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

BRIEF OF MILITARY-VETERANS ADVOCACY INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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

This case concerns 38 U.S.C. § 5110(b)(1), the statute that ties the effective date for disability benefits to a veteran's discharge from service, so long as the veteran files an application within one year of discharge. The Federal Circuit, by an evenly divided en banc court, affirmed the holding of the U.S. Court of Appeals for Veterans Claims that this timing provision is not amenable to equitable tolling. Pet. App. 14a-97a. That ruling erodes veterans' rights to the benefits their dutiful service has earned them. In a veterans' benefits system that is uniquely pro-claimant, depriving veterans of disability compensation for which they have sacrificed their physical and mental health when, as here, those same injuries cause them to delay filing for benefits is an injustice that Congress did not intend. Given the special solicitude long

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

reflected in our nation's veterans' benefit laws, veterans should not be deprived of benefits when the deprivation is wrought by the injury itself. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) ("The process is designed to function throughout with a high degree of … solicitude for the claimant."). Because the ruling below contravenes Congress's intent and this Court's precedents, as well as compromises veterans' ability to be made whole for their injuries, MVA has a strong interest in this Court overturning the Federal Circuit's ruling and clarifying that § 5110(b)(1) is amenable to equitable tolling.

INTRODUCTION AND SUMMARY OF ARGUMENT

Veterans who suffer injury or illness during their military career are entitled to compensation for any resulting disability that impairs their ability to work or go about their life. 38 U.S.C. §§ 1110, 1131. Generally, the effective date for such an award of so-called "service-connected" disability benefits "shall not be earlier than the date" when the U.S. Department of Veterans Affairs (VA) receives the veteran's application for those benefits. 38 U.S.C. § 5110(a)(1). But if the VA receives the application within one year from the date of the veteran's discharge from service, then the veteran is entitled to receive benefits retroactive to that discharge date. *Id.* § 5110(b)(1). Stated differently, Congress specified a clear timeframe by which veterans must submit their application to the VA in order to receive benefits effective as of their discharge date. Veterans who miss that deadline ordinarily lose their statutory right to retroactive compensation.

But are there circumstances in which the one-year deadline in § 5110(b)(1) might be extended? This Court's precedents provide a clear roadmap to answering that question. In *Irwin v. Department of Veterans Affairs*, this Court established a rebuttable presumption that the doctrine of equitable tolling—which allows statutory time limits to be extended when equity and fairness so require—applies to claims against the government unless "a realistic assessment of legislative intent" forecloses its application. 498 U.S. 89, 95-96 (1990). But the en banc Federal Circuit, the only court of appeals with jurisdiction over this case, "is equally divided … as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1)." Pet. App. 16a. This Court's intervention is therefore needed to undo the existing panel and lower-court precedent that denies equitable tolling to deserving veterans like Petitioner.

I. This case presents the exceptionally important question of whether Congress foreclosed the presumptively available doctrine of equitable tolling to the one-year deadline in § 5110(b)(1). It did not. Every relevant indication confirms that *Irwin*'s presumption applies and has not been rebutted here.

Irwin's presumption applies to statutes of limitations and similar timing requirements—including time limits that, as here, relate to the administration of federal benefit programs. The filing deadline in § 5110(b)(1) operates as a statute of limitations subject to *Irwin*'s presumption because it bars entitlement to a statutory right (retroactive compensation) for failure to act within a specified time period (one

year from discharge). Therefore, the presumption applies to § 5110(b)(1).

That presumption is not rebutted here for several reasons. First, the plain language in § 5110(b)(1) is simple and straightforward and therefore can plausibly be read to contain an implied equitable-tolling exception. Second, Congress did not create specific tolling exceptions to § 5110(b)(1)'s deadline, so no negative implication can be drawn to foreclose an equitable exception. Third, Congress placed § 5110(b)(1) outside of the subchapter containing jurisdictional grants. Fourth, Congress placed this provision within a unique statutory scheme designed to assist veterans.

Applying the equitable-tolling doctrine to § 5110(b)(1) does not create serious administrative problems for the federal government. Case-by-case consideration of equitable factors is possible where, as here, there is a relatively small (and declining) beneficiary population, and the individualized analysis of each benefits application is already embedded in the scheme that Congress established.

II. This Court's intervention is necessary to overturn a ruling that perpetuates inequity in a public-benefits program that is essential to a uniquely deserving population.

Foreclosing equitable tolling in this context is especially harmful given the frequency of disabling mental health conditions among the veteran population and the reality that veterans often must initiate

the process without legal assistance from trained lawyers. The Federal Circuit's ruling adversely affects the most vulnerable group of veterans—those who, because of their injuries and mental health illnesses, may not recognize their own disability and therefore do not apply for disability benefits. Denying an equitable outcome to these veterans flies in the face of the government's moral duty and longstanding obligation to make whole veterans who are injured in the line of duty, especially where those injuries are the sole cause of the delay in applying for benefits.

ARGUMENT

I. Certiorari Is Necessary To Overturn A Decision That Wrongly Forecloses The Application Of Equitable Tolling To 38 U.S.C. § 5110(b)(1).

In *Irwin*, this Court established a rebuttable presumption that equitable tolling applies to claims against the United States in the same way it applies to claims against private parties. 498 U.S. at 95-96. That presumption can be rebutted if there is a clear indication that Congress intended to foreclose the availability of such tolling. *Id.* A proper textual analysis of § 5110(b)(1) confirms that the presumption applies and is not rebutted. § I.A. To the extent any concern remains, policy considerations underscore that text-driven conclusion. § I.B.

A. Section 5110(b)(1)'s text and placement within the Veterans' Judicial Review Act confirm that Congress did not foreclose equitable tolling.

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

As this Court has made clear, *Irwin*'s presumption applies to such time limits unless there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (concluding that presumption was not rebutted in the context of limitations periods in tax-refund suits against the government). In answering the "negatively phrased question" of whether Congress intended for the doctrine *not* to apply to a particular statutory provision, courts must analyze the text, structure, and context of that statute to determine Congress's intent. *Id.*

For instance, when setting forth time limitations for a claim, Congress's use of "emphatic," "highly detailed technical" language militates against tolling. *Id.* That is because, "linguistically speaking," it would be difficult to read limits that are set forth "in a highly detailed technical manner ... as containing implicit [equitable] exceptions." *Id.* By the same token, the "explicit listing of exceptions" to the statute's "basic time limits" that "do not include 'equitable tolling'" is powerful evidence that Congress did not intend such tolling to apply. *Id.* at 351-52. This idea is one application of well-established principles of statutory construction, which make clear that "[t]he expression of one thing implies the exclusion of others." Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012); *accord Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (applying negative-implication canon).

There might also be structural and contextual signals of congressional intent to permit equitable exceptions. One such signal is the "placement" of the relevant timing provision outside of the statutory subchapter conferring jurisdiction, since the inability to toll a statutory limit is a common "jurisdictional attribute[]." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (stating that Congress's placement of a timing provision "in a subchapter entitled 'Procedure,'" rather than the "subchapter entitled 'Organization and Jurisdiction'" was evidence that Congress did not want the "provision to be treated as having jurisdictional attributes"). Another signal is its "placement within" a statutory review scheme that has "singular characteristics" reflecting special solicitude toward the claimant. *Id.* at 439-40.

Both instances, especially when taken together, constitute powerful evidence that a statutory time limit does not create a jurisdictional bar, and can be extended when equity so requires.

2. The plain language of § 5110(b)(1) and its placement within the Veterans' Judicial Review Act (VJRA) uniformly support the conclusions that (i) *Irwin*'s presumption applies and (ii) that presumption is not rebutted.

i. As noted above (at 6), *Irwin*'s presumption applies to statutes of limitations and timing requirements that effectively function as such statutes. That includes the statute here. Contrary to what the Federal Circuit has held, § 5110(b)(1) does much more than merely "indicate[] when benefits may begin and provide[] for an earlier date under certain limited circumstances." Pet. App. 23a (Chen, J., concurring) (quoting *Andrews v. Principi*, 351 F.3d 1134, 1138 (Fed. Cir. 2003)). Notably, it "impose[s] what is clearly *a one-year statute of limitations for retrospective claims*—making retrospective benefits unavailable unless the claim is filed within one year after discharge." Pet. App. 77a (Dyk, J., concurring) (emphasis added). Rather than merely indicate when a veteran's disability benefits might begin to accrue, § 5110(b)(1) also operates to bar a veteran's entitlement to retroactive disability benefits. Because the veteran will lose that entitlement to a specific statutory right if the veteran does not act within the specified timeframe, § 5110(b)(1) operates in the same manner as an ordinary statute of limitation. Therefore, this provision is precisely the kind of limit that is subject to *Irwin*'s presumption. *Cf. Young v. United States*, 535 U.S. 43,

46-48 (2002) (applying presumption to "three-year lookback period" in bankruptcy provision); *see also Scarborough*, 541 U.S. at 422; *Irwin*, 498 U.S. at 94-96.

In his concurrence below, Judge Chen sought to distinguish § 5110(b)(1)'s deadline from an ordinary statute of limitation on the basis that the one-year limitations period starts running from the veteran's discharge from service and not from the defendant's breach of a legal duty owed to that veteran. Pet. App. 30a-31a. In other words, § 5110(b)(1) contains a no-fault filing deadline, whereas ordinary statutes of limitations are "triggered by harm from the breach of a legal duty." *Id.* While that distinction may be true in many cases, it is not one that disposes of the relevant question. This Court has made clear that *Irwin*'s presumption applies not only to cases of legal wrong but also to "the administration of benefit programs." *Scarborough*, 541 U.S. at 422. And, as Judge Dyk explained, other no-fault statutory time limits are subject to equitable tolling, such as the one in the National Childhood Vaccine Injury Act of 1986. Pet. App. 74a-76a. Merely classifying § 5110(b)(1) as a no-fault deadline therefore cannot preclude application of *Irwin*'s presumption.

ii. Furthermore, every relevant indication shows that *Irwin*'s presumption has not been rebutted here.

First, the language that Congress enacted in § 5110(b)(1) is "fairly simple." *Brockamp* 519 U.S. at 350. It ties the "effective date" for service-connected disability awards to the veteran's discharge from ser-

vice so long as one condition is met: that the VA receives the application for benefits within a year of discharge. Given that simplicity, the provision can be "plausibly read as containing an implied 'equitable tolling' exception" without wreaking any "kind of linguistic havoc." *Id.* at 350, 352.

There is nothing "unusually emphatic," "highly detailed," or even "technical" about the language in § 5110(b)(1) that would suggest its deadline cannot be equitable tolled. *Id.* at 350. Section 5110(b)(1)'s straightforward time limitation is dramatically different from, for example, the ones at issue in *Brockamp* that involve tax-refund claims not subject to equitable tolling. In the Internal Revenue Code, Congress provided that a tax-refund claim "shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed ... within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a). It further provided that, if filed within "the 3-year period," then "the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return" *Id.* § 6511(b)(2)(A). Unlike here, the level of specificity in that language hardly leaves any space to plausibly read the statute "as containing implicit exceptions." *Brockamp*, 519 U.S. at 350.

It is true that § 5110(b)(1) creates an exception to the general default rule in § 5110(a)(1) that, "[u]nless specifically provided otherwise in this chapter, the effective date of an award … shall not be earlier than

the date of receipt of application" for benefits. That language does not mean, however, that Congress sought to foreclose the availability of equitable tolling in this circumstance. While these provisions may be "cast in mandatory language," this Court has "rejected the notion that 'all mandatory prescriptions, however emphatic'" should "be treated as having jurisdictional attributes." *Henderson*, 562 U.S. at 439 (quoting *Union Pacific R. Co. v. Locomotive Eng'rs*, 558 U.S. 67, 81 (2009)). As this Court has stated unmistakably, "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are) ... Congress must do something special, beyond setting an exception-free deadline" to make a time-bar jurisdictional to which equitable tolling cannot apply. *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

As the petition points out, other statutes that this Court has "found to be nonjurisdictional and subject to the general rule in favor of equitable tolling" under this Court's precedents use "far more emphatic and mandatory" language than § 5110(a)(1). Pet. 23-24 (citing Pet. App. 83a-84a). One clear example is the Federal Tort Claims Act, which states in relevant part that "[a] tort claim against the United States *shall be forever barred unless* it is presented in writing … within two years after such claim accrues." 28 U.S.C. § 2401(b) (emphasis added). Notwithstanding this emphatic, mandatory language, this Court held that there was insufficient textual evidence to conclude that Congress intended to rebut "*Irwin*'s 'general rule' that equitable tolling is available in suits against the Government." *Wong*, 575 U.S. at 410-12. Section 5110(a)(1)'s far simpler language certainly does not

provide a "clear indication" that § 5110(b)(1)'s deadline was meant "to carry the harsh consequences that accompany the jurisdiction tag." *Henderson*, 562 U.S. at 441. Nor does the text suggest "that Congress meant to enact something other than a standard time bar" subject to equitable tolling. *Wong*, 575 U.S. at 410.

Second, structural and contextual signals confirm what the plain language itself suggests—that the *Irwin* presumption is not rebutted. For starters, Congress did not provide any specific exceptions to § 5110(b)(1)'s one-year filing deadline, so no negative implication can be drawn about the availability of this particular exception. *Compare Brockamp*, 519 U.S. at 351-52 (stating that "§ 6511 [of the Internal Revenue Code] sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'"). That Congress created exceptions in § 5110(b)(1) and other provisions to the default rule in § 5110(a)(1), as Judge Chen observed in his concurrence (Pet. App. 59a-60a), misses the point. After all, the relevant question is whether the one-year filing deadline in § 5110(b)(1) is subject to tolling, and Congress did not impliedly limit the circumstances under which *that* deadline can be tolled. In the absence of such "explicit listing of exceptions" for § 5110(b)(1)'s deadline, *Irwin*'s presumption that the timing provision can be equitably tolled remains unrebutted. *Brockamp*, 519 U.S. at 352.

Moreover, Congress was especially careful not to assign a jurisdictional tag to § 5110(b)(1). In *Wong*, this Court explained that "Congress's separation of a filing deadline from a jurisdictional grant indicates

that the time bar is not jurisdictional." 575 U.S. at 411. In that case, the Court noted that the time limitations of the Federal Tort Claims Act (including § 2401(b)) are in "a different section of Title 28" than the one conferring jurisdiction on the federal courts to review claims under that statute. *Id.* at 411-12. And because "[n]othing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions[,] [t]reating § 2401(b)'s time bars as jurisdictional would thus disregard the structural divide built into the statute." *Id.* at 412. Accordingly, the Court held, § 2401(b)'s time limit does "not [create] a jurisdictional requirement" and is subject to tolling on equitable grounds. *Id.* Similarly, in *Henderson*, this Court concluded that the 120-day deadline to appeal a Board of Veterans' Appeals decision to the U.S. Court of Appeals for Veterans Claims was a claim-processing rule, not a jurisdictional requirement. 562 U.S. at 431, 441-42. It did so in part because Congress had placed the time limit in a subchapter entitled "Procedure" rather than the one entitled "Organization and Jurisdiction." *Id.* at 439.

Here, too, Congress placed § 5110 in Part IV of Title 38, along with other claim-processing rules for veterans' benefits claims. In contrast, the statutes defining the jurisdiction of the Board and the Veterans Court, as well as those allocating the functions of the Veterans Benefits Administration, are all in Part V of Title 38. *See* 38 U.S.C. §§ 7104, 7252, 7703. Just as in *Wong* and *Henderson*, this separation further suggests that the timing provision is not rigidly jurisdictional but rather amenable to equitable exceptions such as tolling.

Were there any question remaining about the availability of equitable tolling, the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims" should dispel such doubts. *Henderson*, 562 U.S. at 440. That scheme of adjudication is nothing like "ordinary civil litigation." *Id.* In the words of this Court, the difference between the two "could hardly be more dramatic." *Id.*

Unlike civil litigation, "proceedings before the VA are informal and nonadversarial." *Id.* And there are myriad affirmative duties that Congress has imposed on the VA to assist veterans applying for benefits. For example, VA personnel must help veterans develop the facts necessary to sustain their claim in all but the most implausible cases. 38 U.S.C. § 5103A; 38 C.F.R. §§ 3.103(a), 3.159(c). They must assist veterans in collecting records to support their claims, regardless of whether those records are in the government's custody. 38 C.F.R. § 3.159. Before denying a claim, the VA must notify veterans of any necessary-but-missing evidence. 38 U.S.C. § 5103; 38 C.F.R. § 3.159(b). And when competing evidence regarding a disability is in relative equipoise, the VA must give the veteran the benefit of the doubt. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

There are also numerous pro-veteran evidentiary presumptions that apply to veterans' benefits claims. *See* 38 U.S.C. § 1111 (presumption of soundness), §§ 1112-1118 (presumptions of service-connectedness); 38 C.F.R. §§ 3.307-3.309, 3.318 (same). The differences do not stop there, however. Most

deferentially, this adjudication scheme ties the government's hands by allowing only claimants, not the VA, to appeal an adverse decision by the Board of Veterans' Appeals. 38 U.S.C. § 7266(a). Indeed, *Henderson* concluded that Congress "place[d] a thumb on the scale in the veteran's favor." 562 U.S. at 440 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)); *accord Walters*, 473 U.S. at 311 ("The process is designed to function throughout with a high degree of … solicitude for the claimant.").

Accordingly, any interpretation of § 5110(b)(1) must reflect both Congress's "long standing" solicitude for veterans that this Court has found to be "plainly reflected in the VJRA" and the "long applied" construction canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 440-41 (internal quotation marks and citations omitted). Taken together, these "singular characteristics" of the veterans' adjudication scheme reaffirm the conclusion that Congress did not mean to foreclose the applicability of equitable tolling. Given this special solicitude towards veterans, had Congress intended the time limitation in § 5110(b)(1) "to carry the harsh consequence[]" of not being amenable to tolling when equity so requires, one would have expected Congress to say so expressly. *Id.* at 441. It did not, and the Federal Circuit's decision to the contrary contravenes this Court's precedents.

B. A policy interest in administrative simplicity does not overcome the application of *Irwin*'s presumption to § 5110(b)(1).

Policy considerations can also underscore the text-driven analysis of whether Congress rejected the presumptively applicable equitable-tolling exception. These considerations might include, for example, the need for repose and administrative simplicity. *Brockamp*, 519 U.S. at 352-53. The idea is that it is unlikely that Congress intended for an equitable exception to apply where the tolling would "create serious administrative problems" for the agency, thus undermining an otherwise workable system. *Id.* In circumstances where the consequences of tolling are so significant, one would expect Congress to explicitly write in such an exception into the statute, rather than allow courts to extend time limits when they find it equitable to do so. *Id.*

Here, those policy considerations of repose and administrative simplicity do not rebut the presumption that the time limit in § 5110(b)(1) can be tolled.

Veterans' disability compensation is no doubt administratively complex—just like many of the schemes that Congress has established to review and adjudicate claims for statutory benefits. The system at issue here already provides a comprehensive application process that allows the VA to conduct a thoughtful and searching review of a veteran's records, including efforts to ensure that they are complete and to assist the veteran in obtaining additional

evidence. *See* 38 U.S.C. § 5103A. Individualized attention is therefore necessarily devoted to each applicant when evaluating their medical conditions and service history. And when benefits are awarded, the process already includes a careful grading of the veteran's overall disability. *See* 38 U.S.C. §§ 1155-1157; 38 C.F.R. §§ 3.321-3.385.

Since veterans' disability compensation applications already require a case-by-case analysis of each applicant's circumstances, considering the "individualized equities" of a delayed filing does not impose a substantial additional burden on VA personnel—much less, "create serious administrative problems." *Brockamp*, 519 U.S. at 352. This is especially true given that such equitable considerations would only extend to the relatively small subset of veterans for whom compensation has been approved and effective dates have been established.

Several data points support this conclusion. The eligible veteran population is relatively small and declining. *See* U.S. Census Bureau, *Those Who Served: America's Veterans From World War II to the War on Terror* 1 (2020), https://tinyurl.com/yza3axuj (total veteran population in the United States has "declined by a third, from 26.4 million to 18.0 million between 2000 and 2018" with a "median age" of 65 years); *see also* U.S. Dep't of Veterans Affairs, *Veteran Population Projection Model 2018: A Brief Description* 4 (2020), https://tinyurl.com/yyttab5j (projecting 1.7% decrease in total veteran population over next 30 years). And fewer than 259,000 veterans began receiving compensation benefits for service-connected disabilities in 2020. U.S. Dep't of Veterans Affairs,

Veterans Benefits Administration, Annual Benefits Report Fiscal Year 2020 ("*VBA ABR 2020*") 70 (2021), https://tinyurl.com/47cf35ms.

Significantly, a large bureaucracy serves this declining beneficiary population. Just last fiscal year, the VA, the second largest federal agency in the country, had approximately 400,000 employees. U.S. Dep't of Veterans Affairs, *Annual Report on the Steps Taken to Achieve Full Staffing Capacity* 3-4, 6 (2021), https://tinyurl.com/d4r8d9mx. That bureaucracy includes over 25,000 employees in the Veterans Benefits Administration, *id.* at 7, serving a beneficiary pool of fewer than 10 million veterans, *see* U.S. Dep't of Veterans Affairs, National Center for Veterans Analysis and Statistics, *VA Utilization Profile FY 2017* 4 (2020), https://tinyurl.com/yxctoqnm (9.8 million veterans used at least one service in 2018, including health care, loan guaranty, and life insurance, of whom 4.8 million received compensation or pension).

The reality of an expanding VA bureaucracy adjudicating statutory claims of a declining beneficiary population stands in stark contrast to other schemes where the administrative burdens leap off the page. As this Court observed in the tax-collection context, where it declined to toll the time limit for filing tax-refund claims, federal government programs with tens of millions of participants are "not normally characterized by case-specific exceptions reflecting individualized equities." *Brockamp*, 519 U.S. at 352. Considering that fewer than 259,000 veterans begin receiving compensation benefits in one year, *VBA ABR 2020*, *supra*, at 70, the number of applications for service-connected disability benefits that the VA

receives annually pales in comparison to the 200 million tax returns filed every year and the 90 million refunds that are issued, *Brockamp*, 519 U.S. at 352.

The same contrast is clear when considering social security benefits, which more than 64 million persons in the United States receive. U.S. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2020* 7 (2020), https://tinyurl.com/s6a55wnh. In fiscal year 2019, the Social Security Administration's 62,204 employees processed more than 8 million new claims for old-age, survivor, and disability benefits (as well as nearly 2 million for supplemental security income benefits). *Id.* at 2.68, 2.70. Unlike veterans' disability claims, most applications for social security benefits—particularly, those for old-age and survivor insurance benefits—do not require a searching review. Proving eligibility to those benefits typically involves establishing straightforward vital statistics, like age, marriage or birth to an insured worker, or the death of an insured worker. 42 U.S.C. § 402.

Accommodating case-specific exceptions reflecting individualized equities in the tax-collection and social-security contexts could very well present serious administrative problems for the agencies reviewing and adjudicating those claims. Here, by contrast, the substantially smaller population eligible for veterans' disability compensation makes case-by-case consideration of equitable factors much less burdensome, particularly when an individualized analysis of each application is already embedded in the process.

In short, there is no "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350. Tolling § 5110(b)(1)'s retroactive claim-processing rule is consistent with Congress's intent and imposes no undue burdens on the VA.

II. Certiorari Is Warranted Because Equitable Tolling Is Vitally Important To The Veteran Community.

The VA may argue that this case is not the ideal vehicle to review the question presented, and that this Court should await a different opportunity. But time is of the essence, and there is no reason to delay. Without this Court's prompt intervention, the Federal Circuit's ruling will perpetuate inequity in a nationwide public-benefits program that provides critical sustenance to a large, uniquely deserving population—one made more vulnerable by a system that encourages self-representation and by the military's pervasive stigma against mental illness.

A. Equitable tolling would benefit participants in a large, nationwide public-benefits program.

Mental health conditions account for a vast number of cases within the veterans' disability compensation scheme. As of September 30, 2020, the VA was paying service-connected disability compensation to 5,081,692 veterans. *VBA ABR 2020*, *supra*, at 8. Nearly 1.2 million of them received compensation for post-traumatic stress (PTS) alone—the fourth most common service-connected disability and one of the

conditions that affected Petitioner's ability to seek relief. *Id*. at 71. During the same period, the VA granted new compensation to more than 45,000 PTS claimants who served from World War II through the Global War on Terror—proving the continued salience of mental health conditions in veterans' benefits administration. *Id*. at 96. In all, the VA was paying disability compensation for more than 5 million distinct mental and neurological disabilities. *Id*. at 93. And these claims for mental health disability reflect, on average, far more severely disabling conditions than other common veterans' disabilities. *Id*. at 98 ("most common degree of disability" for mental health conditions is 70%; next highest is endocrine-related disabilities at 20%).

Given the frequency with which mental health conditions occur in the veteran population, barring equitable tolling adversely affects hundreds if not thousands of veterans who, because of their injuries, do not recognize even the existence of their disabilities, let alone their right to seek compensation. Without equitable tolling, the VA makes whole only those veterans who understand, within one year of leaving military service, that they may be entitled to compensation for diseases and injuries incurred or aggravated in service—regardless of the severity of their illness or their culpability for delay. *See* 38 U.S.C. §§ 1110, 1131, 5110(b)(1).

The absence of equitable tolling wreaks special havoc in a compensation scheme "in which laymen, unassisted by trained lawyers, initiate the process." *Zipes*, 455 U.S. at 397. Veterans are statutorily barred from paying a lawyer to represent them when

filing their initial claim application or during the regional office's initial adjudication. 38 U.S.C. § 5904(c)(1). Most veterans therefore file their initial claim applications without a lawyer's help. U.S. Gov't Accountability Off., GAO-13-643, *VA Benefits* 4 (2013), https://tinyurl.com/c6j5c5aw (for pending claims in November 2012, 22% of veterans represented themselves, 76% were represented by service organizations, and 2% by attorneys or non-attorney "agents"); *see Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (assistance from a veterans' service organization "not equivalent to representation by a licensed attorney"). Without the help of trained lawyers at this critical threshold, even veterans without mental disabilities often fail to grasp the costs of delaying filing or failing to claim promptly for all possible disabling conditions. Without equitable tolling, there is no remedy for the layman's excusable error.

B. Equitable tolling protects the most vulnerable veterans.

While it potentially disadvantages all unrepresented veterans filing claims, denying equitable tolling is especially harmful to the most vulnerable veterans—those unable to acknowledge or articulate conditions like psychiatric disorders, traumatic brain injuries, or military sexual trauma. The rule has potentially enormous impact because such conditions are common among veterans. Nearly 4.5 million veterans received VA primary care in 2010—and more than 25% were diagnosed with at least one mental illness. Ranak B. Trivedi et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among U.S. Veterans*, 105 Am. J. Pub. Health 2564, 2566 (2015),

https://tinyurl.com/4zedw9kh. And demand for mental health treatment among veterans continues to grow, with 1.8 million veterans receiving specialty mental health care from the VA in 2020. U.S. Dep't of Veterans Affairs, *FY 2022 Budget Submission: Budget in Brief* 17 (2021), https://tinyurl.com/tscjkyc5.

These veterans who seek mental health treatment are in some ways at an advantage. Many veterans, like Petitioner, cannot acknowledge their condition and are therefore unable to seek help. Pet. App. 128a (quoting treating psychiatrist's opinion that Petitioner "was so sick that he believed that nothing was wrong with him"); *id.* (quoting another treating psychiatrist's opinion that Petitioner's "grave mental illness … has rendered him 100% disabled; and … prevented him from understanding his right and need to apply [for] and procure … service[-]connected disability benefits"); 156a-157a (VA acknowledged "gross impairment in thought processes," "persistent hallucinations," "persistent delusions," "impaired … memory," and "impaired judgment"). A veteran who cannot even acknowledge his disability cannot seek compensation for it.

Petitioner's inability to recognize his condition echoes the larger military community's stigmatization and denial of mental illness. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 New Eng. J. of Med. 13, 13-22 (2004) (only 38-45% of deployed personnel meeting criteria for mental health diagnosis wanted treatment; roughly 20% did not

acknowledge a problem at all). Perceived stigma inhibits military mental health care and, by extension, veterans' disability compensation for mental illness. Thomas W. Britt et al., *The Stigma of Mental Health Problems in the Military*, 172 Military Med. 157 (2007). The Federal Circuit has recognized that "[t]he need for [VA] assistance is particularly acute where, as here, a veteran is afflicted with a significant psychological disability at the time he files" his claim. *Comer*, 552 F.3d at 1369 (VA benefits system "not meant to be a trap for the unwary"). Nonetheless, the Federal Circuit's decision effectively punishes those veterans whose inability to file a timely claim is caused by the disability itself.

C. The equitable tolling bar disserves a uniquely deserving population.

Veterans have earned the government's generous solicitude through physical and mental sacrifice in service on behalf of the nation. That sacrifice imposes a moral duty on the government to make whole veterans who are injured in the line of duty, especially where those injuries—like Petitioner's chronic, severe mental illness—are the sole cause of the delay in filing. *See* Pet.4.

The government has paid veterans' benefits since the nation's founding to recognize the effects of death and disability suffered in the collective defense of America. Act of September 29, 1789, ch. 24, § 1, 1 Stat. 95 (assuring federal payment of state pensions granted to veterans wounded and disabled "during the late war" for independence). Since that time, the nation has recognized its moral obligation to care for

those "who shall have borne the battle" "upon which all else chiefly depends." President Abraham Lincoln, Second Inaugural Address (Apr. 10, 1865); *see also* President Barack Obama, Address to the American Legion (Aug. 26, 2014) ("The bond between our forces and our citizens has to be a sacred trust, and … upholding our trust with our veterans is … a moral obligation.").

A government that sends its soldiers, sailors, airmen, and marines into harm's way in defense of national priorities thus bears a direct responsibility for putting them at risk of the deaths and disabilities that they suffer. This causal connection between government and disability has no parallel in other benefits programs and weighs heavily in favor of tolling § 5110(b)(1)'s period of retroactivity, especially where the service-connected disability is itself the cause of the delay in seeking compensation.

CONCLUSION

For the above reasons and those in the petition, amicus curiae MVA urges the Court to grant the certiorari petition to overturn a decision that is contrary to this Court's precedents by a court of appeals that is deadlocked on a legal issue for which it has exclusive

jurisdiction, and which is of exceptional importance to this country's veterans and their families.

Respectfully submitted,

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