

2009-7006

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IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE FEDERAL CIRCUIT

DAVID L. HENDERSON,  
*Claimant-Appellant,*

v.

ERIC K. SHINSEKI,  
SECRETARY OF VETERANS AFFAIRS,  
*Respondent-Appellee.*

Appeal from the United States Court of Appeals  
for Veterans Claims in 05-0090,  
Judge William P. Greene, Jr.

**BRIEF OF *AMICUS CURIAE* UNITED SPINAL ASSOCIATION  
IN SUPPORT OF CLAIMANT-APPELLANT DAVID L. HENDERSON**

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August 12, 2009

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## CERTIFICATE OF INTEREST

Counsel for United Spinal Association, *Amicus Curiae*, certifies the following:

1. The full name of every party or amicus represented by me is:

United Spinal Association

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Not applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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## STATEMENT OF RELATED CASES

*Amicus Curiae* is unaware whether any other appeal from the action involved in this case was previously before this or any other appellate court. *Amicus Curiae* is aware of one other pending case in this Court that would directly affect or be affected by this Court's decision in the present appeal: *Halseth v. Shinseki*, No. 2009-7048.

## INTEREST OF *AMICUS CURIAE*

*Amicus Curiae* United Spinal Association ("United Spinal") is a nonprofit organization formed in 1946 by paralyzed veterans. It has served the interests of veterans and their families ever since. 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. It has advocated for benefits for veterans with spinal-cord injuries, for veterans dependents with spina bifida, and for veterans suffering from spinal-cord injuries as a result of their service in Iraq and Afghanistan. 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.

United Spinal has a strong interest in the outcome of this appeal. Equitable tolling of 38 U.S.C. § 7266 provides a vital procedural safeguard for veterans with serious physical and mental disabilities, including those resulting from spinal-cord injuries. *See Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005) (applying doctrine of equitable tolling based on physical illness). Veterans with spinal-cord injuries, especially those recently injured, continue to receive in-patient treatment, are only learning to overcome limitations to mobility, and are less able to retain counsel and file appeals. Many veterans with spinal-cord injuries will be affected adversely if this Court overturns its decisions in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), and *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc). United Spinal supports the position of Claimant-Appellant David L. Henderson that 38 U.S.C. § 7266 is subject to equitable tolling. All parties have consented to the filing of this brief.

## ARGUMENT

### **I. Our Government Has a Long History of Solicitous Treatment of Its Veterans**

In 1789, Congress began providing pensions for veterans and has provided for veterans “after every conflict in which the Nation has been involved.” *Walters*

*v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Congress created the Veterans Administration in 1930 to administer the veterans benefits system, which was intended to be “as informal and nonadversarial as possible.” *Id.* at 323. As its motto, the VA adopted President Lincoln’s injunction “to care for him who has borne the battle, and his widow and his orphan.” Under the statutory scheme created by Congress, the VA provides a pro-claimant environment in which a veteran can seek disability payments for service-connected injuries and illnesses. A veteran seeking disability benefits first proceeds by filing a claim in a regional office. Barton F. Stichman & Ronald B. Abrams, *Veterans Benefits Manual* § 12.1.1 (2008). Should the veteran receive an unsatisfactory decision on the claim, the veteran may then appeal to the Board of Veterans’ Appeals (“Board”). *Id.*

**A. The Court of Veterans Appeals Was Created as a Part of the Pro-Claimant Veterans Benefits System**

To ensure the nonadversarial nature of the pro-claimant veterans benefits system, judicial review of decisions by the Board was barred by statute until 1988 when Congress established the Court of Veterans Appeals, later renamed the Court of Appeals for Veterans Claims (referred to hereinafter as “the Veterans Court”). In providing this additional safeguard for veterans, Congress intended to “maintain a beneficial non-adversarial system of veterans benefits,” and emphasized four goals for the system of appellate review of veterans claims:

Accurate, informal, efficient, and fair. These are the goals which have guided the committee in reporting a bill expanding judicial review of VA decision-making. However, achievement 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.

Veterans' Judicial Review Act, H.R. Rep. No. 100-936 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. The Act's legislative history also reveals Congress's concern that the adversarial nature of judicial proceedings might jeopardize the perception of the veterans benefits system as a pro-claimant program:

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.*

**B. Judicial Decisions Have Historically Preserved the Pro-Claimant System for Adjudicating Veterans Benefits**

Consistent with that express legislative intent, the Supreme Court has treated veterans and their dependents with deference. For instance, it adopted a rule in veterans benefits cases that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). The Court has applied that rule historically to other statutes intended to protect the interests of veterans.

For instance, in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the Court interpreted a provision of the Veterans' Reemployment Rights Act "to provide its benefit without conditions on length of service" based on the rule that "benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 220-21 & n.9; *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("[The Selective Training and Service Act of 1940] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *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.").

The Federal Circuit, with its unique mandate as the federal appellate court charged with reviewing decisions of the Veterans Court, 38 U.S.C. § 7292(c), has conscientiously interpreted the veterans statutory and regulatory provisions in a manner that reflects the pro-claimant nature of the system. For example, this Court has protected the perception of fairness toward veterans by enforcing various procedural safeguards that are a part of the veterans benefits system. *See McGee v. Peake*, 511 F.3d 1352, 1357-58 (Fed. Cir. 2008) (enforcing 38 U.S.C. § 7104(a) to provide for full review of applicable law by Board and discussing VA duty to assist under 38 U.S.C. §§ 5103A, 5107(a)); *Paralyzed Veterans of America v.*

*Sec'y of Veterans Affairs*, 345 F.3d 1334, 1344-47 (Fed. Cir. 2003) (invalidating regulation imposing thirty-day time limitation for veteran claimant to submit evidence in response to VA notification required by 38 U.S.C. § 5103); *Disabled American Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003) (invalidating rule violating veterans' statutory right to one administrative review on appeal and enforcing requirement of § 5103); *Hodge v. West*, 155 F.3d 1356, 1359-63 (Fed. Cir. 1998) (interpreting "new and material evidence" requirement for reopening claim under 38 U.S.C. § 5108 in light of "strongly and uniquely pro-claimant" character of veterans benefits statutes); *see also* 38 U.S.C. § 5107(b) (codifying benefit-of-the-doubt doctrine).

This Court's decisions in *Bailey* and *Jaquay* likewise have ensured that veterans are provided a reasonable opportunity to appeal adverse Board decisions. The Court in *Bailey* interpreted § 7266 to permit equitable tolling rather than "requiring ruthless application of the time limit." 160 F.3d at 1368. In *Jaquay*, the Court interpreted § 7266 to allow for tolling when a veteran relied on the regional office to forward a motion for reconsideration to the Board. 304 F.3d at 1288 ("[I]t is not unreasonable for veterans to reasonably expect and rely on the VA to fully comply with the comprehensive policies adopted by the agency for the processing of all incoming mail including misdirected mail.").

## **II. The Doctrine of Equitable Tolling Provides an Important Procedural Safeguard for *Pro Se* Veterans**

The various procedural safeguards enacted by Congress, administered by the VA, and interpreted by the judiciary are particularly important to veterans. The majority of veterans proceed *pro se* when appealing an adverse Board decision to the Veterans Court. See United States Court of Appeals for Veterans Claims Annual Reports (2008), available at [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_-\\_20081.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf) (noting 64 percent of claimants were unrepresented when filing notice of appeal in Veterans Court).

The reason most veterans are unrepresented at the point when their claim moves from the agency to the Veterans Court is that Congress originally imposed a fee limitation on attorneys representing veteran claimants. Specifically, and to preserve the non-adversarial nature of the system, attorneys could collect no more than \$10 in fees for their representation of veterans seeking benefits for service-connected disability. 38 U.S.C. § 3404(c) (2000). The Veterans' Judicial Review Act changed that rule to authorize fee-based representation of veterans in appeals from final Board decisions. 38 U.S.C. § 5904(c)(1) (2000). Congress further amended that rule to authorize fee-based representation on appeals to the Board beginning in 2007. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101. Despite those changes, most claimants

continue to proceed *pro se* as indicated in the Veterans Court's most recent Annual Report, *supra*.

It was against the backdrop of the fee limitation that Congress drafted 38 U.S.C. § 7266 in 1988, providing for a 120-day filing period. Some veterans are unable to meet the 120-day filing period based on physical or mental disability, or exercise due diligence but misfile their notice of appeal. For them, the doctrine of equitable tolling recognized in *Bailey* and *Jaquay* has provided a critical procedural safeguard. Without that safeguard, many veterans would not be able to obtain review of adverse decisions by the Board. Professor Michael Allen has observed that pitfall:

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. A prime example of this difficulty concerns the strict application of the time within which a veteran must file her notice of appeal of an adverse Board decision.

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 (2009) (footnote omitted). This pitfall will become more pronounced if this Court eliminates the doctrine of equitable tolling based on a

broad interpretation of the Supreme Court's statements in *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

### **III. Equitable Tolling Provides an Important Procedural Safeguard to Ensure the Pro-Claimant Nature of the Veterans Benefits System**

In his concurrence in *Bailey v. West*, Chief Judge (then Judge) Michel observed the importance of the “uniquely benevolent statutory framework” to the Court’s decision to permit equitable tolling of the 120-day filing period of § 7266. 160 F.3d at 1369. Based on that framework, Chief Judge Michel distinguished prior decisions holding that tolling was not available for appeal periods in cases involving different statutory frameworks. *Id.* The statutory framework must be considered when interpreting § 7266 because the Veterans Court “is an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.” *Id.* at 1370.

Since the decision in *Bailey*, this Court has interpreted § 7266 to ensure the fair application of that provision for veterans unable to meet the 120-day filing requirement. In *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004), the Court held that § 7266 permits equitable tolling based on mental illness. The Court reached that holding by reading § 7266 in the context of the veterans benefits system, observing that “[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.” *Id.* The Court also observed that “the 120-day period for appeal is relatively short, especially considering that most claimants are not represented by counsel.” *Id.* After *Barrett*, the Court had little difficulty recognizing physical illness as a basis for equitable tolling in *Arbas v. Nicholson*. 403 F.3d at 1381 (“Our precedent requires little extrapolation to conclude that equitable tolling based on physical illness is appropriate. For if mental illness can justify tolling, we see no reason why a physical illness may not as well.”). And the decisions in *Jaquay*, 304 F.3d at 1287, *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002), and *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004), interpreted § 7266 to provide for equitable tolling for veterans who exercise due diligence in preserving their legal rights, despite misfiling a notice of appeal. By protecting, among others, veterans with physical and mental illnesses, the doctrine of equitable tolling ensures fair and accurate treatment of claims filed by veterans most in need of the system’s support.

#### **IV. The Rule of *Bowles* Is Out of Place in the Unique, Pro-Claimant Veterans Benefits System and Is Contrary to Congressional Intent in Establishing the Veterans Court**

This appeal presents a question of statutory interpretation: whether the statute of limitation provided in § 7266 can be equitably tolled. It is a principle of

statutory interpretation that in cases construing statutes providing benefits to veterans, “interpretative doubt is to be resolved in the veteran’s favor.” *Brown*, 513 U.S. at 118. This Court’s decision in *Bailey* interpreted § 7266 in that manner, and the Supreme Court’s decision in *Bowles* does not mandate a different interpretation of that statute.

*Bowles* was not a veterans case, nor did it involve a statute of limitations. Rather, the Supreme Court held in *Bowles* that the time limits for taking appeal under Fed. R. App. P. 4 and 28 U.S.C. § 2107(a) are “jurisdictional,” and thus not subject to the “unique circumstances” doctrine. 127 S. Ct. at 2366. Applying the strict jurisdictional rule of *Bowles* to § 7266 would create a striking appearance of unfairness to veterans, in contrast to Congress’s intent in creating the Veterans Court to “maintain a beneficial non-adversarial system of veterans benefits,” which is “[a]ccurate, informal, efficient, and fair.” H.R. Rep. No. 100-396 (1988), *reprinted in* U.S.C.C.A.N. at 5795, 5808.

Moreover, treating § 7266 as a strict jurisdictional statute without the possibility of tolling for equitable considerations would incorporate into the veterans benefits system the kind of formality and unfairness that Congress warned against when passing the Veterans’ Judicial Review Act. It would result in “the perception of the VA system [that] is [one that] has become inefficient, formalized, and unfair,” and where “veterans will bear the burden of the change.” *Id.* at 5808;

*see also* James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, 234 (2001) (“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.”).

It is particularly unfair that such a strict reading of veterans law would be derived from a broad interpretation of federal criminal law. Veterans have, at the risk of their lives, defended the country, its citizens, the Constitution, and the rule of law, all of which have been jeopardized by those convicted of crimes. Treating injured servicemen, such as Mr. Henderson, the same as convicted criminals, such as Mr. Bowles, is contrary to the deferential treatment historically afforded to our veterans by successive Congresses, Administrations, and Courts for more than 200 years.

**V. The Rule of *Bowles* Did Not Alter the Law for Statutes Such as § 7266 Where Congress Made Its Intent Clear**

Regardless of the unfairness to veterans that would ensue if equitable tolling were abrogated in this case, *Bowles* does not require such a change as a matter of law. When this Court decided *Bailey*, there was already Supreme Court precedent holding timing of review provisions to be jurisdictional. In *Stone v. Immigration & Naturalization Service*, 514 U.S. 386 (1995), for example, the Supreme Court addressed a timing of review provision under the immigration laws. The Court

stated that “[j]udicial review provisions, however, are jurisdictional in nature and must be construed with strict fidelity to their terms.” *Id.* at 405. The Court continued, “[t]his is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, ‘mandatory and jurisdictional,’ and are not subject to equitable tolling.” *Id.* (citation omitted). This Court in *Bailey* squared that exact language from *Stone* with the Supreme Court’s decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), holding that equitable tolling is available unless Congress has expressed intent to the contrary. *Bailey*, 160 F.3d at 1366 (“We do not think this language [from *Stone*] can be read to mean that statutes specifying the time for review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional.”).

The language in *Bowles*, relied upon by the Veterans Court in this case, is similar to that of *Stone* in that it refers to the jurisdictional nature of timing of review provisions. *See Bowles*, 127 S. Ct. at 2366 (“Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.”). The statement in *Bowles* goes no further than the Supreme Court’s statement in *Stone*, which was expressly dealt with by this Court in *Bailey*.

*Bowles* does not involve the statutory framework for adjudicating veterans benefits, but rather the time-for-review provision for appealing a denial of a

petition for habeas corpus. To hold that the statement in *Bowles* requires this Court to overturn its prior interpretation of § 7266 would be “to infer from a single, brief paragraph of analysis a remarkable holding that would far exceed what the facts of the case required the court to decide.” *Atamirzayeva v. United States*, 524 F.3d 1320, 1328 (Fed. Cir. 2008). Rather than eliminating an important safety net for veterans and their dependents, this Court should interpret § 7266 in light of Congress’s goal of ensuring an informal, deferential adjudicative process for veterans seeking compensation for their service-connected disabilities.

#### **VI. The Veterans Court’s Decision in This Case Has Initiated a Dramatic Change in the Availability of Judicial Review for Many Veterans**

Since the Veterans Court issued its decision in this case last year, it has dismissed over 130 appeals based on the inability of claimants to meet the filing requirements of § 7266, an average of over two dismissals per week. *See, e.g., Mobley v. Shinseki*, Vet. App. No. 07-1041 (June 17, 2009) (suffered stroke that affected memory); *Millan v. Shinseki*, Vet. App. No. 06-0078 (Apr. 30, 2009) (mental illness); *Trammell v. Shinseki*, Vet. App. No. 07-2214 (Mar. 18, 2009) (veteran hospitalized); *Hagopian v. Shinseki*, Vet. App. No. 08-3322 (Mar. 18, 2009) (suffered stroke shortly before receiving notice); *Funes v. Shinseki*, Vet.

App. No. 08-2341 (Feb. 26, 2009) (psychiatric disability). Those appeals were filed disproportionately by veterans proceeding *pro se*.<sup>1</sup>

More troubling, many of the dismissed appeals, if heard, likely would have led to a finding of error by the Board. In 2008, the Veterans Court heard 3,542 appeals on the merits, and reversed, vacated, or remanded 2,184 of the Board's decisions. See United States Court of Appeals for Veterans Claims Annual Reports (2008). The result of the Veterans Court's decision in this case is that many veterans with mental health diagnoses or physical injuries, or who acted diligently in filing, will be unable to obtain judicial review of Board decisions containing prejudicial errors.

The Board's high error rate was one of the primary reasons that veterans service organizations began advocating for judicial review of the Board's

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<sup>1</sup> The Veterans Court ordered dismissals in the following appeals in which the veteran was unrepresented: 09-0989, 09-0969, 09-0934, 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, 09-0102, 08-4280, 08-4242, 08-4104, 08-4000, 08-3804, 08-3748, 08-3647, 08-3507, 08-3490, 08-3486, 08-3482, 08-3445, 08-3399, 08-3398, 08-3385, 08-3382, 08-3364, 08-3356, 08-3322, 08-3142, 08-3112, 08-3084, 08-3051, 08-3044, 08-2993, 08-2933, 08-2909, 08-2843, 08-2807, 08-2761, 08-2756, 08-2709, 08-2700, 08-2689, 08-2661, 08-2630, 08-2535, 08-2506, 08-2493, 08-2234, 08-2232, 08-2221, 08-2167, 08-2122, 08-2062, 08-2048, 08-1950, 08-1879, 08-1855, 08-1822, 08-1241, 08-1220, 08-1157, 08-0999, 08-0904, 08-0631, 08-0613, 08-0599, 08-0498, 08-0463, 08-0356, 08-0069, 07-3819, 07-3581, 07-3525, 07-3389, 07-3168, 07-3033, 07-3013, 07-2652, 07-1797, 07-1728, 07-1609, 07-1594, 07-1041, 07-0782, 07-0455, 06-2574.

decisions. The legislative history of the Veterans' Judicial Review Act notes that, as early as 1960, veterans service organizations expressed concern to Congress regarding the consistency and accuracy of the Board's decisions. H.R. Rep. No. 100-936 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 5792. Those concerns remain valid today in view of the high remand rate of appeals filed in the Veterans Court.

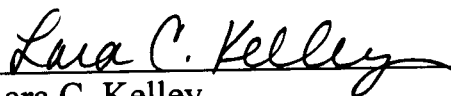
Because many of the appeals being dismissed by the Veterans Court presumably would have presented errors warranting a remand to the Board or a reversal, the Veterans Court's abrogation of equitable tolling represents a significant change in the veterans benefits appeal process. A change that significant to the veterans benefits system is best left to Congress, especially when that policy change runs against Congress's purpose in providing a pro-claimant benefits system for veterans. *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957) ("As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases.").

## **VII. Conclusion**

United Spinal Association respectfully requests that this Court reverse the decision of the Court of Appeals for Veterans Claims and uphold the prior *en banc* decisions in *Bailey* and *Jaquay*.

Dated: August 12, 2009

Respectfully submitted,



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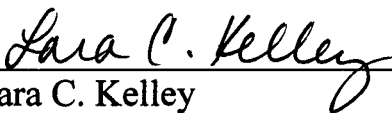
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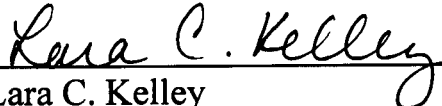
  
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I certify that the foregoing BRIEF OF *AMICUS CURIAE* UNITED SPINAL ASSOCIATION IN SUPPORT OF CLAIMANT-APPELLANT DAVID L. HENDERSON contains 3,756 words as measured by the word processing software used to prepare this brief.

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