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

REPLY BRIEF

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INTRODUCTION

The question whether equitable tolling applies to the time limit for veterans to seek judicial review of a VA denial of disability benefits is of immense and recurring importance to the 23 million veterans and their families who have made enormous sacrifices while serving this Nation. *Hundreds* of cases already have been dismissed based on the court of appeals' erroneous view that *Bowles v. Russell*, 551 U.S. 205 (2007), imposes a jurisdictional time bar to a veteran's *first request* for judicial review.

The government does not contest the importance of the question presented and acknowledges that the decision below imposes "painful" and "unfair" results based on "circumstances beyond a veteran's control." Opp. 5, 13. But unless this Court intervenes or Congress acts, the government's position consigns thousands of wounded veterans to a regime that deprives them of essential financial resources and critical medical care.

The government argues that Congress has before it two proposals that would "soften the effect" of the decision below. Opp. 14. But "the possibility that the legislative branch might fix problems caused by the Federal Circuit's misinterpretation of [a federal] statute provides no reason for this Court to deny review." U.S. Pet. Reply, *United States v. Eurodif, S.A.*, No. 07-1059, at 8, 2008 WL 905193. The government points to a bill sponsored by Senator Specter, which the government *opposes*, and to draft legislation that would apply only prospectively and would be of no benefit to petitioner or any of the hundreds of other veterans whose cases have been dismissed based on this case.

The Nation's wounded veterans and their families deserve better than to be left hanging on a mere thread of speculative hope that Congress may someday step in to correct the erroneous decision below. The Federal Circuit's decision imposes a grave injustice on veterans "who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), and is wrong on the merits. This Court's review is warranted.

ARGUMENT

A. This Court's Review Is Urgently Needed

1. *The question presented is critically important to the Nation's veterans*

The decision below affects a massive nationwide program providing benefits to millions of disabled veterans. The government does not dispute that:

- Millions of veterans have disability claims pending with the VA. Pet. 14.
- Most veterans seeking benefits are unrepresented by counsel. *Id.*
- Veterans prevail in 80% of the Veterans Court cases decided on the merits. *Id.* In over half of those cases, the veteran is awarded attorney fees because the government's position was not substantially justified. *Id.* 15.

- *Hundreds* of veterans' cases already have been dismissed as a result of this case. *Id.* 15-16. Indeed, in the short period since the petition was filed, more than 60 additional cases have been dismissed based on the decision below.

The decision below requires the dismissal of *meritorious* claims. Unless this Court intervenes, the rule will continue to govern the rights of millions of current and future veterans seeking disability benefits from the VA.

The government acknowledges that many "circumstances beyond a veteran's control prevent him from filing a timely notice of appeal." Opp. 13. Indeed, as in this case, those circumstances include serious medical disabilities, including the very service-connected disabilities for which the veteran seeks benefits.[1] Other circumstances involve the VA's misconduct in mishandling a veteran's claim, in providing erroneous advice to the veteran, or both.[2]

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[1] *See, e.g.*, Veterans Court Nos. 10-0438, 09-4743, 09-3686, 09-3271, 09-1417, 09-1158, 09-0934, 08-3385, 08-3322, 08-2689, 08-2489, 08-2341, 08-0904, 08-0631, 07-2214, 07-1041, 07-1175, 07-0782, 06-2861, 06-2574, 03-1996, 02-2382. The government observes that a single-judge order concluded that petitioner had not shown that his 15-day delay resulted from his mental illness. Opp. 3. The government, however, fails to mention that a panel of the Veterans Court revoked that order. Pet. 6-7.

[2] *See, e.g.*, Veterans Court Nos. 09-4669, 09-3554, 09-3242, 09-3182, 09-2493, 09-2042, 09-0567, 08-3507, 08-3406, 08-2984, (Cont'd)

The loss of even one veteran's meritorious claim is a tragedy. Considering the rapid and continuous flow of cases being dismissed—and that, on average, 80% of those claimants would have prevailed in the Veterans Court—this Court's review is urgently needed.

2. *The minuscule chance that Congress will act is not a basis to deny review*

The government observes that two legislative "proposals" are before Congress that would "soften the effect of Section 7266(a)'s 120-day filing deadline." Opp. 14. The government, however, recently advised this Court that proposed legislation was *not* a reason to deny review of a Federal Circuit decision: "In cases involving statutory interpretation, Congress could *always* solve the problem by legislation." U.S. Pet. Reply, *United States v. Eurodif, S.A.*, No. 07-1059, at 8, 2008 WL 905193 (emphasis in original). "The speculative possibility that Congress might ultimately enact one of the bills . . . should not deter the Court from considering the important questions presented by this case." *Id.*[3]

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08-2854, 08-2511, 08-1468, 08-1381, 08-1202, 08-0788, 08-0342, 08-0228, 07-3070, 07-2548, 07-1923, 07-0653, 06-952, 06-3271, 06-3170, 06-2800, 06-0820; *see also, e.g.*, *Posey v. Shinseki*, 23 Vet. App. 406, 411-15 (2010) (Hagel, J., concurring) (criticizing VA's conduct).

[3] *Accord, e.g.*, U.S. Pet., *United States v. Eurodif, S.A.*, No. 07-1059, at 26 n.4, 2008 WL 437010 ("[B]ills are currently pending in committees in Congress. . . . There is no guarantee, however, that the legislation will be enacted, much less that it

(Cont'd)

The odds are exceedingly low that either proposal will ever become law, much less in their current form. Senator Arlen Specter introduced S. 3192 with no co-sponsor, and Senator Specter recently lost his primary election. Dan Balz & Chris Cillizza, *Sen. Arlen Specter Loses Pennsylvania Primary*, Wash. Post, May 19, 2010. Even bills that have a sponsor in office have about a 4% chance of being enacted. *See, e.g.*, U.S. Senate, *Final Resume of Congressional Activity, First and Second Sessions of the 110th Congress*, www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm. And the odds of passage plummet even further where, as here, the executive branch has expressly opposed the bill. Opp. 14 ("The VA has expressed opposition to S. 3192.").[4]

The government also relies on a proposed bill that the VA sent to Congressional leaders two days before the government filed its response in this Court. Opp. App. 1a. That proposal is even less likely to become law.

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will be enacted in its present form."); U.S. Pet., *United States v. Clintwood Elkhorn Mining Co.*, No. 07-308, at 26 n.7, 2007 WL 2608817 ("[B]ills are currently pending in committees in Congress that, if passed, could resolve the question presented.... This Court's review is nonetheless warranted."); U.S. Pet. Reply, *Gonzales v. Duenas-Alvarez*, No. 05-1629, at 10 n.8, 2006 WL 2581844 ("[I]t remains uncertain whether legislation addressing the question presented in this case will be passed.... [T]herefore, the pendency of those bills provides no basis for denying certiorari."); U.S. Pet. Reply, *Gonzales v. Penuliar*, No. 05-1630, at 8 n.5, 2006 WL 2590487 ("[T]he pendency of the bills provides no basis for denying certiorari.").

[4] The only action on S. 3192 was a hearing during which the VA opposed the bill. *See* http://thomas.loc.gov; Opp. 14.

It has no sponsor, is before no committee, and includes numerous *anti-veteran* provisions. *See, e.g.*, §§ 202 (reducing time for challenging initial decision); 203 (eliminating equitable tolling by Board); 204 (eliminating agency consideration of certain evidence); 206 (limiting Board's duty to state reasons for decisions); 207 (limiting veterans' right to attorneys' fees). The proposal also would apply only prospectively, Opp. 14, and would not benefit petitioner or any of the hundreds of other veterans whose likely meritorious cases have already been dismissed.[5]

The timing of the letter is also puzzling. The VA waited to propose legislation until six months after the Federal Circuit's decision below, almost two years after the Veterans Court's decision first dismissing petitioner's claim, and three years after this Court's purportedly controlling decision in *Bowles*. This Court has rejected attempts by the government on the eve of certiorari to promise to fix a problem otherwise worthy of this Court's review. *See, e.g.*, *Sims v. Apfel*, 528 U.S. 1018 (1999) (granting certiorari despite government's promise to resolve question presented by regulation); *see* U.S. Opp., *Sims v. Apfel*, No. 98-9537, at 14-15. The Court likewise should reject the government's eleventh-hour attempt to evade this Court's review.

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[5] The complete version of the VA's legislative proposal is neither included in the government's brief nor posted on the VA's website, but it has been posted by a VA "watchdog" website. *See* Larry Scott, VA News Flash, *Shinseki's Proposed Legislation Could Negatively Impact Many Veterans* (May 28, 2010), www.vawatchdog.org/10/nf10/nfmay10/nf052810-5.htm.

3. *This Court should correct the Federal Circuit's erroneous interpretation of* Bowles

The government's position is not only flawed in relying on legislation that will in all likelihood never pass but also in erroneously assuming that *Congress* created the problem in the first instance. The problem stems not from the statute but from the Federal Circuit's misreading of *this Court's* decision in *Bowles*. This Court has not waited for Congress to correct an erroneous interpretation of *Bowles* for other statutes, *see Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), and it should not wait here.[6]

In addition, the government argues that this Court's review is unwarranted because the Federal Circuit's decision "does not conflict" with the decision of any court of appeals. Opp. 6. But a conflict is impossible given the Federal Circuit's exclusive jurisdiction to resolve the issue. 38 U.S.C. § 7292(c). The en banc decision was deeply divided and the majority, solely on the basis of *Bowles*, upset a decade of precedent by two previous en banc Federal Circuit

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[6] Although a "GVR" would be preferable to a denial of certiorari, a GVR would significantly delay the resolution of petitioner's request for disability benefits that already has languished before the agency for four years and before the courts for five years. Pet. 5; *see Lawrence v. Chater*, 516 U.S. 163, 168 (1996) ("[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate."). As the government's response indicates (Opp. 10), moreover, the court of appeals is unlikely to alter its holding in light of *Reed Elsevier*.

decisions. Only this Court can determine whether the Federal Circuit misread *Bowles* to apply to veterans who for the first time seek judicial review of the VA's decision denying benefits.

When the Federal Circuit in *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir.), *cert. denied*, 552 U.S. 948 (2007), *declined* to hold that a filing deadline in a veterans' program was jurisdictional, the government sought certiorari. U.S. Pet., *Dep't of the Army v. Kirkendall*, No. 07-19, at 22-23. Yet now that the shoe is on the other foot and the Federal Circuit held that a deadline in a vastly larger veterans' program *is* jurisdictional, the government opposes certiorari. This Court should reject the government's double standard.

Indeed, the circumstances of this case are far more cert-worthy than *Kirkendall*, which was decided consistently with the pro-claimant VA scheme. 479 F.3d at 842. *Kirkendall* was decided pre-*Bowles*, did not alter the status quo, and was an interlocutory decision. And *Kirkendall* involved a relatively small number of veterans whose requests for employment preferences were denied. Pet. 17. The decision below has none of those features and is already imposing great harm on the ability of veterans to obtain disability benefits.

B. The Lower Court Decision is Wrong

1. *Section 7266(a) is a statute of limitations*

The following factors, none of which the government disputes, compel the conclusion that Section 7266(a) is a statute of limitations and not an inflexible jurisdictional limit:

- The first opportunity for a veteran to challenge a VA denial of benefits *in court* is the proceeding before the Veterans Court. Pet. 28.

- Disability proceedings before the Secretary are uniquely pro-veteran. *Id.* 3.

- A proceeding before the Veterans Court is the first time the veteran and the Secretary are adversaries. *Id.*

- Section 7266(a) directs the *veteran* to take action; the time limit does not purport to restrict the power of the court. *Id.* 20.

- Congress passed Section 7266(a) as part of a pro-veteran scheme designed to ensure that veterans obtain judicial review of meritorious benefit denials. *Id.* 18.

- Given the unusually high reversal rate of VA decisions, the Veterans Court's review does not remotely resemble a court of appeals' review of district court decisions. *Id.* 28 & n.12.

In light of the settled pro-veteran canon of statutory construction, Pet. 18, it strains credulity to conclude that Congress intended to foreclose *any form of judicial review* of an erroneous VA denial of benefits where the missed deadline resulted from the VA's own misconduct or, as here, from the very disability for which the government wrongfully denied benefits.

The decision below also conflicts with this Court's unanimous holding in *Bowen v. New York*, 476 U.S. 467, 478 (1986), that the time of review provision for an agency decision denying disability benefits, 42 U.S.C. 405(g), is *not* jurisdictional. The government suggests no reason why Congress would have intended to treat our Nation's veterans more harshly than social security claimants, even though both schemes are imbued with pro-claimant characteristics.

The government is also wrong that while a social security claimant "commences" an entirely "new" "civil action" in district court under Section 405(g), the veteran under Section 7266(a) seeks review "*in an existing case*." Opp. 8 (emphasis added). The proceedings before the Board and the Veterans Court are different cases with distinct case numbers. *Compare* Pet. App. 74a *with id.* 103a. Similarly, the first time two adversarial parties appear in a caption is the "civil action" filed in the Veterans Court. *Id.* 26a, 74a, 103a.

2. *An "appeal" of agency action under Section 7266 does not render the 120-day time limit jurisdictional*

The government also reiterates the court of appeals' reasoning that a veteran institutes Veterans Court proceedings by filing a "notice of appeal" and that the Veterans Court deferentially reviews Board decisions. *See* Opp. 8-11. *Bowles* does not suggest, however, that the phrase "notice of appeal," regardless of context, automatically renders a time limit jurisdictional. "Rather, *Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247-48.

The context is controlling here. In *Sims v. Apfel*, 530 U.S. 103, 110 (2000), a decision the government fails to acknowledge, this Court specifically warned against comparing the relationship of administrative bodies and the courts to the relationship between lower and upper courts. *See* Pet. 27-29. The Board is not a court. The Board's denial of a claim is no different from the ALJ's denial of social security benefits on behalf of the Commissioner in *Bowen* and the EEOC's rejection of a federal employee's discrimination claim in *Irwin* v. *Department of Veterans' Affairs*, 498 U.S. 89 (1990); *see* Pet. 27-28.

Viewed in context, Congress could not have used the phrase "notice of appeal" as a term of art against the backdrop of *Bowles*—*Bowles* was decided almost two decades after Congress passed Section 7266(a). Rather, Congress used the phrase "notice of appeal" to denote a veteran's formal request for review in the same way

that a complaint under Section 405(g) reflects the claimant's "appeal" of an ALJ or Appeals Council decision. *Heckler v. Day*, 467 U.S. 104, 107 (1984); Pet. 29. In all events, any "interpretive doubt is to be resolved in the veterans' favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

Congress repeatedly used the term "appeal" throughout the uniquely pro-veteran non-adversarial statutory scheme to mean *to challenge*. *See* Pet. 29-30 (citing 38 U.S.C. §§ 7104-7107); *see also Percy v. Shinseki*, 23 Vet. App. 37, 43 (2009) ("Substantive Appeal" to the Board from an initial agency decision is not jurisdictional); *accord Enocencio v. Shinseki*, No. 08-1957, 2009 WL 4927985, at *1 (Vet. App. Dec. 22, 2009).

The government similarly errs in relying on the standard of review for the Board's factual findings and the rule of prejudicial error. Opp. 8-9. Again, the veterans' context is identical to the social security context. Under the social security system, a district court must uphold an ALJ's findings of fact under the substantial-evidence test and the rule of prejudicial error applies. Pet. 30-31.

Also inapposite is the holding in *Stone v. INS*, 514 U.S. 386, 406 (1995), that a time limit for a convicted alien to challenge a deportation order in the court of appeals is jurisdictional. Opp. 10. A veteran does not challenge the VA's decision in the court of appeals but does so in the Veterans Court, which is then subject to further review by a court of appeals. It is also highly unlikely that Congress intended to put wounded

veterans on par with convicted aliens facing deportation, rather than on par with disabled citizens seeking social security benefits. Section 7266(a) was passed to ensure, not block, a disabled veteran's access to the courts, and the pro-veteran canon of construction in all events tips the balance if there were any ambiguity as to Congressional intent.

* * *

For veterans returning home from a military conflict after being severely wounded or disabled, benefits are a crucial stepping-stone on the road to resuming a normal life. Yet the decision below shuts the courthouse doors to countless veterans even though history shows that 80% of them on average would prevail. Our veterans deserve better. This Court's review is urgently needed to ensure that the claims of men and women who earned their benefits through sacrifices for this Nation are not lost forever.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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