No. 21-432

In the Supreme Court of the United States

ADOLFO R. ARELLANO,
Petitioner,
v.
DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

NICHOLAS F. GIOVE
JONATHAN A. HERSTOFF
Counsel of Record
AAKRUTI G. VAKHARIA
AUDREY R. SPARSCHU
MICHAEL J. HARRIS
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
ngiove@haugpartners.com
jherstoff@haugpartners.com
avakharia@haugpartners.com
asparschu@haugpartners.com
mharris@haugpartners.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Federal Circuit Bar Association ("FCBA" or "the Association") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. Started in 1985, the FCBA was organized to unite the different groups across the nation that practice before the Federal Circuit.

One of the FCBA's primary purposes is to render assistance to the Court of Appeals for the Federal Circuit in appropriate instances by submitting its views on the legal issues before that court. The FCBA also has an interest in assisting this Court by submitting its views on cases that implicate subject matter within the appellate jurisdiction of the Court of Appeals for the Federal Circuit. These submissions further the FCBA's commitment to promoting the health of the legal system in furtherance of the public interest. It is with that interest in mind that the FCBA submits this amicus brief in support of Petitioner.

Because the Respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making

---

[1] All parties have consented to the filing of this amicus brief. Pursuant to Sup. Ct. R. 37.6, this brief was written by the undersigned *amicus curiae*, and was produced and funded exclusively by the undersigned *amicus curiae* and their counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission of this brief.

regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

SUMMARY OF ARGUMENT

The question before this Court is whether the rebuttable presumption of equitable tolling established in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), applies to the one-year deadline in 38 U.S.C. § 5110(b)(1), and if so, whether the government has rebutted this presumption.[2] Equally divided in its reasoning, the Federal Circuit, sitting en banc, unanimously held that equitable tolling was unavailable to Petitioner. *Arellano v. McDonough*, 1 F.4th 1059, 1061 (Fed. Cir. 2021) (Chen, J., concurring). For the reasons stated herein, this Court should hold that *Irwin's* rebuttable presumption does apply to § 5110(b)(1).

In assessing whether *Irwin's* presumption has been rebutted, this Court has considered the nature of the statute at issue and whether the statutory scheme calls for laymen, unassisted by trained lawyers, to initiate the process governed by the statute. *See Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 212 L.Ed. 2d 524, 533-534 (Apr. 21, 2022); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). These factors demonstrate that Congress intended the doctrine of equitable tolling to apply here. *First*, § 5110(b)(1) governs a veteran's claims for statutory benefits for a service-connected disability that, by its

---

[2] This brief is limited to addressing question one of the questions presented.

very nature, may not present itself until well beyond the one-year period required for the filing of a claim, or may itself impair a veteran's ability to file a claim within that timeframe. *Second*, although intended to be uniquely pro-claimant, the entire process of applying for benefits unassisted by counsel may impede a veteran's ability to file a timely claim. And, if any doubt remains, consistent with this Court's repeated admonishments, § 5110(b)(1) should be construed in favor of veterans such that equitable tolling applies. For these reasons, the Court should hold that *Irwin's* presumption applies to § 5110(b)(1).

ARGUMENT

I. *IRWIN'S* REBUTTABLE PRESUMPTION OF EQUITABLE TOLLING APPLIES TO SECTION 5110(b)(1) AND HAS NOT BEEN REBUTTED

In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), this Court found that there is a rebuttable presumption that federal limitation periods are subject to equitable tolling. That presumption applies with equal force to 38 U.S.C. § 5110(b)(1). *First*, treating § 5110(b)(1) as a statute of limitations that is subject to equitable tolling properly accounts for the underlying subject matter of the statute, that is, service-connected disabilities, and how they may bear on a veteran's ability to file a claim within the one-year period. (*See infra* Sec. A). *Second*, construing § 5110(b)(1) as a statute of limitations subject to equitable tolling counterbalances many of the deficiencies inherent in the statutory scheme veterans must follow to obtain benefits, which was designed to be unusually protective

of claimants. (*See infra* Sec. B). In short, construing § 5110(b)(1) in this manner most aptly reflects the special beneficence with which the entire scheme has been imbued by Congress. And because a blanket immunization of § 5110(b)(1) from equitable tolling would be "directly contrary to the legislative purpose," *Butler v. Shinseki*, 603 F.3d 922, 928 (Fed. Cir. 2010) (Newman, J., concurring), construing § 5110(b)(1) as a statute of limitations subject to equitable tolling most properly aligns with the legislative intent.

A. THE NATURE OF THE SUBJECT MATTER UNDERLYING § 5110(b)(1) JUSTIFIES APPLICATION OF *IRWIN'S* REBUTTABLE PRESUMPTION

"The nature of the underlying subject matter" of a statute is an important consideration in determining whether *Irwin's* presumption has been rebutted. *See Boechler*, 212 L. Ed. 2d at 534. Section 5110(b)(1) is part of a larger statutory scheme designed to favor veterans, for whom Congress has expressed special solicitude. *See Henderson v. Shinseki*, 562 U.S. 428, 431 (2011); *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). This special solicitude reflects Congress' recognition that a veteran has performed "an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412. Due regard for the unique circumstances attendant to service-connected disabilities that form the basis of a veteran's claim for benefits is therefore necessary to ensure that the system serves its intended purpose of providing for the Nation's veterans. Those circumstances justify

construing § 5110(b)(1) as a statute of limitations subject to equitable tolling.

Importantly, the most commonly occurring service-connected disabilities giving rise to a claim for benefits may not present themselves until well beyond one year after a veteran has been discharged from service. Moreover, many of those same service-connected disabilities may themselves impede a veteran's ability to file a claim for benefits within one year of discharge. The Court should consider these circumstances in deciding whether § 5110(b)(1) is a statute of limitations to which *Irwin's* rebuttable presumption of equitable tolling applies because they go to the heart of the subject matter of § 5110(b)(1). *See Boechler*, 212 L. Ed. 2d at 533-34.

i. A Veteran's Service-Connected Disability May Not Present Itself Until Well After One Year of Discharge

"Veterans law is at the intersection of law and medicine," and often "involves difficult statutory and regulatory interpretation and the evolution of both law and medicine." Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH. L. REV. 389, 391 (2013). Of the almost 18 million veterans in the United States, mental and physical health issues are a ubiquitous source of claims for service-connected disability benefits at the VA. *See id.* at 394, 400; *see also* U.S. DEP'T OF COMMERCE, CENSUS BUREAU, THOSE WHO SERVED: AMERICA'S VETERANS FROM WORLD WAR II TO THE WAR ON TERROR (June 2020), https://www.census.gov/content/dam/Census/library/p

ublications/2020/demo/acs-43.pdf (last visited May 11, 2022). In 2008, for example, approximately one out of three veterans returning from Iraq appeared for a mental health visit at the VA within one year of their return. Davis, *supra* at 394. Chief among those mental health issues afflicting veterans – and, as here, Petitioner – is post-traumatic stress disorder ("PTSD"), one of the more common service-connected disabilities forming the basis of a claim for benefits. *Id.* Indeed, according to the 2022 Iraq and Afghanistan Veterans of America ("IAVA") Member Survey, 67% of IAVA members reported that they suffered from PTSD as a direct result of their service. Iraq and Afghanistan Veterans of America (IAVA), 2022 IAVA Member Survey at 39, https://iava.org/wp-content/uploads/2022/03/2022_IAVA_Member_Survey.pdf (last visited April 20, 2022).

PTSD is one of many service-connected disabilities that exemplifies why the presumption of equitable tolling should apply to § 5110(b)(1). The "essential feature" of post-traumatic stress disorder is "the development of characteristic symptoms following exposure to one or more traumatic events" typical of those who have seen combat. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274 (5th ed. 2013) ("DSM-V"). Although prevalent at high rates, especially among veterans returning from war, symptoms of PTSD may not present themselves immediately. Maj. Tiffany M. Chapman, *Leave No Soldier Behind: Enduring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 12 (2010). According to the DSM-V, symptoms of PTSD may be delayed by months or even years,

resulting in "delayed expression" of the condition. DSM-V at 276.

Researchers who have undertaken to investigate the delayed expression of PTSD have developed several theories. For example, some researchers attribute delayed expression to "emotional numbing and denial facilitated by troop management and military training." Chapman, *supra* at 12. Moreover, some researchers believe that delayed expression may be a consequence of avoidance, a classic characteristic of PTSD described further *infra* Sec. ii. *See id.*; *see also* DSM-V, at 271-274. Further still, the fluctuating nature and extent of symptoms over time may impede diagnosis and treatment of PTSD. Chapman, *supra* at 12. All of these factors may, alone or in combination, make it especially difficult for veterans afflicted with PTSD to seek benefits within one year of discharge.

PTSD is also strongly associated, or comorbid, with other psychiatric and physical disorders and conditions. *Id.* at 13. According to the DSM-V, "[i]ndividuals with PTSD are 80% more likely than those without PTSD to have symptoms that meet diagnostic criteria for at least one other mental disorder," such as depressive, bipolar, anxiety, or substance use disorders. DSM-V, at 280. The DSM-V also recognizes that 48% of recently deployed veterans experience the co-occurrence of PTSD and mild traumatic brain injury. *Id.* In some cases, PTSD may be mistaken for another disorder, such as borderline personality disorder or substance use disorder. Chapman, *supra* at 13-15. This could have potentially "grave consequences" for a veteran seeking benefits because a misdiagnosis may

result in an application for benefits being denied. *See id.* at 14-15.

Adding further to the delay often experienced by veterans with mental health and other service-connected disabilities is the time it takes to receive a diagnosis or treatment. In 2008, for example, at least 84,450 veterans were on waiting lists for Veterans Health Administration ("VHA") mental health services, with at least 37,902 veterans waiting more than thirty days for any type of medical appointment. Davis, *supra* at 395. Today, delays in accessing critical healthcare services are even worse, with the COVID-19 pandemic disrupting nearly 20 million medical appointments for veterans. Darin Selnick, *A New VA Wait-Time Scandal Is Brewing and We Have No Way to Know How Big It Is*, USA TODAY (Mar. 5, 2021), https://www.usatoday.com/story/opinion/2021/03/05/veterans-affairs-wait-time-medical-appointment-trump-mcdonough-column/6820715002/ (last visited May 11, 2022). Moreover, during the first few months to one year of post-reintegration, the so-called "honeymoon" period, veterans typically enjoy re-connecting with family and friends, and report few problems. Daniel F. Perkins et al., *Veterans' Use of Programs and Services as They Transition to Civilian Life: Baseline Assessment for the Veteran Metrics Initiative*, 46 J. OF SOC. SERV. RES. 241, 251 (2019). The emergence of more serious issues, such as mental health problems, may not become apparent until more than one year after discharge. *Id.*

Even if expression of a service-connected disability is not delayed, stigmas and beliefs about mental health

care can nonetheless present a significant barrier to veterans seeking mental health treatment and, as a result, to veterans applying for benefits within one year of discharge. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-12, VA MENTAL HEALTH: NUMBER OF VETERANS RECEIVING CARE, BARRIERS FACED, AND EFFORTS TO INCREASE ACCESS (2011) at 12 ("GAO-12-12"). According to one review, studies found that less than half of military personnel and veterans who indicate need for mental health services actually receive such care. Rajeev Ramchand et al., *Prevalence of, Risk Factors for, and Consequences of Posttraumatic Stress Disorder and Other Mental Health Problems in Military Populations Deployed to Iraq and Afghanistan*, 17 CURRENT PSYCHIATRY REP. 1, 4 (2015). This may be in part because some veterans have perceptions that mental health care will lead them to be perceived as weak or having lost control. *See* GAO-12-12 at 11. Military dispositions such as the "suck it up" attitude can also contribute to feelings of weakness and failure, thereby discouraging veterans from timely seeking mental healthcare. Ann M. Cheney et al., *Veteran-Centered Barriers to VA Mental Healthcare Services Use*, 18 BMC HEALTH SERVS. RES. 1, 5 (2018).

Similarly, a lack of trust in interactions with non-military healthcare providers with limited understanding of veterans' military experiences has decreased some veterans' motivations to remain in care. *Id.* Other beliefs may also prevent veterans from seeking diagnosis or treatment, such as the belief that mental health treatment is only for people with extreme mental health conditions, or that their mental health conditions are not "severe enough" to warrant

treatment. GAO-12-12 at 11. Another belief some veterans hold is that mental health treatment is unnecessary or unhelpful, or they may even be unaware of their mental health condition altogether. *Id.* Fear or worry about the loss of privacy and confidentiality is yet another concern. Perkins, *supra* at 251.

Further still, some veterans fear adverse repercussions specific to their careers, in the form of negative perceptions from colleagues or employers, if they were to seek mental health treatment. GAO-12-12 at 11. Likewise, a study reported that military service personnel may find it intimidating to get approval to leave work and attend appointments. Terri Tanielian, M.A. et al., *Barriers to Engaging Service Members in Mental Health Care Within the U.S. Military Health System*, 67 PSYCHIATRIC SERVS. 718, 726 (2016). All of these stigmas, beliefs, fears, and misunderstandings prevent veterans from accessing mental health treatment, which, in turn, impairs the timely diagnosis of the underlying condition requisite for a claim of benefits under § 5110(b)(1).

In a system "designed to be 'unusually protective' of claimants," *Bowen v. City of New York*, 476 U.S. 467, 480 (1986), the rebuttable presumption of equitable tolling should be generally available. This is especially true where, as here, the very nature of the disabilities for which compensation was intended may not become apparent within the time allowed for the application for benefits. In short, the fact that a service-connected disability may not present itself or be diagnosed until well beyond the one-year period provided for in

§ 5110(b)(1) should weigh heavily in favor of the availability of equitable tolling.

ii. A Veteran's Service-Connected Disability May Impede His or Her Ability to File a Claim Within One Year of Discharge

In addition to delayed expression, many of the service-connected disabilities that form the basis of a claim for benefits may themselves impede the ability of a veteran to file a claim within one year of discharge. In the context of PTSD, for example, one of the primary symptoms is avoidance, including "emotional avoidance" and "behavioral avoidance." *Post-traumatic stress disorder (PTSD)*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967 (last visited April 20, 2022). Emotional avoidance is characterized by the avoidance of thoughts or feelings about a traumatic event. *Id.* Behavioral avoidance is characterized by the avoidance of reminders, like places, people, sounds, or smells, related to a trauma. *Id.* The process of filing a claim for benefits related to PTSD may, in many cases, be impeded by both.

For example, the process of filing a claim for benefits as a result of PTSD includes completing a Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder ("VA Form 21-0781"). *See* DEP'T OF VETERANS AFFAIRS, STATEMENT IN SUPPORT OF CLAIM FOR SERVICE CONNECTION FOR POST-TRAUMATIC STRESS DISORDER (PTSD), https://www.vba.va.gov/pubs/forms/VBA-21-0781-

ARE.pdf (last visited April 20, 2022). VA Form 21-0781 instructs:

> List the stressful incident or incidents that occurred in service that you feel contributed to your current condition. For each incident, provide a description of what happened, the date, the geographic location, your unit assignment and dates of assignment, and the full names and unit assignments of [people] you know who were killed or injured during the incident . . . It is important that you complete the form in detail and be as specific as possible[.] *Id*.

Understandably, an individual experiencing emotional or behavioral avoidance may be discouraged from filing a claim for benefits within one year of discharge – where symptoms of avoidance may be at their height – so as to avoid having to relive the details of their traumatic experiences in completing VA Form 21-0781.

Additionally, as explained *supra* Sec. i, there is a recognized relationship between PTSD and substance use disorders. *See* DSM-V, at 280; *see also* Chapman, *supra* at 13-14. For example, studies show that among 26,613 active-duty personnel, 6% engaged in "heavy weekly drinking" after returning from Iraq or Afghanistan, and 26.6% began binge-drinking. Chapman, *supra* at 13. The likelihood of developing an alcohol-related problem increased in those individuals afflicted with PTSD. *Id*. at 13-14. In a similar vein, the VA reports that between 60% and 80% of Vietnam veterans seeking PTSD treatment suffer from alcohol

use problems. DEP'T OF VETERANS AFFAIRS, PTSD AND PROBLEMS WITH ALCOHOL USE, https://www.ptsd.va.gov/understand/related/problem_alcohol_use.asp (last visited April 25, 2022). Individuals struggling with alcohol or other substance abuse or dependence disorders are no doubt more likely to have difficulty prioritizing and completing applications for benefits within one year of discharge.

The problem is further compounded by the fact that many mental health issues are comorbid with other service-connected disabilities. For example, as explained *supra* Sec. i, traumatic brain injury (TBI), a traumatically induced structural injury or physiological disruption of brain function caused by external force, frequently occurs together with PTSD. Maria Olenick, et al., *US Veterans and Their Unique Issues: Enhancing Health Care Professional Awareness*, 6 ADVANCES IN MEDICAL EDUCATION AND PRACTICE 635, 636 (2015); *see also* DSM-V at 280. Even mild cases of TBI can involve serious long-term side effects disrupting a veteran's memory, focus, and thinking ability. DEP'T OF VETERANS AFFAIRS, VA RESEARCH ON TRAUMATIC BRAIN INJURY (TBI), https://www.research.va.gov/topics/tbi.cfm (last visited April 27, 2022). Alteration of consciousness or memory loss may impair a veteran from filing a claim for benefits if the veteran has trouble understanding or remembering information necessary to prove the veteran's claim. Likewise, many veteran-specific health issues likely contribute to the increased rate of homelessness in veterans compared to the general population, which, in turn, serves as another barrier to timely filing a claim. Jack Tsai & Robert A. Rosenheck, *Risk Factors for Homelessness*

Among US Veterans, 37 EPIDEMIOLOGIC REVIEWS 177, 177 (2015).[3]

The doctrine of equitable tolling "is available in a variety of circumstances, including when a party has been mentally incapacitated." *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *accord Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003); *Melendez-Arroyo v. Cutler-Hammer DE P.R., Co.*, 273 F.3d 30, 39 (1st Cir. 2001); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999); *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). It would be "both ironic and inhumane to rigidly implement" § 5110(b)(1) "because the condition preventing a veteran from timely filing is often the same illness for which compensation is being sought." *See Barrett*, 363 F.3d at 1320. Thus, in the uniquely pro-claimant veterans' benefits system, a claimant should, at the very least, be given the opportunity to show that the failure to timely file a claim for retrospective benefits was "the direct result of a mental illness that rendered him incapable of rational thought or deliberate decision making, or incapable of handling [his] own affairs or unable to function [in] society." *See Barrett*, 363 F.3d at1321 (internal quotations and citations omitted). In other words, a veteran should be able to show that the facts of the veteran's case justify application of the doctrine of equitable tolling.

---

[3] One report states that veterans constitute 12.3% of all homeless adults in the US, but only 9.7% of the total US population. Tsai & Rosenheck, *supra* at 177.

II. THE STATUTORY SCHEME JUSTIFIES APPLICATION OF *IRWIN'S* REBUTTABLE PRESUMPTION TO SECTION 5110(b)(1)

As this Court has long recognized, "[t]he VA's adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude for the claimant." *See Henderson*, 562 U.S. at 431 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). "[I]mbued with special beneficence from a grateful sovereign," *Barrett*, 363 F.3d at 1320, the statutory design and legislative intent confirms that *Irwin's* presumption of equitable tolling should apply to § 5110(b)(1) and has not been rebutted. The fact that the veteran is often unrepresented when applying for benefits, especially, as here, in the early stages of the process, suggests that Congress intended for equitable tolling to be available. *See Zipes*, 455 U.S. at 397. A brief review of the process veterans must adhere to illustrates why that makes the most sense.

The VA requires disability claimants to go through a multi-step process involving filing an application, submitting "evidence," undergoing an investigation by the VA, and producing any additional documents that the VA may request. At first glance, the process a veteran must follow may appear simple: (i) determine eligibility for benefits, (ii) gather supporting documents or "evidence," (iii) ensure that all paperwork is completed and that all supporting documents are ready to submit with the claim, and (iv) ensure that "any additional forms" needed to support a claim are included. DEP'T OF VETERANS AFFAIRS, HOW TO FILE A

VA DISABILITY CLAIM (2022), https://www.va.gov/disability/how-to-file-claim/ (last visited May 11, 2022). As one digs deeper, however, the complexity of the process—and the myriad formal and informal roadblocks that serve to deter veterans from initiating the process—becomes readily apparent.

Once an application is filed, a veteran has 365 days to gather all of the "evidence" needed to support the claim. *Id.* Such documents include hospital records and VA medical records related to a veteran's "claimed illness or injuries," or evidence that demonstrates a disability has gotten worse, private medical records demonstrating the same, supporting statements from witnesses, discharge papers, and service treatment records. *Id.* If a veteran does not possess the evidence needed to support the claim, the veteran is required to schedule a "claim exam" for the VA to "learn more about [the] condition." *Id.* Claimants must also take care to file the correct type of claim for their situation, or risk denial.

Once a claim is received by the VA, the VA begins its initial review to determine whether more evidence is necessary to process the claim. DEP'T OF VETERANS AFFAIRS, THE VA CLAIM PROCESS AFTER YOU FILE YOUR CLAIM (2022), https://www.va.gov/disability/after-you-file-claim/. Again, while this step may seem straightforward, many veterans are forced to jump through additional hoops to move their claims forward. *See* William Y. Chin, *Serving Those Who Served: Providing Government-Funded Attorneys to Veterans Seeking Disability Benefits from the United States Department of Veterans Affairs*, 54 U.S.F. L. REV. 87,

97 (2019). In 2016, for example, a wounded World War II veteran who received a Purple Heart submitted his discharge papers, the names of the others in the foxhole where he was injured, the X-Ray of his wounded leg, his purple heart, and two bronze stars, in connection with his application for benefits. *Id.* at 105-106. The VA nevertheless requested additional proof, including affidavits from other service members and information relating to the location of the hospital where he was treated. *Id*. Gathering this additional information was difficult for the veteran because there were no "official hospitals" where he was treated, and because, out of the four men in the foxhole that day, two died during the attack. *Id.*

Although the VA has an affirmative duty to assist veterans with their claims, *see* 38 U.S.C. § 5103A, the VA and the claimant necessarily have competing interests. Chin, *supra* at 102-104. On the one hand, the claimant must prove, to the VA's satisfaction, that the veteran's injury is indeed service-connected. *Id.* On the other hand, the VA must scrutinize claims for benefits to root out those they feel are less than meritorious. *Id*. While designed to be "nonadversarial," *Henderson*, 562 U.S. at 431, in practice, the process can be inherently combative. *Id.* To illustrate this point, various whistleblowers have exposed that the VA itself has, in the past, attempted to deprive legitimate claimants of certain benefits to which they were lawfully entitled. Chin, *supra* at 103-104.

Between 1933 and 1962, federal law did not permit veterans to appeal VA disability claim disputes to a

federal court. Marc Whitehead, *History of Attorney Fees in VA Compensation*, MARC WHITEHEAD & ASSOCIATES (Nov. 27, 2019), https://disabilitydenials.com/blog/history-attorney-fees-va-compensation/ (last vised May 11, 2022). Although today appeals are permitted, rating officers within the VA hold much of the power to determine whether to grant or deny an initial claim for benefits. *See* Chin, *supra* at 104-105. While the rating officers must accept a doctor's diagnosis, some officers still rely on their own judgment despite having no formal medical accreditation. Chin, *supra* at 105. Claimants do not have the opportunity to meet with their rating officers to discuss their claims, as the rating officers remain anonymous. *Id*. Moreover, because claimants have the burden of proving their injuries, veterans face an uphill battle in providing sufficient evidence to demonstrate to distrustful examiners that the injuries they suffer are legitimately service-connected. *See* Chin, *supra* at 105-106.

Although veterans are required to undergo a long and confusing process to obtain disability benefits, the system has historically placed restrictions upon a veteran's ability to obtain the assistance of counsel. Prior to 1988, veterans could not pay more than $10 for an attorney to assist with a disability claim. Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS' L. REV. 1, 12-49 (2009); Al Kamen, *$10 Limit on Veterans Legal Fees Upheld*, WASH. POST (Jun. 29, 1985), https://www.washingtonpost.com/archive/politics/1985/06/29/10-limit-on-veterans-legal-fees-upheld/45c129fd-2c9a-4b56-b508-1d3579cf6ae4/. While the statute was designed to protect veterans from

exorbitant legal fees, the practical effect was that veterans were unable to obtain the assistance they needed. *See* Reiss & Tenner, *supra* at 12-49.

In 1988, Congress enacted the Veterans' Judicial Review Act, which finally allowed claimants to hire attorneys for more than $10. *See* Pub. L. 687, 102 Stat. 4105 (1988). Nevertheless, the Act still restricted attorneys' fees to no more than 20% of past-due awarded benefits. *See id.*; *see also* Whitehead, *supra.* Additionally, even under the Act, veterans were still prohibited from hiring attorneys before a final VA decision. Attorneys could only assist with appeals to the Veteran's Court, the Federal Circuit, and the Supreme Court. *See* Whitehead, *supra.* It was not until 2006 that the Veterans Benefits, Health Care, and Information Technology Act permitted veterans to hire attorneys during an earlier stage. Pub. L. No. 109-461, 120 Stat. 2403 (2006); *see also* Reiss & Tenner, *supra*, at 16. But even following that enactment, as well as the enactment of the 2017 Veteran Appeals Improvement and Modernization Act, claimants are still prohibited from retaining counsel until after an initial determination has been issued on their claims. *See* Pub. L. No. 115-55, 131 Stat. 1105-1128 (2017); Chin, *supra* at 97.

The highly complex and burdensome statutory scheme governing a veteran's claim for benefits—and the practical ramifications thereof—strongly weighs in favor of finding that *Irwin's* rebuttable presumption of equitable tolling applies to § 5110(b)(1). As both this Court and the Court of Appeals for the Federal Circuit have recognized, "Congress is more likely to have

intended a statute of limitations that governs a statutory scheme 'in which laymen, unassisted by trained lawyers, initiate the process' to be subject to equitable tolling." *See Zipes*, 455 U.S. at 397. That is especially true where, as here, the entire system is designed to operate in a uniquely pro-claimant nature, but has the practical effect of placing perhaps insurmountable obstacles in the way of those seeking to benefit from it. In short, construing § 5110(b)(1) as subject to *Irwin's* rebuttable presumption most properly effectuates the legislative intent.

III. SECTION 5110(b)(1) SHOULD BE CONSTRUED IN FAVOR OF VETERANS SUCH THAT *IRWIN'S* REBUTTABLE PRESUMPTION OF EQUITABLE TOLLING APPLIES

If any doubts remain as to the applicability of *Irwin's* rebuttable presumption to § 5110(b)(1), this Court should resolve them, just as Judge Dyk and his concurring colleagues would have, in favor of veterans. This Court has long held that the pro-veteran canon dictates that doubt is to be resolved in the veteran's favor. *See Henderson*, 562 U.S. at 441. The rule dates back to at least as early as 1943, when this Court rightly recognized that liberal statutory construction of laws providing for veterans is necessary "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Court echoed this sentiment in 1946 when it reiterated the need to err on the side of helping "those who left private life to serve their country in its hour of great need." *Fishgold*

v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). This canon has, for good reason, withstood the test of time, with the Court most recently acknowledging that for nearly eighty years it has "long 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.

With this Court "presum[ing] congressional understanding of such interpretive principles" as the pro-veteran canon, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991), and Congress legislating against that backdrop, there is no reason to depart from the general rule that time requirements in lawsuits, both between private litigants and the government, are "subject to equitable tolling." *See Irwin*, 498 U.S. at 95. The pro-veteran canon reflects the Court's, and the Nation's, understanding of the sacrifices that veterans have made for the Nation and the Nation's obligations to them in return. *See* Chadwick J. Harper, *Give Veterans the Benefit of the Doubt: Chevron, Auer, and the Veteran's Canon*, 42 HARV. J. OF LAW & PUB. POL'Y 931, 948 (2019). Because construing § 5110(b)(1) as a statute of limitations subject to the doctrine of equitable tolling is the interpretation that benefits veterans, it is a natural extension of the pro-veteran canon. The Court should construe § 5110(b)(1) accordingly.

CONCLUSION

For at least the reasons expressed above, the Federal Circuit Bar Association respectfully requests that this Court hold that the rebuttable presumption of equitable tolling established in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990) applies to the one-year deadline in 38 U.S.C. § 5110(b)(1).

Respectfully submitted,

NICHOLAS F. GIOVE
JONATHAN A. HERSTOFF
Counsel of Record
AAKRUTI G. VAKHARIA
AUDREY R. SPARSCHU
MICHAEL J. HARRIS
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
ngiove@haugpartners.com
jherstoff@haugpartners.com
avakharia@haugpartners.com
asparschu@haugpartners.com
mharris@haugpartners.com

Counsel for Amicus Curiae