

No. 09-1036

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IN THE  
**Supreme Court of the United States**

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DAVID L. HENDERSON,

*Petitioner,*

v.

ERIC K. SHINSEKI,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

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**BRIEF OF *AMICUS CURIAE*  
UNITED SPINAL ASSOCIATION  
IN SUPPORT OF PETITIONER  
DAVID L. HENDERSON**

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## INTEREST OF *AMICUS CURIAE*

United Spinal Association is a nonprofit organization formed in 1946 by paralyzed veterans. It has served in the interests of veterans and their families ever since.<sup>1</sup> Fully recognized by the U.S. Department of Veterans Affairs as a national veterans service organization, United Spinal has several thousand veteran members in its ranks.

The organization's mission is to improve the quality of life of Americans with spinal-cord injuries. United Spinal provides services to veterans through its VetsFirst program, in which it provides direct representation and counseling to all veterans, regardless of their membership status or type of disability, as well as to their dependents and survivors. United Spinal also maintains a network of VA-accredited veterans service representatives across the nation to assist veteran claimants for VA benefits in their communities. Further, United Spinal's public policy component advocates on behalf of veterans before Congress and state legislatures.

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<sup>1</sup> Counsel of record for the parties received timely notice of the intent to file this brief. S. Ct. R. 37.2(a). The parties to this case have consented to the filing of this brief. 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 other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

United Spinal has a strong interest in Mr. Henderson's petition for a writ of certiorari. Equitable tolling of 38 U.S.C. § 7266 has provided a vital safeguard for veterans with serious physical and mental disabilities, including disabilities resulting from spinal-cord injuries. Many veterans with spinal-cord injuries will be affected adversely under the Federal Circuit's decision in this case. United Spinal therefore supports Mr. Henderson's petition for a writ of certiorari.

### SUMMARY OF ARGUMENT

This case presents an important matter of national interest. Not only does the Federal Circuit's decision overturn years of judicial precedent preserving the pro-claimant system for adjudicating veterans benefits through equitable tolling of the 120-day time limit for commencing action in the Court of Appeals for Veterans Claims ("Veterans Court"). It also undermines Congress's expressly stated goal for judicial involvement in the veterans benefits system to be "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808.

In fact, this case creates a striking appearance of unfairness to vulnerable veteran claimants, all of whom appear before the Veterans Court for the first time outside the nonadversarial agency-level process, and most of whom appear *pro se*. Under the Federal Circuit's decision, a veteran who actively pursues a judicial remedy in the Veterans Court but

files a defective pleading will be denied review. This case also effects an “ironic and inhumane” result on many veterans who are unable to meet section 7266(a)’s filing deadline because of the very disabilities for which they seek benefits.

Finally, the agency’s high error rate means that, among the over 200 cases dismissed in the Veterans Court as a result of its own decision in this case, a great many veterans with meritorious claims have been denied review when they were justifiably unable to meet section 7266(a)’s 120-day deadline. The Veterans Court’s now-routine dismissals, which continue at a rate of about two per week, will perpetuate the unfairness to veteran claimants. Because the Federal Circuit’s interpretation of section 7266 falls short of meeting Congress’s goal for the Veterans Court, and has resulted in the dismissal of a high number of meritorious cases among particularly vulnerable veteran claimants, Mr. Henderson’s petition for a writ of certiorari should be granted. United Spinal therefore supports his petition.

## ARGUMENT

### I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE “ACCURATE, INFORMAL, EFFICIENT, AND FAIR”

“Accurate, informal, efficient, and fair.” Those were the goals that guided Congress in establishing

the Veterans Court under the Veterans Judicial Review Act. H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. Members of Congress understood that the Act marked a shift in responsibility within the federal government for ensuring the fair treatment of veterans. “[A]chievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from the Congress. By allowing courts to review VA policy, the Congress is entrusting the courts with an important responsibility.” *Id.*

As noted in the legislative history of the Act, veterans service organizations had been advocating since at least 1960 for the judiciary to be entrusted with responsibility for reviewing adverse decisions of the Board of Veterans’ Appeals (“Board”). A primary concern of the service organizations was that the Board “gave scant attention to appeals.” *Id.* at 5792. Judicial review was thus viewed as a means of ensuring the accuracy and fairness of the Board’s decisions. *See id.* at 5793. Additionally, in endorsing judicial review of the veterans benefits system, the House Committee on Veterans’ Affairs trusted that courts would not overly formalize the veterans benefits system:

If as a result of the enactment of this legislation, the perception of the VA system is that it has become inefficient, formalized, and unfair, and accuracy in decision-making becomes a fortuitous

event rather than a consistent one, veterans will bear the burden of the change. The committee has always been mindful of this possibility, and trusts that courts are no less aware of the vital interests which are at stake.

*Id.* at 5808.

Moreover, this Court has held that statutes providing “for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *King v. St. Vincent’s Hospital*, 502 U.S. 215, 220 n.9 (1991). That canon of construction has been applied to a number of statutes that protect the interests of veterans. *See, e.g., Boone v. Lightner*, 319 U.S. 561, 575 (1943) (“The Soldiers’ and Sailors’ Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”). And that canon has been applied to Title 38. *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

The Federal Circuit, however, ignored that canon in interpreting 38 U.S.C. § 7266(a) based on a flawed reading of a non-veterans case: *Bowles v. Russell*, 551 U.S. 205 (2007). But as Mr. Henderson argues, *Bowles* addressed a court-to-court appeal, not a veteran’s commencement of a judicial challenge to an adverse agency decision. *See* Petition for a Writ of Certiorari, at 26-32. By placing sole reliance on that decision, the Federal Circuit reached an interpretation of section 7266(a) that is contrary this

Court's precedent, as well as Congress's goals in providing for judicial review of veterans claims that is "[a]ccurate, informal, efficient, and fair." For the reasons discussed below, the Federal Circuit's decision in this case is also manifestly unfair and unjust to precisely those veterans Congress and this Court have sought to protect.

## II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS

First, initiating proceedings before the Veterans Court under section 7266(a) is the first step for claimants outside the nonadversarial agency-level process. As Mr. Henderson argues, that feature of the statute indicates that it is a statute of limitations for initiating a judicial challenge to a Board decision. *See* Petition for a Writ of Certiorari, at 19-22. Professor Michael Allen has observed that initiating a challenge in the Veterans Court can be a pitfall for veterans: "Whatever the reality is, there has been, and remains, a tension between the agency-level process and the unquestionably traditional adversarial process at the Veterans Court and beyond. In a sense, veterans transitioning from one system to another have the potential to be caught unaware of new rules and other formalities." Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 379 (2009) (footnote omitted). The agency-level process is designed to

assist veterans and other claimants, and they reasonably rely on that assistance, even after they have received an adverse agency decision and seek judicial review before the Veterans Court. But the VA does not always provide claimants with correct advice for appealing adverse Board decisions. Indeed, claimants relying on incorrect advice from Regional Offices have misfiled their challenges to adverse Board decisions. *See Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (“[Bailey’s] reliance on, and faith in what Congress clearly intended to be a paternalistic means for addressing veterans’ claims, presumably lulled him into accepting and relying upon the advice and aid of the government. Given the particular relationship between veterans and the government, Bailey was misled by the conduct of his adversary into allowing the filing deadline to pass.” (citation omitted)). Prior to the Federal Circuit’s decision in this case, equitable tolling provided a procedural safeguard for those veterans. *Id.*; *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002) (en banc). Reinstating equitable tolling of section 7266(a) in this case would preserve a measure of fairness for veterans facing “the unquestionably traditional adversarial process at the Veterans Court and beyond.” Allen, *supra* at 379.

Second, the majority of claimants are self-represented when they initiate proceedings in the Veterans Court. In 2009, 68% of claimants were self-represented at the time of filing. *See Veterans Court, Annual Reports (2000-2009), available at*

[http://www.uscourts.cavc.gov/annual\\_report](http://www.uscourts.cavc.gov/annual_report). That number has increased from 64% in 2008 and 53% in 2007. Self-represented claimants are obviously more vulnerable to the inherent pitfall they face when transitioning from the informal agency-level proceedings to judicial proceedings. Indeed, of the 169 dismissals in 2009 citing the decision in this case, at least 119 were filed by self-represented claimants.<sup>2</sup> For these claimants, that is a particularly frustrating result. As Professor James O'Reilly has observed, “[a] study of veterans’ jurisprudence illustrates a pattern of unfairness that allows systematic VA staff delays, but consistently rejects claims by unrepresented veterans who miss deadlines.” James T. O’Reilly, *Burying Caesar*:

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<sup>2</sup> See Vet. App. Nos. 09-3464; 09-3364; 09-3336; 09-3260; 09-3182; 09-3179; 09-3153; 09-3145; 09-3094; 09-3050; 09-3049; 09-2794; 09-2636; 09-2618; 09-2436; 09-2407; 09-2384; 09-2298; 09-2287; 09-2102; 09-1939; 09-1906; 09-1732; 09-1661; 09-1607; 09-1417; 09-1146; 09-1040; 09-0989; 09-0969; 09-0947; 09-0934; 09-0888; 09-0766; 09-0730; 09-0721; 09-0701; 09-0630; 09-0572; 09-0544; 09-0468; 09-0435; 09-0399; 09-0389; 09-0363; 09-0327; 09-0266; 09-0188; 09-0163; 09-0156; 09-0117; 09-0111; 09-0102; 09-0056; 08-4280; 08-4242; 08-4104; 08-4000; 08-3804; 08-3748; 08-3647; 08-3507; 08-3490; 08-3486; 08-3482; 08-3445; 08-3406; 08-3399; 08-3398; 08-3385; 08-3382; 08-3364; 08-3356; 08-3322; 08-3142; 08-3112; 08-3044; 08-3011; 08-2993; 08-2933; 08-2922; 08-2909; 08-2807; 08-2756; 08-2709; 08-2700; 08-2689; 08-2661; 08-2630; 08-2535; 08-2506; 08-2232; 08-2221; 08-1202; 08-0904; 08-0613; 08-0463; 08-0356; 08-0069; 07-3819; 07-3581; 07-3525; 07-3389; 07-3168; 07-3033; 07-3013; 07-2937; 07-2652; 07-1797; 07-1728; 07-1609; 07-1594; 07-1175; 07-1041; 07-0827; 07-0782; 07-0653; 06-3271; 06-2574. Veterans Court dockets are available at <https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp>.

*Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 234 (2001).

Third, many veterans are unable to meet the 120-day deadline as a result of disabilities *for which they seek benefits*. Before abolishing equitable tolling, the Federal Circuit had held that section 7266(a) could be tolled for late filings that resulted from mental illness, *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004), or physical illness, *Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005). The court reached those results by construing section 7266(a) in a common-sense manner. According to the court, “[i]t 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, Henderson v. Shinseki*, 589 F.3d 1201, 1221 (Fed. Cir. 2009) (Mayer, J., dissenting).

Fourth, the Board’s decisions are frequently incorrect as measured by the results of the appealed decisions. From 2000 to 2009, the Veterans Court has reversed or remanded Board decisions in an average of 1,762 cases per year, while affirming an average of only 403 cases per year. *See Veterans Court, Annual Reports (2000-2009)*. The result of the Federal Circuit’s interpretation of section 7266(a) is that many veterans who challenge wrongly decided Board decisions will not be heard even though their filings are justifiably late under a

theory of equitable tolling. This result is clearly contrary to Congress's goals for an "[a]ccurate" and "fair" system of judicial review of agency decisions. At a minimum, Mr. Henderson and other veterans should be granted review in this Court to ensure that judicial review of the veterans benefits system maintains at least an appearance of fairness.

### CONCLUSION

For these reasons, United Spinal respectfully requests that the Court grant Mr. Henderson's petition for a writ of certiorari.

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