No. 18-1061

IN THE

Supreme Court of the United States

KAREN GRAVISS,

Petitioner,

v.

DEPARTMENT OF DEFENSE, DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS,

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
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Regulations, and Rules

Congressional Authorities

Other Authorities

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 members number 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.

---

[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 on behalf of Petitioner Karen Graviss because the rule applied by the Federal Circuit in *Graviss v. Department of Defense*, 898 F.3d 1222 (Fed. Cir. 2018), denies judicial review of agency decisions that affect *amici*'s core constituencies—United States military veterans. The Merit Systems Protection Board (MSPB), 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. Over 600,000 veterans are employed in federal agencies across the country, comprising nearly one out of every three federal workers.[4]

If allowed to stand, the Federal Circuit's decision would preclude judicial review of claims by veterans—many of whom proceed *pro se*. 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.

---

[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 (codified at 5 U.S.C. § 3330a).

[4] *See* U.S. Office of Pers. Mgmt., *The Employment of Veterans in the Federal Executive Branch for FY 2016* 2 (2017), https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2016.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Graviss has explained the legal errors in the decision below. *Amici* write to demonstrate further that Congress did not and could not have intended the Federal Circuit's interpretation of the deadline in 5 U.S.C. § 7703(b)(1)(A) to preclude equitable tolling, 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] When enacting laws that affect veterans, Congress "place[s] a thumb on the scale in the veteran's favor," *Henderson*, 562 U.S. at 440 (citation omitted), and ensures 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").

---

[5] U.S. Dep't of Justice Civil Rights Div., *Protecting the Rights of Servicemembers* 3, https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/servicemembers_booklet.pdf (last visited February 28, 2019).

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

USERRA guarantees servicemembers expansive rights to take military leave from their civilian jobs, to be reemployed promptly upon returning from military leave, and to be free from discrimination based on their service. 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").

VEOA helps veterans readjust to civilian life and rewards them for their service to our country by giving veterans certain advantages in the federal hiring process. *See Att'y Gen. v. Soto-Lopez*, 476 U.S. 898, 910 (1986) (plurality opinion) ("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 the claims of veterans denied their benefits under USERRA and VEOA. 5 U.S.C. § 3330a(d)(1). The Federal Circuit has exclusive jurisdiction over subsequent appeals by veterans from the MSPB. 5 C.F.R. § 1201.3(b)(1).

II. In *Henderson v. Shinseki*, this Court explained that statutory filing deadlines 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.*, 138 S. Ct. 13, 20 n.9 (Nov. 8, 2017). Applying the well-established "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 "appeal[s] 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 denying 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*.

III. A decision that equitable tolling is never permissible in appeals of MSPB decisions to the Federal Circuit would have a devastating impact on veterans with meritorious claims. Although Congress enacted the Civil Service Reform Act (CSRA)[6]—the enabling statute for the MSPB—to protect federal employees,

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

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 emphasized 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 critical to ensure that these veterans receive the benefits that Congress prescribed.

ARGUMENT

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

Without equitable tolling, veterans risk losing meritorious claims due to cumbersome procedural hurdles—an outcome inconsistent with Congress's longstanding intent to protect and to aid veterans.

The history of Congress's commitment to veterans dates back to our founding. *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 by passing 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 made USERRA applicable 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 receive preferential treatment in federal 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 strengthen and solidify 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 gave 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 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 presumptively available in suits against the federal government. *See* 498 U.S. 89, 95–96 (1990). And Congress subjected veterans' claims under these statutes 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 recognized that because "[t]he purpose of the

---

[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://archives-veterans.house.gov/witness-testimony/hon-neil-ag-mcphie (last visited Mar. 14, 2019).

VEOA is to assist veterans 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 the 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, demonstrating Congress's intent to have these cases 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 appeals from the MSPB, suggests that Congress wanted to impart harsh jurisdictional consequences on federal employees. 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))).

In sum, 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 *Graviss* impedes Congress's goal to create an avenue for veterans to appeal their USERRA and VEOA claims.

II. The Decision in *Graviss* Contravenes *Henderson*.

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 are subject to equitable tolling. 562 U.S. at 436, 441–42. In doing so, this Court reiterated that filing deadlines are subject to equitable tolling absent a "'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* at 436 (citation omitted). Applying the pro-veteran canon of construction, this Court found no indication that a filing time limit for veterans was intended to "carry the harsh consequences that accompany the jurisdictional tag." *Id.* at 444.

Further, in reviewing its controlling precedent, this Court explicitly rejected the rule—adopted by the Federal Circuit in *Fedora v. MSPB*, 848 F.3d 1013

(Fed. Cir. 2017) *cert. denied*, 138 S. Ct. 755 (2018)—that, under *Bowles v. Russell*, 551 U.S. 205 (2007), statutory appeal deadlines are *per se* jurisdictional. *Id.* at 436. Rather, this Court distinguished *Bowles* as involving a special "type" of deadline—for appeals "from one court to another court"—that Congress intended to pose a jurisdictional bar. *Id.* In *Hamer v. Neighborhood Housing Services of Chicago*, this Court affirmed this distinction, emphasizing that the "clear indication" analysis applies unless the time limit concerns an appeal from "one Article III court to another."[8] 138 S. Ct. at 20 & n.9 (citation omitted).

The Federal Circuit's holding that the deadline in Section 7703(b)(1) is jurisdictional violates *Henderson* in two ways: (1) by deeming a deadline jurisdictional absent a finding of any "clear indication" by Congress to treat it as such; and (2) by failing to consider Congress's longstanding intent that statutes affecting veterans be construed in veterans' favor.

As in *Henderson*, there is no clear indication that Congress intended the deadline to be jurisdictional.

---

[8] This Court's recent opinion in *Nutraceutical Corp. v. Lambert*, No. 17-1094 (2019), which held that Federal Rule of Civil Procedure 23(f) and the applicable Federal Rules of Appellate Procedure explicitly prohibited the extension of the filing deadline for an appeal from the decertification of a class, does not affect the Court's clear statement requirement for determining when *statutory* filing deadlines are jurisdictional. Further, unlike the rules at issue in *Nutraceutical*, the statutes at issue in this case do not contain an explicit limitation on equitable tolling. *See* 5 U.S.C. § 7703(b)(1)(A); 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7121.

Rather, the CSRA's plain language and structure evidence that Congress wanted equitable tolling to apply.

For instance, the provision providing the time limit for appeals, 5 U.S.C. § 7703(b)(1)(A), "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the court. *Henderson*, 562 U.S. at 438. Instead, Section 7703(b)(1)(A) states 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."[9]

Additionally, as in *Henderson*, the appeal filing deadline is in a different section of the U.S. Code from the provision conferring subject matter jurisdiction on the Federal Circuit to review final decisions of the MSPB, 28 U.S.C. § 1295(a)(9).[10] *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

---

[9] Though the provision uses the word "shall," this Court made clear in *Henderson* that the use of "shall" does not render a 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).

[10] Between *Fedora* and *Graviss*, the Federal Circuit has changed its rationale, now positing that the *jurisdictional* nature of the appeal filing deadline comes from 28 U.S.C. § 1295, not 5 U.S.C. § 7703. If such a minimal link were sufficient to make filing time periods jurisdictional and immutable, then *all* of the time periods in sections cross-referenced in Section 1295(a) would be jurisdictional (and equitable tolling inapplicable) notwithstanding that Congress never stated not intended such an extreme result.

Jurisdiction" subchapter indicates that Congress regarded the 120-day limit as a non-jurisdictional rule).

Second, given the CSRA's applicability to USERRA and VEOA, the deadline for appeals from the MSPB should be construed in veterans' favor. In *Henderson*, this Court gave weight to Congress's "solicitude" for veterans and longstanding intent that veterans be treated preferentially under the review schemes that it enacts, 562 U.S. at 440, and the fact that "the veterans benefits program[] [was] 'unusually protective' of claimants," *id.* at 437 (citation omitted). All of these factors, which the Court found "most telling" in analyzing Congress's intent, *id.*, should apply here as Section 7703(b)(1)(A) governs the deadline for appeals of veterans' USERRA and VEOA claims.

In sum, the decision in *Graviss* misapplies the Court's clear indication requirement and overlooks Congress's longstanding solicitude for protecting veterans' rights.

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 face deployment or medical issues that make navigating that morass even more difficult. The doctrine of equitable tolling should be available in such circumstances.

A. Veterans must navigate a "procedural morass" to adjudicate 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 parties to navigate. Courts have acknowledged that this process is a "procedural morass" or "procedural maze" for litigants, *Valentine-Johnson*, 386 F.3d at 802, 805, and that "the provisions that structure both administrative and judicial review of adverse personnel actions form a complicated tapestry" of procedural rules, *Butler*, 164 F.3d at 637.

Compounding this complexity, at least 50 percent of claimants proceed through this process *pro se*. *See generally* MSPB, *Congressional Budget Justification FY 2018*, at 12 ("Pro se appellants do not generally have equal knowledge of the case filing process or equal access to the information available, especially if

they are stationed overseas.").[11] Construing filing deadlines as jurisdictional is "particularly inappropriate" for a system in which "laymen, unassisted by trained lawyers, initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). Rather, these complex remedial schemes "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Express*, 552 U.S. at 403.

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 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. Punishing veterans who fail to grasp the CSRA's complex mechanisms undermines 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.").

---

[11] https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1412494&version=1417936&application=ACROBAT.

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

Forty percent of veterans employed in the federal government are disabled.[12] In particular, veterans disproportionately suffer from diseases, including post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), that can impede their ability to understand and meet rigid filing deadlines. More than 1,000,000 veterans are compensated for PTSD;[13] more than 380,000 veterans and active duty personnel have been diagnosed with TBI since 2000.[14]

Veterans with PTSD and TBI often are significantly impaired in their ability carry out daily tasks.[15] Even veterans with only mild brain injuries may experience intellectual impairment and difficulty with memory, attention, and concentration.[16] Yet, these

---

[12] *See* U.S. Office of Pers. Mgmt., *The Employment of Veterans in the Federal Executive Branch for FY 2016*, *supra* n.4, at 2.

[13] *See* U.S. Dep't of Veterans Affairs, *VA Benefits & Health Care Utilization*, https://www.va.gov/vetdata/docs/pocketcards/fy2018q4.pdf (last updated July 18, 2018).

[14] *See* Defense and Veterans Brain Injury Ctr., *DoD Worldwide Numbers for TBI*, http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi (last visited Feb. 28, 2019).

[15] *See* Nat'l Inst. of Mental Health, *Post-Traumatic Stress Disorder*, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last updated Feb. 2016).

[16] *See* Erin Bagalman, Cong. Research Serv., *Traumatic Brain Injury Among Veterans* 3 (Jan 4, 2013).

are the exact capabilities a layperson needs to navigate an unfamiliar "procedural maze" like the CSRA.

In addition, many veterans and military servicemembers move frequently or need to travel for medical treatment to address service-related injuries, making it even harder for them to be aware of and fulfill statutory deadlines—especially given that claims (like Graviss's) can take several years to resolve. Servicemembers seeking military leave benefits, for instance, may be deployed overseas and not able to receive mail regularly at the time of the MSPB's decision. Likewise, veterans with federal civilian jobs on overseas assignment may experience mail delays. And veterans whose medical conditions require hospitalization or rehabilitation may not be able, 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 vital to ensure that veterans' claims are 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 USERRA discrimination claim and 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 to be represented by counsel, but had he acted *pro se*, as many veterans do, and missed a procedural deadline, judicial review would have been denied and the violation of his USERRA rights left unchecked.

Similarly, 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 VEOA. Had this veteran been in the hospital for his service-related disability when the adverse MSPB decision issued, his meritorious appeal might have been foreclosed under the decision below.

Congress did not intend to deny Article III review in circumstances like these. However, following its precedential decision in *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013, 1015 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 755 (2018), the Federal Circuit has routinely dismissed untimely MSPB appeals by *pro se* veterans without considering equitable tolling arguments. *See, e.g.*, *Jones v. Dep't of Health and Human Servs*, 702 F. App'x 988 (Fed Cir. 2017), *cert denied*, 139 S. Ct. 359 (2018); *Brenndoerfer v. USPS*, 693 Fed. App'x. 904 (Fed. Cir. 2017); *Jarmin v. OPM*, 678 Fed. App'x. 1023 (Fed. Cir. 2017). These rulings threaten to bar equitable tolling, not only for appellants from the MSPB to the Federal Circuit, but for all appellants within that court's jurisdiction—including veterans appealing from the U.S. Court of Appeals for Veterans Claims. 38 U.S.C. § 7292 (a), (c), (d).

Further, under Federal Circuit precedent, the deadline to appeal from the MSPB is even more draconian than the deadline to appeal from a federal district court to a federal appellate court, which permits extensions for "excusable neglect or good cause." *See* 28 U.S.C. § 2107. To conclude, as the Federal Circuit did, that appeals from the MSPB under the CSRA—a remedial scheme designed to protect federal employees, including veterans—can never be tolled 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 intent to secure and protect veterans' rights. This Court's review is needed to correct the Federal Circuit's continued misapplication of this Court's "clear indication" requirement. This Court should grant the petition for a writ of certiorari and reverse the decision of the Federal Circuit.

Respectfully submitted,

Barton F. Stichman
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