C. Cir. July 30, 2010) (discussing the

historical treatment of 41 U.S.C. § 601, enacted in 1994, as opposed to the statute in *Bowles*). Further, Congress was aware of this Court's historical stance on timely filing at the time it created the Court of Appeals for Veterans Claims and did not include the time limitation within the jurisdictional section of the statute. In fact, Congress did not even place the Court of Appeals for Veterans Claims within the same title as the circuit courts, as it did the Court of International Trade, 28 U.S.C. § 1581 (2006), and the United States Court of Federal Claims. 28 U.S.C. § 1491 (2006).

By comparison, statutes pertaining to other Article I courts, in particular the Tax Court and the Court of Appeals for the Armed Forces (CAAF), more clearly indicate that the filing of a timely petition is jurisdictional. *See* 26 U.S.C. § 6213 (2006); 10 U.S.C. § 867 (2006). The Tax Court's governing statute states that a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days of notice being mailed. 26 U.S.C. § 6213(a). This section establishes the Tax Court's subject matter and personal jurisdiction: the court can decide cases regarding redeterminations of tax deficiencies and the appropriate party to bring suit is a taxpayer. The statute continues that the "Tax Court shall have *no jurisdiction* to enjoin any action or proceeding or order any refund under this subsection *unless a timely petition for a redetermination has been filed*." *Id.* (emphasis added). This clearly shows Congress can establish a jurisdictional time limitation for an Article I court and knows to place it in the appropriate section.

Further, the Tax Court, Court of Appeals for the Second Circuit, and Court of Appeals for the D.C. Circuit have all ruled that the 90 days is a jurisdictional time limit. *Hoffenberg v. Comm'r of Internal Revenue*, 905 F.2d 665 (2d Cir. 1990); *Block v. Comm'r of Internal Revenue*, 2 T.C. 761 (1943); *Stebbins' Estate v. Helvering*, 121 F.2d 892 (D.C. Cir. 1941).

With regard to the CAAF, the statute provides that the "accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days" of the decision. 10 U.S.C. § 867(b). While the language is not as plain as the Tax Court statute, it nonetheless is located within the same statute that delineates both the subject matter and personal jurisdiction, and the CAAF has held that, in light of *Bowles*, it is jurisdictional. *United States v. Rodriguez,* 67 M.J. 110 (C.A.A.F. 2009).[7]

On its face, 38 U.S.C. § 7266 is not clearly labeled a jurisdictional statute, and its context in the statutory scheme does not indicate that it should be considered jurisdictional. Nor is there any evidence Congress "ranked" it as jurisdictional. *See, e.g.,*

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[7] The CAAF had previously held that its time limits were not jurisdictional, in order to be "consistent with Congress's intent that servicemembers have the opportunity to obtain appellate review in an independent civilian court." *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006) (citing *United States v. Byrd*, 53 M.J. 35 (C.A.A.R. 2000); *United States v. Ponds*, 1 C.M.A. 385 (1952)). The C.A.A.F. had, until *Bowles*, allowed for filing out of time if the petitioner could show good cause. *Id.*

Henderson, 589 F.3d at 1224-30 (dissent's analysis of non-jurisdictional nature of § 7266). Finally, there is no strong history of § 7266 being treated as jurisdictional, so the only reasonable conclusion is that it is not a jurisdictional statute. If Congress did not intend the statute to be jurisdictional, then the rebuttable presumption favoring the availability of equitable tolling in suits against the government should apply.[8] *Irwin,* 498 U.S. at 95-96.

IV. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW FOR VETERANS, NOT DENY IT, AND DID NOT MAKE 38 U.S.C. § 7266 STRICTLY JURISDICTIONAL.

Bowles has been cited in several decisions by this Court, mainly for the proposition that only Congress may determine a court's jurisdiction. *See, e.g.*, *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. Of Adjustment, Central Region,* 130 S.Ct. 584 (2009). In the *Union Pacific* case, the Court began by noting:

> [T]here is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it. *See* R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, HART & WECHSLER'S THE

[8] The Federal Circuit had previously held that there was no express congressional intent that tolling should not apply. *Bailey v. West,* 160 F.3d 1360 (Fed.Cir.1998) (*en banc*).

> FEDERAL COURTS AND THE FEDERAL SYSTEM 1061-1062 (6th ed. 2009). The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies.

Union Pacific, 130 S.Ct. at 590.

Congress created the Court of Appeals for Veterans Claims as an Article I court with the sole purpose of providing judicial review where it had previously been forbidden. It would be difficult to make a clearer policy argument in favor of judicial review for veterans, so the situations where the court may "decline to exercise" that jurisdiction should be few and clearly defined. *See generally*, VJRA. In creating the Court of Appeals for Veterans Claims and the circumstances under which veterans may obtain judicial review, Congress created no impediment so severe as that now imposed by the Federal Circuit. Rather, given the history preceding the VJRA, the opposite should be presumed: Congress intended to confer jurisdiction to consider the particular controversies of veterans who had been denied by the agency.

There is no dispute that a claimant must establish jurisdiction in the Court of Appeals for Veterans Claims. *See Bethea v. Derwinski,* 2 Vet.App. 252, 255 (1992) (*citing McNutt v. GMAC,* 298 U.S. 178, 181 (1936)). While the court must have an orderly way to conduct its business, it must also undertake the case-by-case analysis required

when something goes awry in a veteran's attempt to appeal. As *Irwin v. Shinseki, Rickett,* and other recent similar cases demonstrate, problems continue to exist; veterans are sometimes confused about how to preserve their appeals rights, and the way VA handles their correspondence only adds to the confusion. *See Posey,* 23 Vet.App. at 409-11.

That confusion may now be fatal to their claims. The burden imposed by *Henderson* presupposes knowledge that many veterans simply do not have. Most veterans do not retain counsel at the agency, and most are still pro se upon filing with the Court of Appeals for Veterans Claims. *See* U.S. Court of Appeals for Veterans Claims Annual Reports, *available at http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf* (showing pro se rates have ranged from 53% to 70% at the time of filing over ten years). Veterans are at a disadvantage when bringing suit against the government, and this Court has interpreted timing provisions to protect claimants who may be at a disadvantage in litigation. *See*, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 478-80 (1986) (finding "compelling" reasons for equitable tolling where the Social Security Administration had a secret policy to deny the claims of mentally disabled applicants).

While *Henderson* further disadvantages veterans, equitable tolling causes no harm or disadvantage to either VA or the lower court. The Federal Circuit had reached the same conclusion in an earlier decision: "We also observe that: (1) the

120-day period for appeal is relatively short, especially considering that most claimants are not represented by counsel; (2) the government is unlikely to experience prejudice as a result of the delay; and (3) the record has been fully developed." *Barrett*, 363 F.3d at 1320.

There has been no action by Congress, and neither *Bowles* nor *Henderson* provide a compelling reason for veteran appellants to now be treated so differently from how they have been since 1998. *Henderson* impedes the implementation of Congress's goal in creating an avenue for veterans to appeal their VA claims. The Court should reverse the Federal Circuit and reinstate the prior cases allowing equitable tolling for veterans appeals.

CONCLUSION

For the foregoing reasons, in addition to those provided by Mr. Henderson, the Court should reverse the Federal Circuit and find that equitable tolling remains available to veterans.

Respectfully submitted,

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