No. 17-544

IN THE

Supreme Court of the United States

ROBERT D. VOCKE, JR.,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL VETERANS LEGAL SERVICES PROGRAM and NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. IN SUPPORT OF PETITIONER

Barton F. Stichman
Joint Executive Director
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K St. NW, Ste. 500
Washington, DC 20006
(202) 621-5677

Benjamin C. Block
Counsel of Record
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
bblock@cov.com
(202) 662-5205

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our nation's 25 million veterans and active duty personnel with the federal benefits that they have earned through their service to our country.[1] NVLSP accomplishes its mission through: litigation; administrative representation of veterans and active duty personnel on claims for benefits; publication of materials that provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled; and service as a national support center that recruits, trains, and assists thousands of lawyer and non-lawyer advocates to represent veterans and active duty personnel on claims for benefits.

National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit educational membership organization incorporated in 1993. NOVA is comprised of approximately 500 attorneys and agents who represent tens of thousands of our nation's military veterans, their families, and their survivors. The vast majority of veterans represented by NOVA members are eligible for veterans' preference rights.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. Counsel for all parties received notice at least 10 days before the due date of *amici*'s intention to file this brief; Petitioner and Respondent have consented to its filing.

Amici submit this brief because the rule adopted by the Federal Circuit in *Vocke v. Merit Systems Protection Board*, No. 2016–2390, 680 Fed. App'x 944 (Fed. Cir. Feb. 17, 2017), and in companion case *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013 (Fed. Cir. 2017), results in the denial of judicial review of agency decisions that would affect *amici*'s core constituencies—United States military veterans. The Merit Systems Protection Board, a quasi-judicial body, hears veterans' claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[2] and the Veterans Employment Opportunities Act of 1998 (VEOA),[3] when veterans are denied the rights to which they are entitled by federal employers. Nearly half a million veterans are employed in federal agencies, comprising more than one out of every four federal workers.[4]

If allowed to stand, the Federal Circuit's decision would preclude judicial review of claims by veterans, who often proceed unrepresented. Such a result would be inconsistent with this Court's decision in *Henderson v. Shinseki*, 562 U.S. 428 (2011), and would contravene Congress's longstanding intent to protect veterans and to provide them the opportunity to vindicate their employment and reemployment rights.

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[2] Pub. L. No. 103-353 (codified as amended at 38 U.S.C. §§ 4301-4335).

[3] Pub. L. No. 105-339, 112 Stat. 3182.

[4] *See* U.S. Office of Pers. Mgmt., *The Governmentwide Veterans' Recruitment & Employment Strategic Plan for FY 2010–2012*, 2 (2010), https://www.fedshirevets.gov/pdf/Vets_Initiative_Strategic_Plan.pdf (last visited Nov. 7, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Vocke and the dissents in the Federal Circuit's initial and *en banc* decisions in *Fedora* have explained the legal errors in the decision below. *Amici* write to demonstrate further that Congress did not and could not have intended the interpretation of 5 U.S.C. § 7703(b)(1)(A) adopted by the Federal Circuit, nor the adverse consequences to veterans resulting from that interpretation.

In recognition of the extraordinary sacrifices made by our nation's veterans in military service, "Congress has enacted a number of laws specifically designed to protect the civil rights of servicemembers, both while they are on active duty and after they return to civilian life."[5] Congress's longstanding solicitude for veterans leads it to "'place a thumb on the scale in the veteran's favor'" when enacting legislation that affects veterans, *Henderson*, 562 U.S. at 440 (citation omitted), and to ensure that those laws enable veterans "to have their claims decided fairly and fully." 146 Cong. Rec. H6786, H6788 (daily ed. July 25, 2000) (statement of Rep. Evans); *see also* 146 Cong. Rec. S9212–13 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller) (explaining that the systems designed to protect veterans "should not create technicalities and bureaucratic hoops for them to jump through").

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[5] *U.S. Dep't of Justice Civil Rights Div., Protecting the Rights of Servicemembers* 3, http://www.justice.gov/crt/publications/servicemembers_booklet.pdf (last visited Nov. 7, 2017).

I. To further protect, assist, and reward veterans for their service, Congress enacted USERRA and VEOA.

A. USERRA guarantees servicemembers an expansive right to take military leave from their civilian jobs, to be reemployed promptly upon returning from military leave, and to be free of discrimination based on service to our country. 38 U.S.C. §§ 4311–16; *see also* 137 Cong. Rec. H2972, H2978 (daily ed. May 14, 1991) (statement of Rep. Penny) (discussing "the importance of employment and reemployment protection for members of the uniformed services").

The MSPB hears the claims of veterans denied the benefits to which they are entitled under USERRA by federal employers, with appeal rights to the Federal Circuit. 38 U.S.C. § 4324; 5 C.F.R. § 1201.3(b)(1).

B. VEOA gives qualified veterans a favorable position in competing for federal employment, with the aim of assisting veterans in readjusting to civilian life and rewarding them for their service to our country. *See Att'y Gen. v. Soto-Lopez*, 476 U.S. 898, 910 (1986) (plurality op.) ("Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments.").

Congress enacted VEOA to strengthen veterans' preference rights, following testimony that "redress for veterans who are wronged is often inadequate." *Veterans' Preference: Hearing Before the Subcomm. on Civil Service of the H. Comm. on Gov't Reform and Oversight*, 104th Cong. 20, at 1 (2nd Sess. 1996) (statement of Rep. John L. Mica). VEOA "provide[s]

preference eligible veterans with a method for seeking redress where their veterans' preference rights have been violated in hiring decisions made by the federal government." *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 837 (Fed. Cir. 2007) (en banc).

The MSPB hears claims of veterans denied their veterans' preference rights under VEOA, with appeal rights to the Federal Circuit. 5 U.S.C. § 3330a(d)(1); 5 C.F.R. § 1201.3(b)(1).

In *Henderson*, this Court explained that statutes should not be interpreted to create jurisdictional bars for litigants unless Congress clearly intended that result. 562 U.S. at 434–35; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, No. 16–658, ___ S. Ct. ____, slip op. at 8 n.9 (Nov. 8, 2017). Applying the longstanding "'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor,'" *Henderson*, 562 U.S. at 441 (citation omitted), the Court found that veterans' appeals from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans Claims were subject to equitable tolling, distinguishing such appeals from the "appeal from one court to another court," *id.* at 436, found to be jurisdictional in *Bowles v. Russell*, 551 U.S. 205 (2007). The Federal Circuit's decision foreclosing equitable tolling for appeals from the MSPB thwarts Congress's longstanding policy of favorable treatment toward veterans and is inconsistent with the holding and guidance of *Henderson*.

II. A decision that equitable tolling is never permissible in appeals of MSPB decisions before the Federal Circuit would have a devastating impact on

veterans with meritorious claims. Though Congress enacted the Civil Service Reform Act (CSRA)[6]—the enabling statute for the MSPB—to protect federal employees, *see* S. Rep. No. 95-969, at 3 (1978), that Act's procedural processes are complex, confusing, and difficult to navigate. The Sixth Circuit has recognized that traversing the CSRA involves a "procedural maze" and "procedural morass." *Valentine-Johnson v. Roche*, 386 F.3d 800, 802, 805 (6th Cir. 2004) (finding that an Air Force employee "was unsuccessful in navigating the procedural maze for the processing of a mixed case because of erroneous advice given to her by the MSPB Administrative Judge (AJ) hearing her claims").

This Court has noted repeatedly that complex remedial systems "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402–03 (2008) (citing *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988) (discussing the ADEA and Title VII "remedial scheme[s] in which laypersons, rather than lawyers, are expected to initiate the process")). Yet veterans—who often proceed *pro se* and suffer from cognitive impairments and other challenges as a result of their service that make it difficult to follow procedural formalities scrupulously—are left to wrestle with this "complicated tapestry." *Butler v. West*, 164 F.3d 634, 637 (D.C. Cir. 1999). Equitable tolling is essential to ensuring that these veterans receive the benefits to which they are entitled.

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[6] Pub. L. No. 95-454, 92 Stat. 1111 (1978).

ARGUMENT

I. Congress Has Consistently Enacted Legislation To Support And Assist Veterans In Their Interactions With The Government.

The history of the government's commitment to veterans dates back to the earliest days of Congress. *See, e.g.*, Invalid Pensions Act of 1792, 1 Stat. 243. Over the past 75 years Congress repeatedly has expanded and strengthened protections for veterans reentering the workforce or taking leave from employment to fulfill military obligations. In 1940, Congress established a right to reemployment for draftees and voluntary enlistees in World War II. *See* Selective Training and Service Act, Pub. L. No. 76-783, 54 Stat. 885, 890 (1940). Congress further strengthened these rights through enactment of the Veterans' Reemployment Rights Act of 1974 (VRR). *See* Vietnam Era Veterans' Readjustment Assistance Act, Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974).

Congress enacted USERRA in 1994 based on a concern that "the VRR law has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions that, at times, hinder the resolution of claims." 139 Cong. Rec. S5181, S5182 (daily ed. Apr. 29, 1993) (statement of Sen. Rockefeller). USERRA aims "to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65, at 18 (1993).

To ensure broad application of its protections, Congress ensured that USERRA applied to public sector employers of all sizes, including federal, state, and local governments. *See* 38 U.S.C. §§ 4314 (a), (d).

Congress's commitment to veterans' preference rights is similarly longstanding. Since the Civil War era, veterans applying for federal jobs have been afforded preference. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 n.6 (1979). In 1944, President Roosevelt signed into law the Veterans' Preference Act, Pub. L. No. 78-359, 58 Stat. 387 (1944), which took a comprehensive approach to assuring that veterans would be provided preferential treatment in employment with federal agencies. *See Mitchell v. Cohen*, 333 U.S. 411, 419 n.12 (1948) ("I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment" (quoting letter from President Roosevelt to Rep. Ramspeck, found in H.R. Rep. No. 78-1289, at 5 (1944))).

Most recently, in 1998, Congress passed VEOA to solidify and strengthen further veterans' preference rights, following testimony that "veterans' preference is often ignored or too easily evaded, and redress for veterans who are wronged is often inadequate." *Veterans' Preference: Hearing Before the Subcomm. on Civil Service of the H. Comm. on Gov't Reform and Oversight*, 104th Cong. 20, at 1 (2nd Sess. 1996) (statement of Rep. John L. Mica). Through VEOA, Congress sought to "provide preference eligible veterans with a

method for seeking redress where their veterans' preference rights have been violated." *Kirkendall*, 479 F.3d at 837. As part of this goal, Congress conferred upon the MSPB "the power to decide cases brought by preference eligibles and certain other veterans who allege a violation of their employment rights."[7]

In light of Congress's longstanding special solicitude for veterans and their rights, this Court has consistently recognized that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *see also Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977) ("'This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.'") (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

Congress enacted both USERRA and VEOA with knowledge of *Irwin v. Department of Veterans Affairs*' settled holding that equitable tolling is available in suits against the federal government. *See* 498 U.S. 89, 95–96 (1990). And Congress made veterans' claims under these statutes subject to the 60-day time limit of 5 U.S.C. §7703(b)(1)(A) with no indication that it sought to restrict the availability of equitable tolling. Indeed, the Federal Circuit previously had recognized that "[t]he purpose of the VEOA is to assist veterans

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[7] *Veterans' Preference: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 110th Cong. 25, at 25 (1st Sess. 2007) (statement of Hon. Neil A.G. McPhie), https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg39450/pdf/CHRG-110hhrg39450.pdf (last visited Nov. 7, 2017).

in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right … [i]t defies logic to suppose that when Congress adopted the VEOA in 1998, well after the Supreme Court's decision in *Irwin*, it intended" to foreclose equitable tolling to such veterans. *Kirkendall*, 479 F.3d at 841 (holding that equitable tolling applies to appeal period under the VEOA); *see id.* at 843 ("Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling.").

The history and structure of the CSRA, USERRA, and VEOA all demonstrate that Congress did not intend to create traps for the unwary or misinformed. Mechanisms to help abate some of the CSRA's complexity are even built into the statute, indicating Congress's aim that these cases be heard on the merits. *See* 5 U.S.C. § 7702(f) (savings provision for timeliness purposes when litigant erroneously files in incorrect forum).

Likewise, nothing in Section 7703(b)(1)(A), the provision governing timeliness of appeals from the MSPB, suggests that Congress intended to impart harsh jurisdictional consequences. Rather, Congress purposefully made the MSPB appeals regime applicable to veterans' claims under USERRA and VEOA—legal regimes intended to be specially protective of claimants, and to which the pro-veteran canon of construction of *King*, 502 U.S. at 220 n.9, should apply. *See also, e.g.*, *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both

have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."); *McKnight v. Gobe*r, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (finding that "if there is ambiguity in the statute, 'interpretive doubt is to be resolved in the veteran's favor'" (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994))).

Congress's repeated enactment of legislation to assist veterans and to provide them with means of redress demonstrates its intent that legal matters affecting veterans' rights be subject to equitable considerations such as equitable tolling. The Federal Circuit's decision in *Vocke* impedes Congress's goal to create an avenue for veterans to appeal their USERRA and VEOA claims.

II. The Considerations In *Henderson* Apply Here.

In *Henderson v. Shinseki*, this Court held that veterans' appeals from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans Claims were subject to equitable tolling. 562 U.S. 428, 436, 441–42 (2011). In doing so, and in distinguishing its prior decision in *Bowles v. Russell*, 551 U.S. 205 (2007) involving time limits to appeal from a federal district court to a federal court of appeals, this Court applied the "'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (citation omitted). This Court reiterated that filing deadlines are not jurisdictional unless there is a "'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* at 436 (citation omitted).

These same considerations should apply to appeals of MSPB decisions. As in *Henderson*, there is no clear indication of Congressional intent to make the appeals deadline jurisdictional. Vocke's appeal from the MSPB, a quasi-judicial agency, is unlike the statute governing appeals "from one court to another court" at issue in *Bowles*. *Henderson*, 562 U.S. at 436. Rather, the statute's plain language and its applicability to appeals of USERRA and VEOA claims indicate that Congress intended the deadline to be subject to equitable tolling.

When Congress intends to make a deadline jurisdictional, it does so unambiguously. *Henderson* explained that Congress intends that a jurisdictional bar apply when the statute provides that Article III review occur "within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* at 438. Congress did not do so for the deadline for seeking review of an MSPB decision. 5 U.S.C. § 7703(b)(1)(A) provides only that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board."[8]

Additionally, as in *Henderson*, the provision providing the time limit for appeals, 5 U.S.C. § 7703(b)(1)(A), is in a different section of the U.S. Code from the provision conferring subject matter jurisdiction on the Federal Circuit to review final

[8] Though the provision uses the word "shall," this Court made clear in *Henderson* that use of "shall" does not render the time limit jurisdictional: "we have rejected the notion that 'all mandatory prescriptions, however emphatic, are … properly typed jurisdictional.'" *Henderson*, 562 U.S. at 439 (citation omitted).

decisions of the MSPB, 28 U.S.C. § 1295(a)(9). *Compare* 5 U.S.C. § 7703 ("Judicial review of decisions of the Merit Systems Protection Board") *with* 28 U.S.C. § 1295 ("Jurisdiction of the United States Court of Appeals for the Federal Circuit"); *see Henderson*, 562 U.S. at 439 (finding that the deadline's placement in the "Procedure" subchapter, not the "Organization and Jurisdiction" subchapter suggests that Congress regarded the 120-day limit as a claim-processing rule); *see also United States v. Wong*, 135 S. Ct. 1625, 1633 (2015) (holding time bar was not jurisdictional when "§ 2401(b) houses the FTCA's time limitations [and] a different section of Title 28 confers power on federal district courts to hear FTCA claims").

In determining whether Congress intended for the deadline at issue in *Henderson* to be jurisdictional, this Court also gave weight to Congress's "solicitude" for veterans, *Henderson*, 562 U.S. at 440, and the fact that "the veterans benefits program[] is 'unusually protective' of claimants," *id.* at 437 (citation omitted). This Court considered Congress's longstanding intent that veterans be treated preferentially under the review schemes it enacts. *See id.* at 440. All of these factors, which the Court found "most telling" in its analysis, *id.*, should also apply here as Section 7703(b)(1)(A) governs the deadline for appeals of veterans' claims under USERRA and VEOA.

In sum, the Federal Circuit's holding violates *Henderson* in two ways: (a) by deeming a deadline jurisdictional absent a finding of any "clear indication" by Congress to treat it as such; and (b) by failing to consider Congress's longstanding intent that statutes affecting veterans be interpreted in veterans' favor.

III. The Elimination Of Equitable Tolling Would Thwart Congress's Goal Of Ensuring Fair And Equitable Treatment Of Veterans.

The Federal Circuit's decision, if not reversed, would contravene Congress's goal of ensuring fair and equitable treatment of veterans. MSPB appeals can present a "procedural morass" for claimants. Veterans often proceed *pro se* and disproportionately may face deployment or medical circumstances that make navigating that morass even more difficult. The doctrine of equitable tolling should be available in such circumstances.

A. Veterans already bear the burden of navigating a "procedural morass" in adjudicating their claims before the MSPB.

The MSPB was established under the CSRA, a remedial regime designed to protect federal employees. *See* S. Rep. No. 95-969; *see also* 5 U.S.C. § 2301(b)(8)(A) (under governing merit systems principles, employees should be "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes"). The CSRA codifies the 60-day time limit for appeals from the MSPB. *See* 5 U.S.C. § 7703(b)(1)(A).

Despite Congress's intent that the CSRA protect federal employees, the statute imposes a complex and confusing set of procedures that are difficult for both courts and litigants to navigate. This process has been described as a "procedural morass" or "procedural maze" for litigants. *Valentine-Johnson*, 386 F.3d at

802, 805. "[T]he provisions that structure both administrative and judicial review of adverse personnel actions" have likewise been described as "a complicated tapestry." *Butler*, 164 F.3d at 637.

Veterans are not trained to navigate the procedural hurdles of the MSPB claims process, and the complex nature of the CSRA can lead litigants to miss filing deadlines through no fault of their own. In *Valentine-Johnson*, for instance, the Sixth Circuit heard an Air Force employee's pre-termination discrimination claims under principles of equity when the employee "was unsuccessful in navigating the procedural maze for the processing of a mixed case because of erroneous advice given to her by the MSPB Administrative Judge (AJ) hearing her claims." 386 F.3d at 802.

These issues are of particular concern given the substantial portion of claimants proceeding through this remedial scheme *pro se*. *See generally* MSPB, *Congressional Budget Justification FY 2018*, at 12 ("[A]t least half or more of the appeals filed with the [MSPB] are from *pro se* appellants.")[9]. The MSPB regime is one in which "'laypersons, rather than lawyers, are expected to initiate the process.'" *Fed. Express*, 552 U.S. at 402 (quoting *Commercial Office*, 486 U.S. at 124). Complex remedial schemes such as these "must be accessible to individuals who have no detailed knowledge of the relevant statutory

[9] *Available at* https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1412494&version=1417936&application=ACROBAT (last visited Nov. 7, 2017).

mechanisms and agency processes." *Id.* at 403. Without equitable tolling, veterans are at risk of losing meritorious claims, and their statutory right to judicial review, due to procedural claim processing hurdles—an outcome inconsistent with Congress's intent.

To punish veterans who fail to grasp the CSRA's mechanisms—mechanisms sufficiently complex as to even challenge the courts at times—would undermine Congress's express intent to protect these litigants. The CSRA's many nuances should not preclude merits review by an Article III court when the equities warrant. *See Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1585 (Fed. Cir. 1994) ("It is well established that judicial review of agency action is to be presumed, absent clear and convincing evidence of Congressional intent to the contrary.").

B. Veterans disproportionately suffer cognitive impairments and other circumstances that can affect their ability to pursue claims and meet statutory filing deadlines.

Veterans disproportionately suffer from diseases, including post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), that may impede their ability to understand and meet filing deadlines. More than 850,000 veterans are compensated for PTSD;[10]

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[10] *See VA Benefits & Health Care Utilization*, U.S. Dep't of Veterans Affairs, https://www.va.gov/vetdata/docs/pocketcards/fy2016q4.pdf (last updated July 22, 2016).

more than 350,000 veterans and active duty personnel have been diagnosed with TBI since 2000.[11]

Veterans with PTSD and TBI often are significantly impaired in their ability to concentrate and carry out daily tasks.[12] Even veterans with only mild brain injuries may experience intellectual impairment and difficulty with memory, concentration, and attention.[13] These conditions can impair a veteran's ability to manage his or her own affairs and may make it difficult for him or her to navigate administrative systems with unfamiliar rules and regulations, particularly if he or she is proceeding *pro se*.

In addition, many veterans and military servicemembers move frequently or may need to travel for medical treatment to address service-related injuries, making it even more difficult for them to be aware of and fulfill statutory deadlines. Servicemembers seeking denial of military leave benefits may be deployed overseas and not receiving mail regularly at the time of the MSPB's decision. Likewise, veterans with federal civilian jobs on overseas assignment may

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[11] *See DoD Worldwide Numbers for TBI*, Defense and Veterans Brain Injury Center, http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi (last visited Nov. 7, 2017).

[12] *See* Nat'l Inst. for Mental Health, *Post-Traumatic Stress Disorder*, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last updated Feb. 2016); *see also* Veterans Health Initiative, *Traumatic Brain Injury* 59–60 (Apr. 2010), https://www.publichealth.va.gov/docs/vhi/traumatic-brain-injury-vhi.pdf (last visited Nov. 7, 2017).

[13] *See* Veterans Health Initiative, *Traumatic Brain Injury*, *supra* n.12, at 39–40.

experience attendant mail delays. Additionally, veterans whose medical conditions require hospitalization or rehabilitation may not be in a position over a particular 60-day period to give a jurisdiction-preserving action their immediate attention.

C. The availability of Article III judicial review of MSPB decisions is an important safeguard for veterans' rights.

Given the importance of Article III judicial review for these claims, the availability of equitable tolling is important to ensure that veterans' claims can be heard.

On numerous occasions, the Federal Circuit has reversed MSPB decisions denying veterans' claims under USERRA and VEOA. For instance, a veteran had to appeal twice to the Federal Circuit after the MSPB denied his discrimination claim under USERRA and subsequently found that he had waived his USERRA rights by failing to raise them while on active duty in an overseas military deployment. *See Erickson v. U.S. Postal Serv.*, 636 F.3d 1353, 1356 (Fed. Cir. 2011). The Federal Circuit reversed both of the MSPB's decisions. *See id.* at 1356, 1359. The veteran in *Erickson* was fortunate enough to have had counsel representing him, but had he proceeded *pro se*, as many veterans do, and relied on incorrect guidance in the Federal Circuit's Guide, as Petitioner Vocke did, then the opportunity for Federal Circuit review would have been foreclosed to him under the rationale below, and the violation of his USERRA rights left unchecked.

Likewise, in *Lynch v. Department of the Army*, 107 M.S.P.R. 224, 225 (M.S.P.B. 2007), the veterans' preference rights of a disabled veteran were vindicated only after the Federal Circuit reversed the MSPB's summary order denying his request for corrective action under the VEOA. But if this veteran had been in the hospital for his service-connected disability when the adverse MSPB decision issued, his meritorious appeal would have been foreclosed under the holding below.

Congress did not intend to foreclose Article III review in circumstances such as these. But under the decision below, the claims-processing statute in 5 U.S.C. § 7703(b)(1)(A) is even more draconian than the jurisdictional statute at issue in *Bowles*. That statute, 28 U.S.C. § 2107, provides that the time to appeal can be extended in certain circumstances upon a showing of "excusable neglect or good cause." To conclude, as the decision below did, that there can never be excusable neglect or good cause to toll appeals from the MSPB is not what Congress provided or intended.

CONCLUSION

The decision below undermines the ability of veterans to obtain core statutory preferences and benefits to which they are entitled, frustrating Congress's longstanding efforts to secure and protect veterans' rights. This Court's review is needed to correct the Federal Circuit's misapplication of *Bowles* and misunderstanding of *Henderson*. This Court should grant the petition for a writ of certiorari and reverse the decision of the Federal Circuit.

Respectfully submitted,

Barton F. Stichman
Joint Executive Director
NATIONAL VETERANS
LEGAL SERVICES PROGRAM
1600 K St. NW, Ste. 500
Washington, DC 20006
(202) 621-5677

Benjamin C. Block
Counsel of Record
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
bblock@cov.com
(202) 662-5205

Counsel for Amici Curiae

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