No. 21-432

IN THE

Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF MILITARY-VETERANS ADVOCACY INC. AND JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

The Jewish War Veterans of the United States of America, Inc. (JWV), organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924 and chartered by an act of Congress in 1983, JWV's objectives include "encourag[ing] the doctrine of universal liberty, equal rights, and full justice to all men," and "preserv[ing] the spirit of comradeship by mutual helpfulness to comrades and their families." 36 U.S.C. § 110103(5), (7).

This case concerns 38 U.S.C. § 5110(b)(1), the statute that ties the effective date for disability benefits to a veteran's discharge from service, so long as the veteran files an application within one year of discharge. The U.S. Court of Appeals for the Federal Circuit, by an evenly divided en banc court, affirmed the

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

holding of the U.S. Court of Appeals for Veterans Claims that this timing provision is not amenable to equitable tolling. *Arellano v. McDonough*, 1 F.4th 1059, 1060 (Fed. Cir. 2021) (en banc) (Pet. App. 14a-97a); *Arellano v. Wilkie*, No. 18-3908, 2019 WL 3294899 (Vet. App. July 23, 2019) (Pet. App. 2a-7a). The Federal Circuit's ruling continues to erode veterans' rights to the benefits their dutiful service has earned them. In a benefits system that Congress intended to be pro-veteran, depriving veterans of disability compensation for which they have sacrificed their physical and mental health when, as here, those same injuries cause them to delay filing for benefits is an injustice that Congress clearly did not intend. Given the special solicitude long reflected in our veterans' benefits laws and this Court's precedents on the presumptive availability of equitable tolling, veterans should not be deprived of disability compensation when the deprivation is wrought by the disability itself.

Because the ruling below contravenes Congress's intent and this Court's precedents, and because it compromises veterans' ability to be made whole for their service-connected injuries, MVA and JWV have a strong interest in this Court overturning the Federal Circuit's ruling and clarifying that the one-year deadline in § 5110(b)(1) is amenable to equitable tolling. If allowed to stand, the Federal Circuit's decision will continue eroding veterans' rights.

Ultimately, both MVA and JWV have an interest in advocating that all veterans—including those experiencing post-traumatic stress stemming from their military service—receive the benefits to which they

are entitled. Jewish American novelist J.D. Salinger suffered from post-traumatic stress following World War II and became a recluse. It is believed that, perhaps due to his condition, he never accessed the benefits to which he was entitled. To veterans like J.D. Salinger and Petitioner, our government should not impose additional barriers, but rather, must act like a catcher in the rye.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout American history, there are "those 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). They endure the sacrifice that comes with rigorous military training and service, including the risks to personal safety and the separation from home, family, and friends. And all too often their military service causes them injury, trauma, and illness. At a minimum, their service has earned them our solicitude. That is why the system that Congress designed for their benefit is uniquely pro-claimant.

Veterans are entitled to compensation for any disability resulting from their military service that impairs their ability to work or go about their life. 38 U.S.C. §§ 1110, 1131. Generally, veterans are entitled to benefits for such so-called "service-connected" disabilities from the date when the U.S. Department of Veterans Affairs (VA) receives their original claim for compensation. *Id.* § 5110(a)(1). There is an important exception, however. So long as VA receives a disability-compensation claim within one year from the date

of the veteran's discharge from service, VA must treat the day after discharge as the effective date from which the veteran is entitled to receive benefits flowing from the claim. *Id.* § 5110(b)(1). In other words, a veteran may receive disability-compensation benefits from the moment she leaves active duty if VA receives her application for those benefits within one year of her discharge.

The question presented in this case is whether that one-year deadline in § 5110(b)(1) is amenable to equitable tolling. Can the deadline be extended in the rare instance where equity and fairness so dictate—as in this case, where the claimant's service-induced disability was the very reason for missing the deadline? Or did Congress intend this uniquely pro-claimant scheme to nonetheless carry the harsh consequence that a veteran cannot be made whole even when their disability prevented them from filing a disability-compensation claim within one year of their discharge from service?

As Petitioner explains, this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and related precedents, provide a clear roadmap toward the conclusion that Congress enacted § 5110(b)(1)'s one-year deadline against the presumptive availability of the equitable-tolling doctrine. Pet. Br. at 14-29. The Federal Circuit's categorical prohibition of equitable tolling misinterprets the roadmap, as well as Congress's intent, and thus improperly harms the intended beneficiaries of the veterans' disability-compensation system.

I. Recognizing the availability of the equitable-tolling doctrine for veterans like Petitioner is vital to a uniquely deserving population and necessary to guarantee that this public-benefits program, which is unlike any other, functions in the manner that Congress intended.

Veterans earn VA disability compensation through their hard sacrifice and service to our nation. Service-connected physical and mental health conditions render some veterans unable to adequately support or care for themselves or their families. And disability-compensation benefits provide financial support for these veterans, including monthly compensation payments to veterans and their dependents. Accordingly, equitably tolling § 5110(b)(1)'s deadline for retroactive benefits, where appropriate, is indispensable to making sure that veterans are made whole. Tolling is particularly crucial to the most vulnerable in the veteran community, including veterans with psychiatric disorders, traumatic brain injuries, and sexual trauma—conditions that are far too common in military service and may, in certain cases, prevent a veteran from recognizing or acknowledging that they have a disability for which they might be entitled to compensation.

Not only does tolling § 5110(b)(1)'s one-year deadline recognize the effect that these psychiatric and traumatic conditions may have on a veteran's ability to file a claim for compensation, it also recognizes the reality that many veterans with these conditions are expected to initiate and navigate the claims process without the assistance of a trained lawyer. Notwith-

standing Congress's intent to create an informal program designed to help veterans obtain the benefits they have earned, VA operates a system where applicants are left to fend for themselves or, at best, rely on non-lawyers to initiate and navigate a complex administrative process where technical pitfalls abound. Foreclosing equitable tolling in this context is therefore especially harmful to vulnerable veterans like Petitioner and flies in the face of the government's longstanding obligation to make whole those veterans who are injured in the line of duty, especially where the injuries are the cause of the delay in applying for compensation.

II. Whereas recognizing the availability of the equitable-tolling doctrine would be incredibly beneficial to vulnerable veterans, doing so would not create serious administrative problems for VA. Policy considerations of repose and administrative simplicity cannot overcome the text-driven conclusion that Congress enacted § 5110(b)(1) against the longstanding interpretive rule that equitable tolling is presumptively available. Even if those policy considerations were relevant, they are not so significant here as to conclude that Congress had to provide for equitable tolling explicitly to preserve the tolling exception.

Section 5110(b)(1)'s deadline is especially amenable to equitable tolling because case-by-case consideration of individual equities is already embedded in the administrative scheme that Congress established. That system involves a relatively small (and declining) beneficiary population whose claims are processed by one of the largest bureaucracies in the federal government. Allowing for equitable tolling

would not substantially burden the disability-compensation system—much less render it unworkable. The veterans' system is unlike other administrative schemes—such as tax collection and social security—where tolling could create administrative problems to the point that it would be inconsistent with Congress's intent.

Upon recognition of Congress's intent to make equitable tolling available, the vast benefits to vulnerable veterans, the absence of significant problems for VA's operation, and the system's pro-veteran disposition, there is no way to justify the Federal Circuit's categorical bar on tolling § 5110(b)(1)'s time period. That categorical prohibition is both unsupported as a legal matter and deeply harmful to the veteran community. This Court should reverse the Federal Circuit's judgment.

ARGUMENT

I. Equitably Tolling 38 U.S.C. § 5110(b)(1)'s Time Limit Would Broadly Benefit A Uniquely Deserving Population.

Equitably tolling § 5110(b)(1)'s one-year filing deadline would benefit all veterans. But it would have the greatest impact on those veterans whose failure to file a timely claim results from their service-connected disability. Among the disabilities that may hamper a veteran's ability to file are psychiatric and cognitive conditions, traumatic brain injuries, and military sexual trauma—all common within the veteran community. Following their military service, the

difficulties that veterans suffering from such conditions must face are compounded by a statutory bar against veterans paying lawyers to protect their interests. Equitable tolling presumptively applies to cases brought by veterans against the government and ensures that these veterans can be made whole despite the many obstacles they face. (§ I.A). Not only are veterans a uniquely deserving population in our country (§ I.B), but also the equitable-tolling doctrine would help exceptionally vulnerable veterans to receive the compensation that they have earned (§ I.C), especially because these disabled veterans are expected to navigate a complex administrative scheme without the assistance of a trained lawyer (§ I.D).

A. Section 5110(b)(1) contains a statutory filing deadline that is amenable to equitable tolling.

Time requirements in lawsuits between private litigants and the government are presumptively subject to equitable tolling, a doctrine that grants a court discretion to extend legal deadlines when a party's reasonable diligence is thwarted by extraordinary circumstances. *Irwin*, 498 U.S. at 95; *Equitable Tolling*, Black's Law Dictionary (11th ed. 2019); *see also Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010) (mental illness a ground for equitable tolling); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (same). *Irwin*'s presumption can be defeated only by "good reason to believe that Congress did *not* want the … doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

Irwin's presumption of equitable tolling has been applied to different kinds of time limits relating to "the administration of benefit programs," including traditional statutes of limitations and other timing requirements. *Scarborough v. Principi*, 541 U.S. 401, 420-23 (2004) (involving application deadline for fees under the Equal Access to Justice Act); *see, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 388-89, 393-94 (1982) (concluding that Title VII's deadline for filing a "charge of discrimination with the EEOC is not a jurisdictional prerequisite … but a requirement that, like a statute of limitations, is subject to … equitable tolling"), cited in *Irwin*, 498 U.S. at 95 & n.2.

Applying the equitable-tolling doctrine to veterans' disability-compensation applications makes sense because § 5110(b)(1) establishes a statutory deadline by which veterans must apply to receive fully retroactive disability-compensation benefits. *Scarborough*, 541 U.S. at 422. ("benefit programs" may be amenable to *Irwin* presumption even though they lack a "precise private analogue"). This one-year deadline encourages veterans to file existing claims as soon as possible, when service records and medical evidence are readily available and before the passage of time makes evaluating a service connection more difficult. *See, e.g.,* 38 C.F.R. § 3.307(a)(3) (certain chronic diseases presumptively service-connected only if "manifest to a degree of 10 percent or more within 1 year … from the date of separation from service").

Authorizing the equitable tolling of § 5110(b)(1) will benefit deserving veterans without undermining this goal. No amount of encouragement will motivate a veteran to file a disability-compensation claim when

the disability is itself preventing the veteran from doing so. Such veterans are not sitting on their rights; their disabilities tie their hands and prevent them from exercising those rights. Recognizing that veterans are sometimes too damaged by their service to seek the benefits they have earned will ensure Congress's "solicitude" for veterans is enforced. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

In light of *Irwin*'s presumption, § 5110(b)(1)'s purpose, and the singularity of the veteran community and benefit system, there is no "good reason" to believe Congress intended to foreclose equitable tolling from applying to § 5110(b)(1)'s filing deadline.

B. The veteran community is uniquely deserving of equitable treatment under this public-benefits program.

Veterans earn their benefits through their readiness to lay down their lives in pursuit of national interests. Carl von Clausewitz, *On War* 87 (Michael Eliot Howard & Peter Paret trans., Princeton Univ. Press 1989) (1976) ("The political object is the goal, war is the means of reaching it."). Even in peacetime, military service entails rigorous training, family separation during overseas tours of duty, and frequent reassignments. During wartime, military service may involve prolonged exposure to combat, ruin, and even death.

A government that sends its soldiers, sailors, airmen, marines, and guardians into harm's way in pursuit of national priorities bears direct responsibility

for the resulting disabilities. The United States has long recognized this moral obligation and kept faith with those "who shall have borne the battle." President Abraham Lincoln, Second Inaugural Address (Apr. 10, 1865); *see also* Act of September 29, 1789, ch. 24, § 1, 1 Stat. 95 (Revolutionary War pensions for the "wounded and disabled"); Act of July 24, 1862, ch. 166, § 1, 12 Stat. 566 (Civil War pensions for disabled Union soldiers); Act of March 20, 1933, ch. 3, § 1, 48 Stat. 8 (pensions for disabled veterans regardless of conflict). This causal connection between service and sacrifice has no parallel in other benefits programs and weighs heavily in favor of tolling § 5110(b)(1)'s deadline for retroactive benefits, especially where, as here, the service-connected disability is itself the cause of the delay in seeking compensation.

C. Tolling § 5110(b)(1)'s deadline would help the most vulnerable veterans obtain the compensation they are entitled to receive.

Within this uniquely deserving population, one especially vulnerable group would benefit the most from the availability of equitable tolling. That group consists of veterans, like Petitioner, who have a service-connected disability that is itself the cause of the delay in seeking disability compensation. Tolling in those circumstances protects veterans who are unable or unwilling to acknowledge or articulate conditions like psychiatric disorders, traumatic brain injuries, or military sexual trauma.

Such impairments and experiences are common among veterans. Nearly 4.5 million veterans received

VA primary care in 2010—and more than 25% were diagnosed with at least one mental illness. Ranak B. Trivedi et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among U.S. Veterans*, 105 Am. J. Pub. Health 2564, 2566 (2015), https://tinyurl.com/4zedw9kh. Demand for mental health treatment among veterans continues to grow, with 1.84 million veterans—or 30% of all Veterans Health Administration users—receiving specialty mental health care from VA in 2021. U.S. Dep't of Veterans Affairs, *FY 2023 Budget Submission: Budget in Brief* 22 (March 2022), https://tinyurl.com/2p8jdmp7. Nearly 16% of veterans seeking health care through VA facilities also report experiencing military sexual trauma (MST)—3.9% of male veterans and 38.4% of female veterans. Laura C. Wilson, *The Prevalence of Military Sexual Trauma: A Meta-Analysis*, 19 Trauma, Violence, & Abuse 584, 591-92 (2018). And the Defense and Veterans Brain Injury Center reported nearly 414,000 traumatic brain injuries among U.S. service members between 2000 and 2019. U.S. Dep't of Veterans Affairs, Office of Research & Development, *Traumatic Brain Injury (TBI)*, https://tinyurl.com/ykc25cah.

These statistics, of course, reflect only those veterans who are able to seek VA care for their conditions. They do not include veterans, like Petitioner, who cannot acknowledge their condition and are therefore unable to seek help. Pet. App. 128a (quoting treating psychiatrist's opinion that Petitioner "was so sick that he believed that nothing was wrong with him"); *id.* (quoting another treating psychiatrist's opinion that Petitioner's "grave mental illness … has rendered him 100% disabled; and … prevented him

from understanding his right and need to apply [for] and procure … service[-]connected disability benefits"); Pet. App. 156a-157a (VA acknowledged "gross impairment in thought processes," "persistent hallucinations," "persistent delusions," "impair[ed] … memory," and "impaired judgment"); *see also* 38 C.F.R. § 4.130 (describing 100% disability rating of "[t]otal occupational and social impairment due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; … [and] memory loss"). Almost definitionally, a veteran who cannot even acknowledge her disability will not seek compensation for it.

Moreover, even veterans who do not suffer symptoms as severe as Petitioner's often avoid thinking about their military experiences simply to cope with the trauma they have endured. In fact, one diagnostic criterion for post-traumatic stress is "persistent avoidance of stimuli associated with the traumatic event(s)," including avoidance of "distressing memories" or "external reminders." Am. Psych. Assoc., *Diagnostic and Statistical Manual of Mental Disorders* 271 (5th ed. 2013). Estimates for lifetime prevalence of post-traumatic stress in certain veteran cohorts (like those from the Vietnam War and Operation Enduring/Iraqi Freedom) range as high as 37.3%. Sharon M. Smith et al., *The Association Between Posttraumatic Stress Disorder and Lifetime DSM-5 Psychiatric Disorders among Veterans*, 82 J. Psych. Res. 16, 16-17 (2016). Therefore, a significant number of veterans may not be able to simultaneously avoid thoughts, feelings, or reminders of their experiences and still file an adequate claim for veterans' benefits.

U.S. Dep't of Veterans Affairs, Office of the Inspector Gen'l, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma* i (Aug. 21, 2108), https://tinyurl.com/2vnzj3ac (describing difficulties in filing successful MST-related disability claims). For these veterans, filing a claim is, understandably, secondary to their more immediate need to survive the effects of their trauma. As Jewish American World War II veteran Joseph Heller might put it, refusing to compensate veterans for the effects of their trauma because one of those effects is an inability to seek compensation is the ultimate "Catch-22."

To be sure, a visceral need to avoid thinking about a disabling experience is not the only obstacle to filing a compensation claim. Many veterans are unwilling to acknowledge trauma and seek benefits because of the stigmatization and denial of mental illness in the military and veteran communities. In a military culture that celebrates strength and stoicism and embraces hardship (or, in military patois, "embraces the suck"), mental illness is often perceived as weakness. Despite years trying to combat this stigma, the Department of Defense recently conceded its prevalence. U.S. Dep't of Defense, Press Briefing (Mar. 22, 2022) https://tinyurl.com/3mpwnw5m (acknowledging "the stigma of seeking help for mental health problems … is still a problem in the military"). Perversely, that stigma associated with mental health care is actually highest among service members who screen positive for mental health symptoms or disorders. Joie D. Acosta et al., *Mental Health Stigma in the Military* 1 (RAND Corp. 2014); Charles W. Hoge et al., *Combat*

Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care, 351 New Eng. J. of Med. 13, 13-22 (2004).

These barriers do not disappear when service members retire or separate from service. They continue to affect veterans' ability to acknowledge and seek compensation for mental illness. So adverse are these impacts that the Federal Circuit has recognized "[t]he need for [VA] assistance is particularly acute where, as here, a veteran is afflicted with a significant psychological disability at the time he files" a claim. *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). Ultimately, making equitable tolling available in cases such as Petitioner's recognizes the reality that no service-connected disability should prevent a deserving veteran from obtaining the full compensation they have earned.

D. Tolling § 5110(b)(1)'s deadline would help these vulnerable veterans who are also expected to navigate a complex administrative scheme unassisted by a trained lawyer.

1. VA's system discourages veterans from initiating a disability claim with the help of a trained lawyer.

During the Civil War, Congress enacted a statute capping the fees that agents and attorneys could charge claimants to "prevent the numerous frauds committed by pension agents upon applicants for pensions." Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The*

"New Paternalism", 1 Veterans L. Rev. 2, 6 (2009) (quoting Cong. Globe, 37th Cong., 2d Sess. 2099, 2101 (1862)). That 19th-century paternalism still prevails in the current disability-compensation system. Veterans remain statutorily barred from paying a lawyer to represent them when filing their initial claim application or during the Regional Office's initial adjudication process. *See* 38 U.S.C. § 5904(c)(1). Only after a veteran is dissatisfied with the Regional Office's adjudication of the claim may the veteran then obtain paid representation. *Id.*

VA's myriad affirmative duties to aid veterans after they have filed claims do not ameliorate the lack of legal representation before filing. VA's receipt of a disability compensation claim triggers statutory obligations to: assist claimants by developing relevant facts to support their claims (38 U.S.C. § 5103A; 38 C.F.R. §§ 3.103(a), 3.159(c)); notify veterans of necessary evidence before denying claims (38 U.S.C. § 5103; 38 C.F.R. § 3.159(b)); give them the benefit of the doubt when the evidence for and against their claims is in approximate balance (38 U.S.C. § 5107; 38 C.F.R. § 3.102); and recognize numerous evidentiary presumptions favoring veterans. *See, e.g.,* 38 U.S.C. §§ 1111 (presumption of soundness), 1112-1118 (presumptions of service-connectedness).

Notably, however, VA has no duty to assist vulnerable and unrepresented veterans in clearing the very first hurdle: filing their initial claim within the one-year deadline set forth in § 5110(b)(1) to secure uninterrupted compensation after they leave service. Authorizing equitable tolling would ensure that this same pro-claimant principle applies at this critical

threshold step. There is no good reason to think that Congress would have wanted a different system.

2. Veterans face significant hurdles in navigating the process of filing a disability claim.

Equitably tolling § 5110(b)(1)'s deadline where appropriate would benefit the most vulnerable veterans for another important and related reason: Although the veterans' disability-compensation scheme is meant "to function throughout with a high degree of informality and solicitude for the claimant," *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985), the scheme fails to measure up in practice. As a former VA Secretary conceded during his time in office, "[t]he [disability payments] system … puts VA in an adversarial relationship with veterans," who must "constantly be refiling claims to get what they deserve." David Shulkin, U.S. Sec'y of Veterans Affairs, Address at the National Press Club on Improving the VA Healthcare System (Nov. 6, 2017), https://tinyurl.com/2p8rkk6m; *see also From the Inside Out: A Look at Claims Representatives' Role in the Disability Claims Process: Hearing Before the H. Comm. on Veterans Affairs*, 112th Cong. 57 (2012), https://tinyurl.com/48nxvkcp ("[T]he disability claims process is pretty confusing for the layman. Even for the people who work with this system on a daily basis it can be pretty confusing sometimes.") (statement of Randall Fisher, American Legion disability claims service officer).

The Federal Circuit has confirmed this reality. Long ago, the court recognized that "the system has

changed from a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims, to one in which veterans … must satisfy formal legal requirements, often without the benefit of legal counsel." *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998). Put simply, the disability-compensation system is no longer the beneficent process Congress originally intended. On the contrary, it is a system where "substantively and procedurally complex rules" abound. James D. Ridgway*, The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 252 & n.4 (2010).

The statutory bar on paid legal representation means most veterans' initial foray into this complex and confusing system is without the benefit of a lawyer. The Government Accountability Office has estimated that 22% of veterans represent themselves at initial filing and 76% are represented by veteran service organizations (VSOs)—whereas the remaining 2% were represented by attorneys or non-attorney "agents." U.S. Gov't Accountability Off., GAO-13-643, *VA Benefits* 4 (2013), https://tinyurl.com/c6j5c5aw (estimates based on claims pending in November 2012). Indeed, self-representation or VSO representation has been the norm for decades. *Walters*, 473 U.S. at 312 n.4 (citing VA statistics in the 1980s showing "that 86% of all claimants are represented by service representatives, 12% proceed *pro se*, and 2% are represented by lawyers.").

While VSOs represent the majority of veterans, working with VSOs presents its own challenges. For

example, although VSOs must certify their representatives are adequately trained, the quality of the training varies by organization. *From the Inside Out*, *supra* (initial training varies from "a rigorous 16-month on the job training program" to "a 40-hour classroom 'boot camp'" to "multi-day conferences"). Recognizing the qualitative difference between VSO training and formal legal education, the Federal Circuit has required VA to construe an application filed with VSO assistance as "sympathetically" as those filed by pro se veterans. *Comer*, 552 F.3d at 1369 (noting that, while VSOs "provide invaluable assistance," their representation "is not equivalent to representation by a licensed attorney").

Accordingly, in the vast majority of cases, applicants are left to fend for themselves or rely on nonlawyers to navigate a complex administrative scheme. Making equitable tolling available, where appropriate, will mitigate the disadvantages that self- and VSO-represented veterans may face in navigating VA's admittedly adversarial disability-benefits scheme and will effectuate the special "solicitude for the claimant" that underlies Congress's enactment of the Veterans' Judicial Review Act (including § 5110(b)(1)). 134 Cong. Rec. E3682-01 (daily ed. Oct. 21, 1988) (statement of Rep. Burton) (noting the law's "prime concern and motivation was the best interest of our Nation's veterans" and it ensures "the benefit of the doubt will be given to the veterans, as it should").

II. Equitably Tolling § 5110(b)(1)'s Time Limit Would Not Create Serious Administrative Problems For VA.

For the reasons explained above, the Federal Circuit's categorical prohibition against equitably tolling § 5110(b)(1)'s one-year deadline punishes a uniquely deserving population. Fortunately, there are numerous textual and contextual signals demonstrating that Congress did not foreclose the availability of equitable tolling in this case—including the placement of § 5110(b)(1) in a uniquely pro-claimant administrative scheme. *See* Pet. Br. at 29-39; MVA Cert-Stage Amicus Br. at 5-15. Faced with that reality, the government might invoke general considerations of repose and administrative simplicity to defend the lower court's judgment, arguing perhaps that tolling would create serious administrative problems for VA. That argument, if made, is transparently flawed.

While policy considerations may sometimes be pertinent in statutory interpretation, this Court has relied on them only to "underscore[]" a statute's plain language when evaluating whether tolling would "create serious administrative problems" for an agency. *Brockamp*, 519 U.S. at 352. Policy considerations cannot, after all, overcome the statutory text, which we presume Congress to have enacted "against a background of clear interpretive rules" that exist precisely so that the drafter "know[s] the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.); *accord PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2066 (2019) (Kavanaugh, J., concurring in the judgment) ("[Government's] policy-laden argument

cannot overcome the text of the statute and the traditional administrative law practice."). One such interpretive rule or principle is the presumption recognized in *Irwin*: In waiving sovereign immunity and establishing a cause of action, Congress makes equitable tolling applicable to suits against the government unless it says otherwise. 498 U.S. at 95-96.

But even if this Court were to consider the practical consequences of tolling § 5110(b)(1), it will find that they are not so significant as to expect Congress to have explicitly written an equitable-tolling exception into the statute. On the contrary, § 5110(b)(1)'s deadline is especially suitable for equitable tolling (§ II.A) and is easily distinguishable from other statutory deadlines where tolling would be impracticable, if not unrealistic (§ II.B).

A. Distinct features of the veterans' disability-benefits system render the deadline in § 5110(b)(1) especially amenable to equitable tolling.

There are at least three features of the disability-benefits system that, when combined, highlight the viability of an equitable-tolling exception in the circumstances presented.

First, the system is sufficiently complex and so centered around assisting each individual applicant that it can bear any limited burden that may result from equitably tolling the deadline in § 5110(b)(1) in the rare instance where it would be appropriate. Congress designed the system to give individualized attention to each and every claim for disability

compensation. It did so by imposing affirmative obligations upon VA and establishing a comprehensive application process that examines each applicant's individual circumstances.

As to the affirmative obligations imposed upon VA, several of which are discussed above (at 16), the text of the statute tells a clear story. VA has a statutory duty to make "reasonable efforts" to ensure that the records of *each* claimant are complete and, if necessary, assist them in obtaining any additional "evidence necessary to substantiate the claimant's claim for a [disability] benefit." 38 U.S.C. § 5103A(a)(1); *see also id.* §§ 5103A(b)-(c) (establishing duty to assist claimants obtain relevant records, including private ones, to support their claims for disability compensation). VA also has a duty to "provid[e] a medical examination or [to] obtain[ ] a medical opinion when such an examination or opinion is necessary to make a decision on the claim." *Id.* § 5103A(d). As to the individualized nature of the review and adjudicative process, the system, as designed by Congress and implemented by VA, requires a case-by-case analysis of each applicant's individual circumstances. VA must evaluate, among other things, their medical conditions and military service history and assign a carefully calibrated rating of the veteran's overall disability pursuant to Congress's directives and VA regulations. *See* 38 U.S.C. §§ 1155-1157; 38 C.F.R. §§ 3.321-3.385.

Congress clearly meant for individualized attention to be present at every turn of this statutory scheme. It mandated VA to assist individual appli-

cants in presenting their claims for review and adjudication, and to evaluate each applicant's individual circumstances carefully and thoroughly.

Second, the veteran population that might submit a claim for disability compensation is relatively small and is declining. The veteran population has declined by almost one third in just this century alone—from approximately 26 million to 18 million. *See* U.S. Census Bureau, *Those Who Served: America's Veterans From World War II to the War on Terror* 1 (2020) ("*Those Who Served*"), https://tinyurl.com/yza3axuj. And it is projected to decline further over the next 30 years. *See* U.S. Dep't of Veterans Affairs, *Veteran Population Projection Model 2018: A Brief Description* 4 (2020), https://tinyurl.com/yyttab5j. Moreover, the "median age" of the current veteran population is 65 years, and 23.5% are ages 75 and older. U.S. Census Bureau, *U.S. Census Bureau Releases Key Stats on Nation's Veteran Population* (Nov. 10, 2021), tinyurl.com/59x8aw72; *Those Who Served*, *supra*, at 1.

More critically, within the declining total veteran population, only veterans who missed the one-year deadline in § 5110(b)(1)—and for whom compensation has been approved—would even be eligible to invoke the doctrine of equitable tolling. While the precise number of eligible claimants is unknown, we can safely assume that it is relatively small considering that fewer than 259,000 veterans began receiving compensation benefits for service-connected disabilities in 2020. U.S. Dep't of Veterans Affairs, *Veterans Benefits Administration, Annual Benefits Report Fiscal Year 2020* ("*VBA ABR 2020*") 70 (2021), https://tinyurl.com/47cf35ms.

Third, VA personnel that serves this declining beneficiary population is among the largest bureaucracies in the federal government. The Veterans Benefits Administration has approximately 25,000 employees—approximately, 22% of VA, which is the second largest federal agency. U.S. Dep't of Veterans Affairs, *Annual Report on the Steps Taken to Achieve Full Staffing Capacity* 3-4, 6-7 (2021), https://tinyurl.com/d4r8d9mx.

In short, the veterans' disability-benefits scheme is one that (1) requires individualized attention (2) to a relatively small and declining beneficiary population (3) by a large and expanding bureaucracy. By its very nature, then, it is not a statutory scheme where considering the "individualized equities" of a delayed filing would impose an unwarranted burden on agency personnel—much less "create serious administrative problems" that would render the system "[un]workable." *Brockamp*, 519 U.S. at 352-53.

B. The veterans' disability-benefits system is unlike other administrative schemes where tolling would cause serious administrative problems for the agency.

This Court's opinion in *Brockamp* offers an example of the kind of "serious" administrative burdens that, when properly considered, might advise against recognizing an equitable-tolling exception. *Id.* at 352. There, after considering the text and structure of the "statutory time (and related amount) limitations for filing tax refund claims set forth in § 6511 of the Internal Revenue Code of 1986," this Court unanimously held that "Congress did not intend the

'equitable tolling' doctrine to apply to § 6511's time limitations." *Id.* at 348, 354. Among the factors that this Court considered was the fact that the statutory scheme at issue involved tax collection. It observed that, at the time (which was 27 years ago), "[t]he IRS processe[d] more than 200 million tax returns each year" and "issue[d] more than 90 million refunds." *Id.* at 352 (citing U.S. Dep't of Treasury, Internal Revenue Service, *1995 Data Book* 8-9 (1996)). Given those statistics, the Court explained, "read[ing] an 'equitable tolling' exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.*

In light of that administrative problem, this Court observed that the better reading of the Internal Revenue Code suggested two things about Congress's intent. First, it suggested that Congress accepted "the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." *Id.* at 353. And second, it suggested that "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *Id.* The underlying lesson of *Brockamp* is clear: Consistent with the text of § 6511 of the Internal Revenue Code, a tax-refund program with tens of millions of participants is "not normally characterized by case-

specific exceptions reflecting individualized equities." *Id.* at 352.

This case presents the precise opposite of the tax-refund program in *Brockamp*. For starters, "tax collection"—the administrative scheme in *Brockamp*—is hardly regarded to be pro-taxpayer as a categorical matter. *Id.* Here, by contrast, Congress designed a disability-benefits program "for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (requiring "legislation … to be liberally construed" in light of Congress's pro-veteran solicitude); *Boone*, 319 U.S. at 575 (same). Permitting occasional unfairness in individual cases—which, unfortunately, happens far too often—is not a "price" that Congress was willing to "pay" when it designed the veterans' administrative scheme. *Brockamp*, 519 U.S. at 353.

Had Congress intended to do so, one would have expected Congress to say it explicitly in light of its recognized "solicitude … for veterans," which "is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). As discussed above (at 21-23), Congress tasked VA with operating an administrative scheme characterized by an individualized analysis of each applicant's circumstances and equities for the benefit of the applicant. And considering that fewer than 259,000 veterans begin receiving compensation benefits in a given year, *see supra* 23, the number of applications for service-connected disability benefits that VA receives annually pales in comparison to the 200 million tax returns filed every year and the 90

million refunds that are issued, *Brockamp*, 519 U.S. at 352.

Admittedly, there are other federal administrative schemes that may contain a retroactive benefits provision akin to § 5110(b)(1)'s one-year deadline. One such example is the federal statute authorizing Social Security old-age, survivor, and disability benefits for six or twelve months preceding the filing of the claim for compensation. *See* 42 U.S.C. § 402(j) (authorizing twelve months of retroactive benefits for most wife, husband, child, widow, and widower insurance applicants; six months for old-age-insurance applicants); *id.* § 423(b) (authorizing twelve months of retroactive benefits for disability insurance applicants). There are, however, important textual and linguistic differences between the veterans' disability-benefits scheme and the social-security scheme. Perhaps the most notable one is that, in the social-security context, Congress provided explicitly for equitable tolling only in the narrow circumstance where the agency (the Social Security Administration) misled the applicant into delaying their application. *See id.* § 402(j)(5) (authorizing tolling of retroactive-benefit period where an otherwise eligible applicant for old-age or survivor benefits fails to apply for benefits "by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits").

To be sure, expanding a tolling provision beyond its express terms arguably runs afoul of Congress's intent as enacted. But even looking past the textual

differences between the two schemes, tolling in the social-security context likely would create the sort of administrative problems identified in *Brockamp* and that are absent in the veterans' system.

The social-security administrative scheme is not designed to provide the kind of individualized attention that would make the consideration of the individualized equities of a delayed filing unduly burdensome. The vast majority of claims for social-security benefits—particularly those for old-age and survivor insurance benefits—do not require a searching review of the individual circumstances of each applicant. Proving eligibility to those benefits typically involves establishing straightforward vital statistics like age, marriage or birth to an insured worker, or the death of an insured worker. 42 U.S.C. § 402. That is a far cry from the individualized and searching review of veterans' applications, including the thorough and careful examination of each applicant's medical and military service history. *See supra* 21-23. By the same token, the Social Security Administration does not have the same affirmative statutory duties that Congress imposed upon VA to assist each applicant in making sure that their records are complete and that they can obtain any additional evidence to substantiate their claims. *See supra* 16, 22.

Furthermore, more than 64 million persons in the United States receive social security benefits. U.S. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2020* 7 (2020), https://tinyurl.com/s6a55wnh. And in just one fiscal year, there were more than 8 million new claims for old-age, survivor, and disability benefits (as well as nearly 2

million for supplemental security income benefits). *Id.* at 2.68, 2.70. Those numbers resemble the tax-collection statistics discussed in *Brockamp*. And, like the statistics in *Brockamp*, they stand in stark contrast to the statistics for veterans' disability-benefits claims.

Accommodating case-specific exceptions reflecting individualized equities in the tax-collection and social-security contexts could very well present serious administrative problems for the agencies reviewing and adjudicating those claims. Indeed, the administrative burdens in those schemes leap off the page. Here, by contrast, the substantially smaller population eligible for veterans' disability compensation makes case-by-case consideration of equitable factors much less burdensome, particularly when an individualized analysis of each application is undertaken by a large bureaucracy that Congress already tasked with doing just that.

CONCLUSION

The judgment of the court of appeals is contrary to the statute as enacted by Congress, as well as this Court's precedents, and is deeply harmful to a uniquely deserving population that sacrificed their security and well-being in service to our nation. The judgment should be reversed.

Respectfully submitted,

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