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 AMICUS CURIAE THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF THE PETITIONER

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INTERESTS OF AMICUS CURIAE

Amicus Curiae National Law School Veterans Clinic Consortium (the "Consortium"), a 501(c)(3) organization, submits this brief in support of the position of the Claimant-Appellant, Adolfo R. Arellano, with consent from all parties.[1] The Consortium's Board authorized the filing of this brief.

The Consortium is a collaborative effort of the nation's law school and legal aid clinics and individual attorneys dedicated to addressing U.S. military veterans' unique legal needs on a pro bono basis. The Consortium advocates for veterans who have been unfairly impacted by the erroneous interpretation and implementation of federal laws designed to compensate veterans for their service to this country. Member clinics in the Consortium work with veterans every day who live with severe mental health issues related to military service. Our members are keenly interested in the accurate interpretation of 38 U.S.C. § 5110(b)(1) to include the possibility of equitable tolling, an interpretation that would protect disabled veterans and their families consistent with the pro-veteran nature of the veterans' benefits system.

[1] The parties have consented to the filing of this brief. No party or counsel to a party authored this brief in whole or part, and no party or counsel to a party contributed money to fund the preparation or submission of this brief. Only amicus curiae itself paid for the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

Foreclosing equitable tolling of a statutory time limitation in the veterans' benefits system would be illogical. Congress intentionally designed the system to operate informally and with great care toward veterans and their families. The disability compensation program recognizes the realities of military service can burden veterans with disabling symptoms and conditions, including trauma-inflicted mental health symptoms. For veterans who leave service with severely-disabling mental health symptoms, every day is a survival test—they fight through flashbacks, nightmares, obsessional thoughts of suicide, and hypervigilance. These symptoms naturally lead veterans to avoid conversations about and reminders of their traumatic experiences, not seek care for them.

While Congress designed the veterans' benefits system to help veterans like those living with severely-disabling PTSD, over time, too many veterans have been unaware they were eligible for disability benefits or known how to apply for them. Veterans suffering from mental health symptoms also face stigma surrounding mental illness and mental health treatment—they have just left a place where they knew they needed to "suck it up," especially when they were struggling mentally, not physically, so asking VA for help with mental health can feel simply wrong.

The compounding impacts of severe trauma-inflicted mental health symptoms, paralyzing stigma surrounding those symptoms, and systemic barriers

within the VA system can reach an apex for a veteran in the year following service. The U.S. Court of Appeals for Veterans Claims should be allowed to consider whether, given a particular veteran's circumstances during that year, it would be unfair to apply the statutory time limitation in 38 U.S.C. § 5110(b)(1) and deny the veteran the compensation to which he or she was entitled upon leaving service.

ARGUMENT

I. Veterans carrying the daily burden of trauma-inflicted mental health conditions caused by service to their country will be harmed if the Court forecloses equitable tolling of the statutory time limitation in 38 U.S.C. § 5110(b)(1).

A one-year statutory deadline that does not bend in the face of extenuating circumstances is particularly harmful to veterans living with incapacitating symptoms of a mental illness caused by service. The symptoms of PTSD and the perceived stigma that surrounds mental illnesses cloud veterans' awareness of their own disabilities and the disability benefits to which they are entitled, hindering their capacity to act within statutory timelines like 38 U.S.C. § 5110(b)(1). The U.S. Court of Appeals for Veterans Claims (Veterans Court) should be free to consider each veteran's circumstances and empowered to apply equitable tolling to protect veterans—as the veterans' benefits system was designed by Congress to do—from unfairly losing

retroactive compensation that would help them and their families carry the lasting burdens of military service.

A. PTSD symptomatology adversely impacts veterans' ability to file a disability benefits claim within the statutory time limitation.

Section 5110(b)(1) should be read as a statute of limitations subject to equitable tolling; to read the statute otherwise harms veterans who leave service with PTSD by ignoring their challenging and extenuating circumstances following discharge.

Veterans who suffer from PTSD might not apply for disability benefits within the year after discharge because of avoidance—a symptom emblematic of the very disability those veterans incurred in military service. According to VA's National Center for PTSD, avoidance as a symptom of PTSD is a common reaction to trauma. U.S. Dep't of Veterans Affairs, *PTSD: National Center for PTSD*, https://www.ptsd.va.gov/understand/what/avoidance.asp#:~:text=Avoiding%20reminders%E2%80%94like%20places%2C%20people,war%20or%20current%20military%20events (last visited May 17, 2022). Avoidance may be emotional or behavioral, and it causes an individual to shun reminders of trauma, including "thoughts or feelings about a traumatic event" and any past places or people that are connected to the traumatic event(s). *Id*. Veterans experiencing behavioral avoidance may avoid filing within a year after

discharge due to either an initial reluctance to report an incident or fear of re-traumatization. Many veterans will avoid discussion relating to their combat experience altogether, a reaction that makes it nearly impossible to apply for disability benefits related to their trauma.

To apply for disability benefits, veterans must support their claim by collecting information related to and recounting their traumatic experience(s). 38 C.F.R. § 3.304(f). This process almost uniformly re-traumatizes veterans applying for disability benefits. Veterans must also fill out the VA "stressor form," VA Form 21-0781. *See* U.S. Dep't of Veterans Affairs, *About VA Form 21-0781*, https://www.va.gov/find-forms/about-form-21-0781/ (last visited May 17, 2022). This form requires extraordinary detail of the "stressful incidents," detail each veteran will have to either explain to a representative or try to write on his or her own. *Id*. After completing the stressor form, veterans must again relive their trauma by describing in detail the events and experiences to a VA psychologist through the Compensation and Pension exam. VA may grant the claim during the first claim cycle, but veterans might need to go through this process more than once to obtain the disability benefits to which they are entitled. The realities of this process dissuade veterans already facing daily symptoms of PTSD from filing a valid claim for disability benefits, particularly within the year after leaving military service during which they experienced the trauma.

VA itself has found that veterans suffering from PTSD and other mental health conditions specifically as a result of military sexual trauma (MST) are reluctant to initially report the assault; even if they do report, survivors are unlikely to file for VA disability benefits upon discharge. *See* Dep't of Veterans Affairs Office of Inspector General, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma* i-ii (Aug. 21, 2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf. Veterans' reluctance to report MST is often due to avoidance, stigma, or well-founded concerns that VA will erroneously deny their claims. *Id.* at i-ii, 1-4, 8-9. In 2018, the Office of Inspector General (OIG) reported a 49% error rate in MST claims—meaning VA mishandled or incorrectly processed nearly half of all veterans' denied MST claims. *Id*. at ii. Though VA agreed to take corrective action in light of the 2018 report, the most recent OIG audit published in 2021 revealed that the MST claims' error rate actually *increased* by almost 10%. Dep't of Veterans Affairs Office of Inspector General, *Improvements Still Needed in Processing Military Sexual Trauma Claims* ii (Aug. 5, 2021), https://www.va.gov/oig/pubs/VAOIG-20-00041-163.pdf.

Given VA's well-documented and alarming errors when processing veterans' MST cases, survivors might avoid the claim process altogether, and their one-year time limit could expire before they are able to bring themselves to engage with this onerous system. VA OIG has found the process of applying for VA disability benefits is re-traumatizing and therefore dissuades

MST survivors from filing claims. *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma*, *supra*, at 8-9. For example, one veteran reported "nausea and vomiting for several days surrounding any time they had to discuss the MST event with mental health providers or examiners." *Id.* at 9. The OIG report highlighted that "the trauma of restating or reliving stressful events could cause psychological harm to MST victims and prevent them from pursuing their claims." *Id*.

The Consortium's member clinics often work with MST survivors to file claims for disability benefits, and their anecdotal reports track VA OIG's findings about the negative impacts of avoidance on survivors' capacity to file claims immediately after service. Member clinics report that the MST survivors with whom they work do not pursue disability benefits claims until many years after discharge, largely because they believed the VA process would be re-traumatizing—potentially requiring them to revisit their trauma multiple times over years—and unlikely to lead to an accurate and beneficial result.

Allowing the Veterans Court to consider equitable tolling for veterans who have been incapacitated by trauma would help mitigate a system that has become fundamentally unfair to survivors of MST.

B. Foreclosing equitable tolling fails to recognize the sometimes severe impacts of perceived stigma surrounding mental illness when applying for VA disability benefits.

Veterans' perceptions of stigma—fueled by military culture and lagging understanding of trauma-related mental health conditions—regularly keep them from seeking mental health care and filing disability benefits claims. PTSD was not acknowledged as a legitimate mental health condition until 1980, when it was added to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)—five years after the conclusion of the decades-long Vietnam War. Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 Temp. L. Rev. 1, 21-30 (2011). Therefore, veterans discharged prior to 1980 were not able to apply for VA disability benefits for their service-connected PTSD. Thirty-three percent of Vietnam veterans meet the DSM criteria for PTSD, yet in the year following their discharge, they had no basis on which to file for disability benefits related to their disabling mental health symptoms. *Id.* at 22.

Even following PTSD's inclusion in the DSM, stigma surrounding PTSD impedes veterans' ability to apply for disability benefits within the statutory time limitation. In 2011, the Government Accountability Office (GAO) identified key barriers that hinder veterans' ability to access VA mental health care. Government Accountability Office, *VA Mental Health: Number of*

Veterans Receiving Care, Barriers Faced, and Efforts to Increase Access 11 (Oct. 2011), https://www.gao.gov/assets/590/585743.pdf. GAO reported one major barrier is the stigma associated with seeking mental health care in the first place. *Id.* Veterans may not seek a mental health diagnosis, which is necessary to obtain disability benefits, out of fear that "by accessing mental health care they will be perceived as weak or having lost control." *Id.* GAO also reported that veterans may believe their social networks, including the military community, have "values and priorities that conflict with accessing" mental health care. *Id.* Similarly, in 2018, researchers found that "military socialization, command structure influences, and institutional attitudes (e.g., 'suck it up' mentality)" reinforce the attitude that seeking help is a sign of "weakness" among veterans. Ann M. Cheney et al., *Veteran-Centered Barriers to VA Mental Healthcare Services Use*, BMC Health Services Research 11 (2018), https://bmchealthservres.biomedcentral.com/track/pdf/10.1186/s12913-018-3346-9.pdf.

Initiating both the health care services and disability benefits claims processes requires veterans to confront and disclose personal mental health struggles—the opposite of "sucking it up." Thus, veterans paralyzed by the stigma of accessing VA mental health care are also held back from filing disability benefits claims for mental health conditions. Their concerns cause associated behavioral avoidance and delay action, particularly within the year after service when military culture continues to loom large in their daily

lives. Allowing the Veterans Court to consider equitable tolling will help address this additional obstacle to filing a disability benefits claim within the year after military service.

II. Allowing equitable tolling is a fundamentally fair response to systemic failures within the veterans' benefits system.

In addition to mental-health-related barriers to filing disability benefits claims, structural issues within the veterans' benefits system prevent veterans in need from receiving disability benefits. The veterans' benefits system is marked by a historic lack of veterans' awareness surrounding benefit eligibility that often prevents veterans from filing claims within statutory time limitations. Even veterans with an approved caregiver lack awareness of the benefits to which they are entitled. Allowing equitable tolling of the statutory time limitation would help address these systemic inequities, not create a floodgate of disability benefits claims.

A. Congress's belated action and ineffective programs to provide VA benefits education has resulted in entrenched awareness issues among veterans seeking disability benefits.

Veterans might not file a disability benefits claim within a statutory deadline because they were unaware of the disability benefits Congress provides to those

who serve this country—disability benefits payable to a veteran on behalf of a grateful nation—and their eligibility to receive those benefits. Before 2006, veterans did not have programs providing benefits eligibility education. Congress did create two programs that require VA to proactively assist veterans with understanding their eligibility for disability benefits, but older veterans—like Mr. Arellano—were discharged from military service decades before Congress took action. Still, for those veterans discharged after these programs came into existence, there remains a systemic failure to apprise them of their eligibility for disability benefits. Because of these programs' demonstrated ineffectiveness, many veterans are not aware of their eligibility status nor how or when to apply for disability benefits.

In 2006, Congress passed the first of two assistance programs for veterans, the Veterans' Housing Opportunity and Benefits Improvement Act of 2006. Pub. L. No. 109-233, 120 Stat. 397 (2006). This legislation created an outreach services program, now codified at 38 U.S.C. §§ 6301 *et seq*., for "the purpose of charging the Department [of Veterans Affairs] with the affirmative duty of seeking out eligible veterans and eligible dependents and providing them with such services." 38 U.S.C. § 6301(a)(2). Section 6301 requires VA to "reach[ ] out in a systematic manner to proactively provide information, services, and benefits counseling to veterans" and to their dependents who may be eligible for benefits. 38 U.S.C. § 6301(b)(1). Additionally, Section 6303 requires the U.S. Secretary of Veterans

Affairs ("the Secretary") to mail individual notice of all potential VA disability benefits to new veterans at the time of their discharge from service and to establish in-person or telephone contact with veterans who do not have a high school education at the time of their discharge from service. 38 U.S.C. § 6303(b). Further, Section 6307 requires the Secretary to address the needs of dependents of veterans eligible for disability benefits. 38 U.S.C. § 6307(a), (b).

Contrary to congressional intent, the outreach services program's efforts have failed to effectively reach veterans in need of disability benefits. Many veterans continue to be unaware of their VA disability eligibility. To illustrate, four years after the outreach services program's implementation, the 2010 National Survey of Veterans, a "comprehensive, nationwide survey [designed] to help VA plan its future programs and services for Veterans," revealed that only "[s]omewhat more than 21% of Veterans reported that they have applied for disability compensation benefits." Westat, *National Survey of Veterans—Final Report* xiii, 1 (2010), https://www.va.gov/survivors/docs/nvssurveyfinalweightedreport.pdf. Of the veterans who indicated that they had not applied for disability benefits, "17.1[%] indicated that they were not aware of the VA service-connected disability program." *Id.* at xiii. Especially in light of the programs created specifically to inform veterans of their eligibility status, these are disappointing statistics.

In 2011, Congress again sought to address veterans' lack of awareness with additional legislation and

passed the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011 to improve the Transition Assistance Program (TAP). VOW to Hire Heroes Act of 2011, Pub. L. No. 112-56, §§ 221-226, 125 Stat. 711 (2011). TAP is a pre-separation counseling program, mandatory for all military service members with at least 180 continuous days of active duty. U.S. Dep't of Labor, *Transition Assistance Program*, https://www.dol.gov/agencies/vets/programs/tap (last visited May 17, 2022); U.S. Dep't of Labor, *Transition Components*, https://webdm.dmdc.osd.mil/dodtap/transition_gps.html (last visited May 17, 2022). TAP provides information and resources, including a course on VA benefits and services, to service members as they transition from military to civilian life. U.S. Dep't of Veterans Affairs, *Your VA Transition Assistance Program (TAP)*, https://www.benefits.va.gov/transition/tap.asp (last visited May 17, 2022). Again, though, veterans like Mr. Arellano, who discharged prior to the 2011 implementation of the VOW to Hire Heroes Act, did not benefit from these informational programs.

Even though Congress passed the outreach services program in 2006 and the mandatory transition program in 2011, deeply-entrenched barriers to awareness remain for older and more recent veterans alike. According to the National Survey of Veterans, VA has failed to reach the veterans who need disability benefits the most. Additionally, older veterans like Mr. Arellano continue to grapple with long-standing awareness issues that extend prior to congressional action. Foreclosing equitable tolling would ignore the impacts of

these systemic issues for Mr. Arellano and other veterans who served their country.

B. Having an approved caregiver does not effectively mitigate a veteran's lack of awareness surrounding VA disability benefits eligibility and statutory time limitations for claims.

Judge Dyk suggested having a caregiver may mitigate the circumstances that could warrant equitable tolling. But in a pro-veteran, non-adversarial system, foreclosing equitable tolling harms even those veterans who have access to approved caregivers. In fact, veterans like Mr. Arellano who rely on caregivers for daily needs are among the most vulnerable population of veterans, which means they are also the most likely to experience circumstances incapacitating enough to warrant equitable tolling.

Congress created caregiver programs for veterans that enable family members or other loved ones to become approved caregivers. These programs provide training and monetary assistance to approved caregivers. *See* Yelena Duterte, *Splendid Isolation: VA's Failure to Provide Due Process Protections and Access to Justice to Veterans and Their Caregivers*, 29 J. L. & Pol'y 1, 3 (2020). For example, the Program of Comprehensive Assistance for Family Caregivers was created in 2010 for severely wounded post-9/11 veterans to help them perform daily activities like dressing, bathing, grooming, toileting, eating, and adjusting to

prosthetic or orthopedic appliances or other mobility issues. 38 C.F.R. § 71.15.

Programs designed to support family caregivers prepare them to help veterans meet daily needs; they do not prepare caregivers to decipher the requirements for disability benefits claims or statutory time limitations for those claims. For example, the Program of Comprehensive Assistance for Family Caregivers provides training in core competencies like medication management, checking the veteran's vital signs and helping control pain, nutrition, behavioral management, and self-care for the caregiver. *Id*. § 71.25. While a caregiver may be authorized to sign a claims form on behalf of the veteran, 38 U.S.C. § 5101(a)(2), the core competencies listed for approved caregivers do not include preserving the veteran's right to disability benefits or meeting statutory time limitations for claims.

Even without requiring caregivers to take on the duties of claims agents, caregivers lack sufficient support to help severely disabled veterans. A 2014 study done by the RAND Corporation estimated that of the 22.6 million Americans acting as unpaid caregivers to other adults, 5.5 million (approximately 25%) cared for veterans or current members of the military. Rajeev Ramchand et al., *Military Caregivers: Who are They? And Who Is Supporting Them?*, RAND Corporation (2014), https://www.rand.org/pubs/research_briefs/RB9764.html. RAND researchers found most relevant programs and policies support caregivers only incidentally. *Id.* Few of the more than 100 programs offering direct services to military caregivers are actually specifically

designed for the caregiver population; rather, the programs generally target injured service members and veterans and extend services to the family caregivers. *Id.* RAND researchers found nearly 20% of post-9/11 caregivers spend more than 40 hours per week performing caregiver duties, estimating that the collective value caregivers provide society is worth at least $3 billion. *Id.* Some military caregivers are tasked with helping veterans cope with PTSD, or assisting veterans with extensive physical injuries or disabilities in basic tasks, like bathing, getting dressed, and eating and drinking. Anna Sutherland, *The Forgotten Military Caregivers*, Institute for Family Studies (Nov. 11, 2019), https://ifstudies.org/blog/the-forgotten-military-caregivers. "Military caregivers consistently experience worse health, greater strains in family relationships, and more workplace problems than non-caregivers . . . [they] also face an elevated risk for depression." Ramchand et al., *supra*. In 2010, 88% of caregivers polled reported increased stress and anxiety as a result of caregiving, and 77% indicated sleep deprivation due to their responsibilities. National Alliance for Caregiving and United Health Foundation, *Caregivers of Veterans—Serving on the Homefront: Report of Study Findings* 17 (Nov. 2010), https://www.unitedhealthgroup.com/content/dam/UHG/PDF/uhf/caregivers-of-veterans-study.pdf. VA's family caregiver program recognizes that supporting a veteran with a mental health issue may require the caregiver to seek one's own mental health care and "interventions to reduce the negative impact for the veteran of mental illnesses or other medical conditions in family members." 38 C.F.R. § 71.50.

During arguably the most difficult time for both veterans and their caregivers—the first year transitioning back into society—placing on caregivers the additional burden of meeting a statutory time limitation for disability benefits claims is impractical and unfair. Caregivers are overworked and undertrained for the challenging tasks they are already assigned. They help veterans with daily living and medical care—they do not have sufficient knowledge or capacity to ensure a veteran has filed a disability benefits claim within a statutory time limitation like that in 38 U.S.C. § 5110(b)(1).

C. The equitable tolling standard is sufficiently stringent to ensure the doctrine is allowed only in extraordinary circumstances, mitigating any concerns about opening the floodgates to disability benefits claims.

The specific standards for equitable tolling in veterans' disability benefits cases, as well as the veterans' heavy burden of proof, will ensure that equitable tolling of § 5110(b)(1) will not "open the floodgates" to disability benefits claims. Rather, allowing the Veterans Court to consider equitable tolling for veterans who qualify for disability benefits will mitigate the prejudicial nature of the current system and ensure veterans in need of disability benefits receive them.

In veterans' disability benefits cases, courts have imposed a stringent standard for equitable tolling. The

claimant must demonstrate: "(1) that [the claimant] has been pursuing [their] rights diligently, and (2) that some extraordinary circumstance stood in [their] way." *Palomer v. McDonald*, 27 Vet. App. 245, 252-53 (Vet. App. 2015), *aff'd*, 646 Fed. Appx. 936 (Fed. Cir. 2016) (unpublished). When lack of capacity due to severe mental illness is the reason for the claimant's delay, untimely filing, or appeal, the severe mental illness may, in itself, show the claimant "was incapable of a diligent response." *Claiborne v. Nicholson*, 19 Vet. App. 181, 188 (Vet. App. 2005), *aff'd*, 173 Fed. Appx. 825 (Fed. Cir. 2006) (unpublished). The standard for equitable tolling in veterans' disability benefits cases is even more stringent if the claimant is represented by counsel. In such cases, when mental illness is the alleged justification for equitable tolling, "the veteran must make an additional showing that the mental illness impaired the attorney-client relationship." *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).

With regard to the second element, the claimant must demonstrate the extraordinary circumstance directly caused the claimant's delay in filing or appealing a claim. *Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015) (citing *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014)); *see also Claiborne*, 19 Vet. App. at 185-86. " 'Extraordinary' refers not to the uniqueness of [the claimant's] circumstances, but rather to the severity of the obstacle impeding compliance." *Palomer*, 27 Vet. App. at 253 (citing *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011)). When the claimant's health is the alleged "extraordinary circumstance," the claimant

must demonstrate that "mental or physical illness renders him incapable of handling his own affairs or functioning in society"; severe impairment is not enough. *Id*.; *Claiborne*, 19 Vet. App. at 187.

Veterans shoulder an already-heavy burden when seeking equitable tolling, which would prevent an exponential increase in future successful claims even if § 5110(b)(1) is equitably tolled. For example, in *Barrett*, the Federal Circuit held that the veteran who suffered from mental illness and missed a filing deadline needed to show he was "incapable of 'rational thought or deliberate decision making,' or 'incapable of handling [his] own affairs or unable to function [in] society.'" 363 F.3d at 1321 (citing *Melendez-Arroyo v. Cutler-Hammer de P.R., Co*., 273 F.3d 30, 37 (1st Cir. 2001)). The stringent standard, according to the court, only allows for equitable tolling in extreme cases of mental impairment: "A medical diagnosis alone or vague assertions of mental problems will not suffice." *Id*. In *Barrett*, the veteran claimed he could not timely file his Veterans Court appeal because he was incapacitated by PTSD and panic disorder. *Id*. at 1318. The Federal Circuit determined that equitable tolling was reserved for cases where the veteran's failure to timely file was the *direct* result of mental illness, rendering the veteran incapable of rational thought or deliberate decision-making. *Id*. at 1321.

Even when veterans face obstacles rendering them incapable of managing their affairs, courts have denied requests for equitable tolling. In *Palomer*, the Veterans Court held that an elderly veteran did not

meet his burden to justify equitable tolling, even when he alleged that: (1) delays in receiving and sending mail between the United States and the Philippines constituted extraordinary circumstances; (2) his poor health rendered him incapable of handling his affairs; and (3) VA provided confusing notice concerning deadlines for asserting appellate rights. 27 Vet. App. at 249. The Veterans Court reasoned that equitable tolling should be decided on a case-by-case basis, with the claimant shouldering the burden of proof, which could require production of evidence. *Id.* at 251. The Court determined Mr. Palomer failed to show that he had insufficient time to consider his options and timely file the motion. *Id.* at 252-53. The Court also rejected Mr. Palomer's argument that his advanced age, poor eyesight, and poor hearing rendered him incapable of handling his affairs. *Id.* at 253-54.

Veterans with impaired ability to handle their own affairs do not automatically meet the standard for equitable tolling in other contexts within the VA system. *Claiborne*, 19 Vet. App. at 187. For example, equitable tolling was not granted where a veteran produced multiple medical opinions demonstrating that he suffered from symptoms compatible with early dementia, severely impacting his ability to meet deadlines and remember dates. *Id.* at 187-88. Despite this significant medical evidence, the Veterans Court reasoned the veteran failed to adequately provide "evidence that the symptoms of his dementia [had] manifested in such a manner and to such an extent that his failure to file . . . in a timely fashion was 'a

direct result' of his medical condition." *Id.* at 186. The Court reasoned the medical opinions were conclusory and did not provide sufficient rationale. *Id.* at 186-87. Importantly, the Court held that, even assuming the medical opinions had set forth adequate rationale, to the extent the opinions stated merely the veteran was "severely impaired" in his ability for rational thought, deliberate decision-making, and handling his own affairs, they did not justify equitable tolling. *Id.* "Severe impairment" due to mental condition was insufficient; the veteran had to show a direct nexus between the mental illness and his incapacity to handle his own affairs. *Id.* at 185 (quoting the standard in *Barrett*, 363 F.3d at 1321).

In veterans' disability benefits cases, the stringent standard for allowing equitable tolling when a veteran has exercised due diligence, but extraordinary circumstances caused the veteran to delay, assuages any concerns that authorizing equitable tolling of 38 U.S.C. § 5110(b)(1) would open the floodgates to disability benefits claims.

III. Experiences of veterans who live with daily disabling symptoms of PTSD demonstrate the need for equitable principles like equitable tolling in the veterans' benefits system.

The individual stories of veterans living with PTSD as a result of their military service reveal how important it is to allow the Veterans Court to consider

equitable principles like equitable tolling. As mentioned above, Consortium members include law school clinics that help veterans with myriad conditions file disability benefits and other claims. Members also represent MST survivors in their claims for VA disability benefits.

Below are only a few accounts from clients of the Consortium's member clinics illustrating the real-life difficulties veterans or dependents face when grappling with mental health issues in a system with deeply-entrenched institutional barriers to access benefits.

A. "Nash"

Nash always wanted to serve in the Navy and enlisted immediately after graduating from high school in the early 1980s.[2] While completing a tour off the coast of Japan on an aircraft carrier, he suffered endless harassment from his peers and sleep deprivation. He sought help from the ship's counselor with no success. He soon felt he had no way out and jumped off the aircraft carrier, hoping the propellers would kill him. After nearly eight minutes in frigid water, Navy sailors pulled him aboard. The Navy's response to this cry for help was to discharge Nash with an Other Than Honorable discharge status. Since his discharge in 1984,

[2] In an effort to keep the veteran's name confidential, the veteran will be referred to by his nickname "Nash."

Nash has suffered from bipolar disorder and PTSD. He has been homeless for nearly 36 years.

In 2019, several years after the Hagel[3] and Kurta Memoranda[4] provided instruction to the Boards of Correction for Military Records relating to discharge upgrade applications involving mental health conditions, Nash, with assistance of counsel at the Veterans and Servicemembers Legal Clinic at University of Florida, submitted his application for a discharge upgrade to the Board of Corrections for Naval Records (BCNR). In the psychological assessment supporting Nash's BCNR application, the psychologist opined that the hazing and harassment he suffered in service triggered his bipolar disorder, which affected his mental state, initialized his impulsivity, exaggerated his sense of hopelessness, and ultimately culminated in his suicide attempt. The BCNR, in determining Nash's application, requested review from the BCNR's Physician Advisor. The Physician Advisor concurred, opining that

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[3] Office of the Secretary of Defense, Memorandum for Secretaries of the Military Departments, *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder* (Sep. 03, 2014), https://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf.

[4] Office of the Under Secretary of Defense, Memorandum for Secretaries of the Military Departments, *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of Their Discharge Due to Mental Health Conditions, Sexual Assault or Sexual Harassment* (Aug. 25, 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf.

it is not unusual for stress to bring on the initial presentations of bipolar disorder, which typically manifests in early adulthood. Therefore, the Physician Advisor ultimately concluded it was "more likely than not" that Nash's bipolar disorder and PTSD resulted in his misconduct during military service and that his suicide attempt was attributable to his mental health conditions.

Based on the Physician Advisor's opinion, the BCNR concluded that Nash's suicide attempt that resulted in his Other Than Honorable discharge was the outgrowth of his bipolar disorder and PTSD. The BCNR upgraded Nash's discharge status to Honorable.

Despite Nash's successful discharge upgrade, he could not retroactively seek VA medical care, disability benefits, and homeless veterans assistance programs. He has lived with the consequences of the military's error for decades. The Veterans Court should be able to consider this type of barrier in evaluating whether a veteran's failure to file within the statutory time limitation should be equitably tolled to retroactively compensate veterans like Nash for the burdens they have carried for serving this country.

B. "C.A."

The Veterans Clinic at the University of Missouri School of Law represents "C.A.," a dependent of a

veteran who served honorably in the Vietnam War.[5] C.A.'s father received a Combat Action Ribbon for his service, including fighting on Hill 55 and 91 and combat in the mountains of On Wa. C.A.'s father was severely disabled as a result of his service.

In November 2004, VA determined that C.A.'s father should receive the highest possible rating for PTSD: 100%. This rating was based on his extreme symptoms, including suicidal ideation, mild auditory hallucinations, nightmares, and flashbacks. The VA examiner specifically noted C.A.'s father had major impairment of family relations. Because his disability was total and permanent in nature, VA granted C.A. Dependents Education Assistance (DEA), an educational benefit provided to the children of severely disabled veterans. *See* 38 U.S.C. § 3512. Since service in the Vietnam War rendered C.A.'s father completely disabled, VA was obliged to pay the veteran monthly disability benefits and support his dependents by paying for their higher education.

C.A. became estranged from her father when she was 12 years old following physical, emotional, and verbal abuse. VA was aware that C.A. was being raised by her mother, the custodial parent, and communicated with C.A.'s mother. However, VA failed to provide notice to C.A.'s mother that C.A. was entitled to receive the DEA benefit as a result of her father's disability, even though the statute requires that notice be given

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[5] C.A.'s case is pending at the Veterans Court and under seal. These are the initials used in that proceeding.

to the "parent or guardian." 38 U.S.C. § 3563. Consequently, C.A. did not learn about the DEA benefit until three years after her graduation from college. C.A. applied for the benefit at that time.

VA denied C.A.'s claim and refused to apply a regulation allowing for good cause extensions because it contends C.A.'s father should have provided notice of the DEA benefit to C.A. VA relied on, *inter alia*, 38 U.S.C. § 5113, which provides that effective dates relating to DEA awards "shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation" in denying the award. C.A.'s case is currently on appeal to the Veterans Court, and stayed pending the outcome of this case and the related case of *Taylor v. McDonough*. 4 F.4th 1381 (Fed. Cir. 2021).[6]

As noted, VA asserts that notice was provided to C.A.'s father, and he should have notified his dependents, including C.A. Yet C.A.'s father is a veteran with a 100% disability rating for PTSD due to suicidal ideation, auditory hallucination, and difficulty communicating with family. Therefore, it is illogical for VA to expect C.A.'s father to communicate with his estranged, traumatized daughter regarding her entitlement to education benefits. Equitable relief is justified, given the extraordinary circumstances arising from C.A.'s father's severe PTSD.

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[6] *Taylor v. McDonough* was stayed by the Federal Circuit in light of this case. *See* Order to Stay Pending Disposition of *Arellano, Taylor v. McDonough*, No. 119-2211 (Feb. 22, 2022).

C. "C.S."

C.S. is represented by the Robert W. Entenmann Veterans Law Clinic at Hofstra University. C.S. was always fascinated by the military and enlisted in the Army as soon as he was eligible. He deployed to Saudi Arabia in 1990 during the Gulf War and saw active combat, the effects of which negatively impacted the rest of his life. C.S.'s trauma stemmed from being ambushed, stranded in the desert, and witnessing harrowing images of burning bodies and corpses.

C.S. returned from Saudi Arabia in March of 1991. He suffered from panic attacks and nightmares, and he began having flashbacks. Yet, C.S. had never heard of PTSD and therefore had no way to comprehend what was happening to him. C.S. felt ashamed about his inability to control his emotions. The military had always taught C.S. to "suck it up and prepare for the next mission." He recalls that the atmosphere within the military was that only the strong survive; to C.S., this meant not only being strong physically, but also emotionally and mentally. Despite C.S.'s struggle with mental health during his military service, he received an Honorable discharge in 1991. He reenlisted shortly thereafter because he still felt a duty to serve his country.

Due to his continued, uncontrollable panic attacks, anxiety and flashbacks, C.S. began to self-medicate to numb the pain he was feeling. He started with marijuana and escalated to cocaine. He felt shame and guilt about his self-medication. Following his reenlistment,

C.S.'s addiction to substances led him to spiral out of control. C.S. was desperate to feed his addiction and while in an altered state of mind, he agreed to cash fraudulent checks in order to sustain his addiction. He was promptly arrested in 1992, and on March 4, 1993 he was discharged under Other Than Honorable conditions. C.S. describes this as the most devastating day of his life.

Following his Other Than Honorable discharge, C.S. continued to struggle with his mental health, addiction, and homelessness. C.S. stated that he gave so much to this country at such a young age and the federal government "turned their back" on him when he began to suffer mentally. He described his symptoms as "a daily fight happening inside his mind." He felt so ashamed of himself that he gave up hope that he would ever improve his mental health. Although his debilitating symptoms directly led to his discharge in 1993, he did not become service-connected for his PTSD until 2017—over 20 years later. He is currently service connected for "PTSD with stimulant disorder, cocaine, in full sustained remission," for treatment purposes only due to his discharge and receives no disability benefits. C.S. currently is in the process of filing for a discharge upgrade as well as an appeal to a VA-issued Character of Service Determination.

Given the growing understanding of PTSD over the past decades and the improved manner in which the military separates veterans to properly account for mental health, the Veterans Court should be allowed to consider equitable tolling for veterans like C.S. A

2017 report found the military often fails to consider the impact mental health conditions may have on misconduct in service. *See* Government Accountability Office, *DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury are Considered in Misconduct Separations* (May 2017), https://www.gao.gov/assets/gao-17-260.pdf. This study found that 62% of the service members discharged for misconduct during the time period 2011-2015 suffered from a mental health issue within the two years preceding the discharge. *Id.* at 12. This statistic is startling, and likely understated, given that PTSD, traumatic brain injury (TBI), and other mental health disorders are often not recognized until after the service member separates. Margaret Kuzma et al., *Military Discharge Upgrade Legal Practice Manual*, Ch. 8, § 1.2, American Bar Association (2021). A statute addressing this issue was passed in 2009 requiring medical examinations when mental health conditions are at issue. 10 U.S.C. § 1177 (2009). Today, the statute requires a medical examination prior to an administrative separation whenever a veteran has deployed (or experienced MST) within 24 months prior to separation, and has been diagnosed with or reasonably alleges PTSD or TBI. 10 U.S.C. § 1177(a) (2016). Such an exam may have saved C.S. from his Other Than Honorable Discharge. Only equitable tolling could remedy the unfairness in his situation.

CONCLUSION

The symptoms and stigma associated with PTSD and other mental illnesses, the lack of awareness regarding disability benefits eligibility due to systemic failures within the VA, and the lived experiences of veterans, including those assisted by the Consortium, all support allowing equitable tolling of 38 U.S.C. § 5110(b)(1).

Respectfully submitted,

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