

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

**BRIEF FOR AMICUS CURIAE PARALYZED
VETERANS OF AMERICA IN SUPPORT
OF PETITIONER**

LINDA E. BLAUHUT

Counsel of Record

WILLIAM S. MAILANDER

General Counsel

MICHAEL P. HORAN

Deputy General Counsel

Paralyzed Veterans of America

801 Eighteenth Street, NW

Washington, DC 20006

(202) 416-7793

LindaB@pva.org

Counsel for Amicus Curiae

228981



COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS CURIAE¹

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

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* has made a monetary contribution to its preparation or submission. The parties have been given at least 10 days notice of amicus' intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

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, Paralyzed Veterans of America has a strong interest in seeking to have this Court review – and reverse – the *Henderson* decision.

SUMMARY OF ARGUMENT

As this Court’s March 2, 2010, decision in *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010), shows, questions of whether a statute should be deemed “jurisdictional” continue to bedevil the federal circuit courts of appeals. In *Reed Elsevier*, the Court harmonized its precedents on jurisdiction and provided guidance on the application of *Bowles v. Russell*, 551 U.S. 205 (2007). Given that the Federal Circuit based its *Henderson* decision on *Bowles* but did not have the benefit of the clarifying analysis in *Reed Elsevier*, and given that 38 U.S.C. § 7266 (2006) should be subject to that analysis, the safest course of action in this matter is to grant Petitioner’s request, vacate the decision, and remand to permit the lower court to apply the most recent precedent.

Even without this new precedent, the Federal Circuit’s decision should not stand. Petitioner Mr. Henderson and the dissent in the Federal Circuit’s *en banc* decision have eloquently explained the errors in the decision below and set forth reasons for this Court to grant certiorari and review the matter. Petition at 11-32; *Henderson*, 589 F.3d at 1221-33. Paralyzed Veterans of America writes to support Mr. Henderson’s petition and to further argue that Congress did not and

could not have intended the interpretation of 38 U.S.C. § 7266 adopted by the Federal Circuit or the consequences that result from the interpretation, and certiorari should be granted.

The Federal Circuit's decision will harm 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 normal 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 could not have intended this result when making judicial review available to veterans.

Paralyzed Veterans of America asks that this Court grant Mr. Henderson's petition and review and reverse the Federal Circuit's decision.

ARGUMENT**I. THIS COURT’S RECENT DECISION IN *REED ELSEVIER, INC. V. MUCHNICK CONTROLS*, AND THE FEDERAL CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO ANALYZE 38 U.S.C. § 7266 UNDER THE CORRECT STANDARD.**

In *Reed Elsevier*, this Court noted, “While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice.” *Reed Elsevier*, 130 S.Ct. 1237, 559 U.S. ___, slip op. at 5 (Mar. 2, 2010). The Court went on to explain that the correct analysis in determining whether a statute imposes a jurisdictional requirement depends upon whether Congress has so stated, and cited *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), as the relevant test. *Id.*, slip op. at 6. The Court further explained that *Bowles* did not “hold that all statutory conditions imposing a time limit should be considered jurisdictional.” *Id.*, slip op. at 12. Rather, the Court cautioned that *Bowles* should be read for its analysis, not its result, and that the correct analysis requires reviewing context in determining whether a statute imposes the type of requirement “properly ranked as jurisdictional absent an express designation.” *Id.*, slip op. at 13.

The majority opinion of the Federal Circuit in *Henderson* does not cite *Arbaugh*, much less undertake the analysis announced in that case. Rather, the court relied solely upon *Bowles* to find that 38 U.S.C. § 7266 is a “time of review” provision and therefore

jurisdictional.² *Henderson*, 589 F.3d at 1212. Once the Federal Circuit determined that 38 U.S.C. § 7266 was jurisdictional, not a statute of limitations, it followed under the court’s analysis of *Bowles* that equitable tolling could not be available to veterans seeking review in the Court of Appeals for Veterans Claims because Congress did not expressly say so. *Id.* at 1216.

Under the guidance of *Reed Elsevier*, this analysis cannot be correct. The first step, using *Arbaugh*’s criteria, should focus on whether Congress specifically intended a statute to be jurisdictional.³ On its face, 38 U.S.C. § 7266 is not clearly labeled a jurisdictional statute. *See, e.g., Henderson*, 589 F.3d at 1224-30 (dissent analysis of non-jurisdictional nature of § 7266). If Congress did not intend the statute to be jurisdictional,

² In relevant part, 38 U.S.C. § 7266 states:

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.

38 U.S.C. § 7266(a).

³ Mr. Henderson’s petition was also filed without the benefit of this Court’s *Reed Elsevier* decision. However, similar to the analysis in that case, Mr. Henderson argues that Congress determined the jurisdiction of the Court of Appeals for Veterans Claims in a different statutory section, 38 U.S.C. § 7252 (2006), labeled “Jurisdiction; finality of decisions,” indicating that Congress intended § 7252, not § 7266(a) to define the court’s jurisdiction. Petition at 20-21.

then the rebuttable presumption favoring the availability of equitable tolling in suits against the government should apply.⁴ *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

As it is common practice for this Court to remand for application of a new precedent, the Court should do so here. *See, e.g.*, 36 C.J.S. Federal Courts § 316 (June 2009). Because *Elsevier* clarified the correct analysis a mere few months after *Henderson* issued, the Federal Circuit did not have the benefit of that clarification, and a grant of Mr. Henderson's petition and remand to apply the correct analysis should be considered.

II. THE FEDERAL CIRCUIT'S DECISION SWEEPS TOO BROADLY AND ALREADY HAS HAD HARMFUL CONSEQUENCES TO DISABLED VETERANS.

The vast majority of claims filed with VA are filed by veterans seeking benefits for their disabilities. To these veterans, whether to apply this Court's decision in *Bowles* to 38 U.S.C. § 7266 or whether to characterize the statute as a "statute of limitations" or a "timing of review provision," *Henderson*, 589 F.3d at 1211, sounds like an academic or theoretical inquiry. But, by extending this Court's inapposite holding in *Bowles* to 38 U.S.C. § 7266 and characterizing the statute as jurisdictional, the Federal Circuit has caused actual harm to disabled veterans claiming benefits. These veterans, who may

⁴ 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*).

have either misfiled a notice of appeal with the VA or the agency's Board of Veterans' Appeals (Board)⁵ or filed late because of their disability, as Mr. Henderson did, had no idea that their minor errors would have significant, fatal consequences to their claims.

A. The Federal Circuit Improperly Sweeps Two Different Appeals Situations Into The Same Category; Under Prior Case Law, The Court Distinguished Between Filings That Were Late But Excusable And Filings That Were Misdirected.

Over a number of years, the Federal Circuit had developed two lines of jurisprudence, one dealing with veterans who had misfiled appeals-related documents with VA, *see, e.g., 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), and one dealing with veterans whose disability caused them to be unable to meet the filing deadline. *See, e.g., 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). Although each line of cases derived from *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (*en banc*), each is distinct and involves analytically

⁵ 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.

different scenarios – one in which a veteran attempts to protect his rights by filing something but falls short or is impeded by his litigation adversary, and another in which the veteran’s disability prevents him from even protecting his rights. These distinctions were based in part on *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.

Although the Federal Circuit had painstakingly developed each line of cases, in *Henderson* the Federal Circuit suddenly wiped out both the lines of cases and any analytical distinction. Instead of case-by-case analysis, the Federal Circuit has imposed a blanket rule, even though Congress has done nothing to require one.

- i. For disabled veterans, such as Mr. Henderson and the members of Paralyzed Veterans of America, the Federal Circuit’s decision is doubly punishing.**

It is difficult to imagine 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. 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 also Arbas*, 403 F.3d at 1381.⁶ In *Henderson*, however, the Federal Circuit has essentially found that Congress did 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.”)

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.⁷ Because there are no time requirements upon

⁶ 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.

⁷ *See, e.g.*, VA Claims Backlog Ready to Hit 1 Million, Associated Press (June 18, 2009), available at http://www.armytimes.com/news/2009/06/ap_vaclaims_backlog_061809/.

the VA or Board, the veteran cannot control when a decision is issued or 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 the mail one random day.

This unpredictability can result in a heavy burden on veterans with severe disabilities, such as paraplegia,⁸ whose conditions and complications from those conditions may require lengthy hospitalization and rehabilitation at specialized facilities.⁹ An appeal-

⁸ Paraplegia is a general term for spinal cord injury and describes “the condition of a person who has lost feeling and/or is not able to move the lower parts of his/her body.” Understanding Spinal Cord Injury and Functional Goals, Spinal Cord Injury Info Sheet, University of Alabama, *available at* <http://images.main.uab.edu/spinalcord/pdf/files/info-4.pdf>. Depending on the location of the injury to the spinal cord, a person with a paralyzing condition may lose the ability to use his arms and legs, may have his lung function affected, and will have many other body systems affected as well. *See id.*, *see also* Spinal Cord Injury, Paralyzed Veterans of America, http://www.pva.org/site/PageServer?pagename=injury_main.

⁹ For example, pressure ulcers are one of the most common health risks for paralyzed people and can turn into life-threatening infection; surgical care of a pressure ulcer may require “lengthy hospitalization.” Pressure Ulcer Treatment, Northwest Regional Spinal Cord Injury System, *available at* http://sci.washington.edu/info/newsletters/articles/05fall_pressureulcers.asp; *see also* Medical Services Program, Paralyzed Veterans of America, *available at* http://www.pva.org/site/PageServer?pagename=benefits_medical_commoncomplications.

preserving action may suddenly be required of them when they are in no position to give it thoughtful attention. As an example, while the VA has more than 900 clinics and facilities nationwide, *see* VA Organizational Briefing Book (June 2009), *available at* <http://www4.va.gov/ofcadmin/docs/vaorgbb.pdf>, the agency has only 24 centers, called “SCI Centers,” that specialize in the treatment of spinal cord injury and disease. *See* SCI Centers, Dep’t of Veterans Affairs, http://www.sci.va.gov/sci_centers.asp. These centers may treat all eligible SCI veterans. 38 U.S.C. § 1705(a)(4) (2006); 38 U.S.C. § 1710 (2006). An injured veteran such as a Paralyzed Veterans of America member who requires extensive hospitalization and surgical intervention may find himself far 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. Yet, under the Federal Circuit’s decision, a paralyzed veteran seeking service connection or an increased rating for his disability may well lose his appeal rights should he be receiving treatment for his disability at the same time the Board happens to issue a decision in his case. The clock starts ticking, no matter whether anyone is home to hear it.

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 grant Mr. Henderson’s petition.

ii. The Federal Circuit’s decision rewards VA for thwarting veterans’ attempts to appeal.

For veterans who may have misdirected their filings to VA instead of the Court of Appeals for Veterans Claims, *Henderson* has already produced harsh results. An unhappy byproduct of *Henderson* has been decisions such as *Irwin v. Shinseki*, 23 Vet. App. 128 (2009). In *Irwin*, 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.¹⁰

¹⁰ 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. For example, in *Stambush v. Shinseki*, 2010 WL 318493 (Jan. 28, 2010), Judge Moorman stated:

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

(Cont’d)

Perhaps more shocking is the recent decision of *Rickett v. Shinseki*, Vet. App. No. 09-2493 (March 19, 2010). In *Rickett*, the veteran attempted to file his notice of appeal but mistakenly mailed it to VA's Office of General Counsel. At the time, the veteran had roughly fifty days remaining in his appeal period. One might expect the agency'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.*, slip op. at 1-2. The appeal period then 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.*, slip op. at 2.

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., Santoro v. Principi*, 274 F.3d 1366 (Fed. Cir. 2001) (misaddressed appeal), *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); *see also Henderson*, 589 F.3d at 1220-21 (conurrence, noting that difficulties in navigating the system "are not merely hypothetical.") In each case, a veteran misdirected a filing intended for the Court of

(Cont'd)

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.

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. 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 review and correct the Federal Circuit's interpretation.

B. This Court Regularly Counsels Against Overly Broad Application of Precedent.

The Federal Circuit erred in placing too much emphasis on one comment in this Court's *Bowles* decision: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. In so broadly applying *Bowles* to overturn two distinct branches of its prior precedents, the Federal Circuit has run afoul of this Court's regular admonitions to carefully construe precedent. *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."); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

(It remains the Court’s “prerogative alone to overrule one of its precedents.”); *see also Hohn v. United States*, 524 U.S. 236, 252-253 (1998) (reiterating that prior decisions remain binding precedent until specifically reconsidered).

Instead, it appears the circuit court took guidance from this Court’s decision in *Shinseki v. Sanders*, 129 S.Ct. 1696 (2009), which found that the Federal Circuit’s harmless error analysis conflicted with established law and that the special nature of the veterans system did not merit unique treatment in applying harmless error rules. *Sanders*, 129 S.Ct. at 1707. The *Henderson* majority concluded by stating, “We complete our analysis with *Sanders* in mind . . . we must be wary of hinging different procedural frameworks solely on the special nature” of the veterans system. *Henderson*, 589 F.3d at 1220.

This reliance on *Sanders* was misplaced. Prior decisions finding equitable tolling applied to veterans cases were not grounded in the special nature of the veterans claims system; they were firmly grounded in this Court’s *Irwin* precedent. *Bailey*, 160 F.3d 1363. Neither *Sanders* nor *Bowles* changed any relevant element of the prior analysis, and the Federal Circuit erred in causing upheaval where none was required.

C. Congress Has Not Changed 38 U.S.C. § 7266 to Prohibit Equitable Tolling.

Ever 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 Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) (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 wished 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.)

III. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW OF VETERANS APPEALS FROM THE VA ADJUDICATION PROCESS AND DID NOT MAKE 38 U.S.C. § 7266 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, 558 U.S. __ (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 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, and 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)). The court must have an orderly way to conduct its business. But, the court must also undertake the case-by-case analysis required when something goes awry in a veteran’s attempt to gain entrance through the courthouse doors. As *Irwin v. Shinseki*, *Rickett*, and other recent similar cases demonstrate, problems continue to exist; veterans are sometimes confused about the best way to preserve their appeal rights, and they turn to the VA – which had been helping them process their claims – for assistance.

Now, however, that confusion may 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; 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_-_20081.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, no harm or disadvantage comes to either VA or the lower court, with or without equitable tolling. 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 suddenly be treated so differently than they have been since 1998. Instead,

Henderson impedes the implementation of Congress's goal in creating an avenue for veterans to appeal their VA claims. The Court should grant the petition and review Mr. Henderson's case.

CONCLUSION

For the foregoing reasons, in addition to those stated in the petition, the Court should grant the petition.

Respectfully submitted,

LINDA E. BLAUHUT
Counsel of Record
WILLIAM S. MAILANDER
General Counsel
MICHAEL P. HORAN
Deputy General Counsel
Paralyzed Veterans of America
801 Eighteenth Street, NW
Washington, DC 20006
(202) 416-7793
LindaB@pva.org
Counsel for Amicus Curiae

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