No. 21-432

In the Supreme Court of the United States

ADOLFO R. ARELLANO,
PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
RESPONDENT.

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

BRIEF OF EDGEWOOD VETERANS, NATIONAL VETERANS ORGANIZATIONS, PARALYZED VETERANS OF AMERICA, AARP, AND AARP FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Statutes:

Page

Other Authorities:

Page

Other Authorities—continued:

Page

Other Authorities—continued:

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are veterans and advocates for veterans and older adults who are all too familiar with the injustices disabled veterans can encounter when applying for congressionally mandated veterans' disability benefits. Federal Circuit precedent—specifically, *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)—exacerbates these injustices by precluding equitable tolling of 38 U.S.C. § 5110(b) in even the most egregious of circumstances. This precedent and the injustices it generates require correction.

Messrs. Bruce R. Taylor and Charles J. Raybine are two Vietnam-era U.S. Army veterans who merit equitable tolling. Each sacrificed their minds and their bodies for their country when they were subjected to cruel, inhumane, and unethical chemical testing at Edgewood Arsenal, Maryland. While at Edgewood, the Army required both Messrs. Taylor and Raybine to sign secrecy oaths that threatened each with criminal prosecution if they discussed Edgewood with anyone, including their doctors. Both were subjected to a battery of chemical tests and were severely injured as a result.

Despite their injuries, both were prevented from applying for veterans' benefits until the government lifted its threat of criminal prosecution in 2006. Messrs. Taylor and Raybine have since applied for veterans' benefits but

[1] Appellant and Appellee have both consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

have been unable to receive the benefits Congress intended them to receive—benefits from their respective dates of discharge—because *Andrews* precludes equitable tolling.[2]

Messrs. Taylor's and Raybine's cases represent just two particular examples of an injustice that potentially affects many of the hundreds of thousands of veterans that the National Veterans Legal Services Program ("NVLSP"), the National Organization of Veterans' Advocates ("NOVA"), the Paralyzed Veterans of America ("PVA"), AARP, and AARP Foundation serve and represent.

Founded in 1981, NVLSP has worked to ensure that the government delivers to our nation's veterans the benefits to which they are entitled based on injuries incurred during their military service. NVLSP also publishes the *Veterans Benefits Manual*, the authoritative guide for veterans advocates, and provides pro bono representation to veterans across the country.

NOVA is a not-for-profit educational membership organization that was incorporated in 1993. It includes nearly 750 accredited attorneys and agents that represent veterans before the VA and federal courts. NOVA's bylaws include as its purpose the development of veterans' law and procedure through participation as *amicus curiae*. NOVA works to develop high standards of service and representation for all people seeking veterans' benefits.

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[2] The Federal Circuit heard Mr. Taylor's case en banc in February 2022. It stayed his case pending the outcome of this case. *See Taylor v. McDonough*, No. 19-2211 (Fed. Cir.), ECF No. 91. Mr. Raybine's case is pending before a panel of the Federal Circuit. *See Raybine v. McDonough*, No. 20-1218 (Fed. Cir.).

PVA is a national, congressionally chartered veterans service organization headquartered in Washington, D.C. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of veterans of the armed forces who have experienced a spinal cord injury or disorder ("SCI/D"). PVA seeks to improve the quality of life for veterans and all people with SCI/D through its medical services, benefits, legal services, advocacy, sports and recreation, architecture, and other programs. PVA advocates for quality health care, research and education addressing SCI/D, benefits based on its members' military service, and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and citizens with disabilities. PVA has nearly 16,000 members, all of whom are military veterans living with catastrophic disabilities, and it provides representation to its members and other veterans throughout the VA claims process and in the federal courts, including the United States Supreme Court.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. Among its members are hundreds of thousands of American retirees that previously served in the U.S. military. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP and the Foundation regularly serve as *amici curiae* in the courts of the United States on matters that impact older adults, including veterans.

SUMMARY OF THE ARGUMENT

Particularly during times of armed conflict, many veterans sacrifice their minds and bodies for this country. These veterans and their families depend on the disability

benefits that they earned—and that can be a matter of life or death. But unfortunately, for some veterans, the same disabilities that earned them those benefits can prevent them from pursuing them. Of course, one would assume that the veterans' benefits scheme would account for such circumstances—that courts, for instance, would exercise their equitable powers in such circumstances to toll filing deadlines to ensure veterans receive what Congress intended. But that assumption is incorrect under *Andrews*.

The experiences of Messrs. Bruce R. Taylor and Charles J. Raybine acutely illustrate *Andrews*' harsh effect. Both of these Vietnam-era veterans survived the Army's dangerous, unethical, and inhumane chemical testing on unsuspecting volunteers at Edgewood Arsenal, Maryland. The Army required Messrs. Taylor and Raybine and thousands of others to sign secrecy oaths at Edgewood before subjecting them to some of the most toxic chemicals in the U.S. military's inventory. These horrific experiments inflicted mental and physical injuries on them, but neither could seek disability benefits for decades: Their secrecy oaths threatened criminal prosecution if they discussed their experiences with anyone, including their doctors. Even today, long after the government's threat has abated, these veterans remain unable to receive the benefits Congress appropriated for them because the Federal Circuit precludes equitable tolling for veterans.

Unfortunately, Messrs. Taylor and Raybine do not stand alone. Traumatic brain injuries, severe psychological damage, and feelings of alienation as a result of military sexual trauma are some of the many obstacles that can prevent veterans from timely filing for benefits. And importantly, as Mr. Arellano's case makes plain, depriving these veterans of the benefits they earned impacts not

merely those who sacrificed their minds and their bodies for their country. It also affects their families and caregivers, who must step up in the government's absence.

These circumstances would be troubling in any context. What is especially jarring here, however, is that *Andrews* treats veterans worse than other similarly situated litigants. By doing so, the Federal Circuit has turned this Court's caselaw on its head. Congress's desire to "provide[] for him who has borne the battle" is readily apparent. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985) (citation omitted). This Court has been clear that Congress designed the veterans' benefits scheme to be friendly and deferential to veterans. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431, 440–41 (2011).

The law demands that veterans like Messrs. Taylor, Raybine, and Arellano be able to at least make a case for equitable tolling. This Court should right this wrong by reversing the judgment below.

ARGUMENT

I. Without equitable tolling, veterans suffer.

Section 5110(b)(1) dates a service-disabled veteran's benefits to her discharge or release if the VA receives her application for benefits "within one year from such date of discharge or release." If the veteran files after this one-year period, the effective date of any benefits awarded "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1).

In *Andrews*, a panel of the Federal Circuit held that "principles of equitable tolling . . . are not applicable to the time period in § 5110(b)(1)." 351 F.3d at 1137–38. Relying on that precedent, which the Federal Circuit left intact in

its *en banc* decision in this case, the Board of Veterans' Appeals and the Veterans Court for decades have denied equitable tolling to every service-disabled veteran without exception. That blanket policy has had disastrous effects for veterans.

A. *Andrews* prevents courts from remedying even the most egregious circumstances.

1. "The place God forgot."

Nicknamed "the place God forgot,"[3] the U.S. Army Laboratories at Edgewood, Maryland, represent an atrocious chapter in American history. As the VA's own website recounts, "[f]rom 1955 to 1975, the U.S. Army Chemical Corps conducted classified medical studies at Edgewood Arsenal, Maryland." U.S. Dep't of Veterans Affs., *Public Health: Edgewood/Aberdeen Experiments*, https://tinyurl.com/ya67e8wr (last visited May 17, 2022). The chemicals the Army used on 7,000 unwitting volunteers included sarin nerve gas, mustard agents, nerve agent antidotes, psychoactive agents like LSD or PCP, and riot control agents. *Id.*

The VA now admits that some "volunteers exhibited certain symptoms at the time of exposure" to these toxins. *Id.* And it invites veterans subjected to these tests to "file a claim for disability compensation for health problems they believe are related to exposures during Edgewood . . . chemical tests," in part because "[l]ong-term psychological effects are possible from the trauma associated with being a human test subject." *Id.*

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[3] News Desk, *Secrets of Edgewood*, New Yorker (Dec. 21, 2012), https://tinyurl.com/2p88k6n2.

But many Edgewood veterans who suffered from these symptoms did not seek benefits immediately following their discharge because the Army enforced their silence. As a 2011 Department of Defense memorandum acknowledges, "non-disclosure restrictions, including secrecy oaths," associated with the Edgewood Program "inhibited" these "chemical or biological agent research volunteers" from seeking VA disability benefits. *Viet. Veterans v. CIA* (*Viet. Veterans I*), 288 F.R.D. 192, 199–200 (N.D. Cal. 2012); *see also* S. Rep. No. 94-755, bk. I, at 418 (1976). Each participant agreed to "not divulge or make available any information related to U.S. Army Intelligence Center interest or participation in the . . . Army Medical Research Volunteer Program to any individual, nation, organization, business, association, or other group or entity, not officially authorized to receive such information." S. Rep. No. 94-755, *supra*, at 418. The inhibition to which the Defense Department memorandum referred included criminal prosecution, dishonorable discharge, and jail time. *See id.*

Edgewood has been condemned at all levels. As early as 1976, a committee of the U.S. Senate rebuked the Edgewood program, noting that the "disregard for the well-being of subjects during drug testing is inexcusable" and "the absence of any comprehensive long-term medical assistance for the subjects of these experiments is not only unscientific; it is unprofessional." *Id.* In 1979, the Army's General Counsel recognized "mounting public concern about the long-term effects" of experiments like those at Edgewood and "concluded that, as a policy matter, some type of notification program is necessary." *Viet. Veterans v. CIA* (*Viet. Veterans II*), 811 F.3d 1068, 1073 (9th Cir. 2016). She wrote that the Government could "be held to have a legal duty to notify those . . . drug-testing

subjects whose health [it] has reason to believe may still be adversely affected by their prior involvement in [the] drug-testing program." *Id.* (alterations in original).

But it took nearly three decades for the government to fulfill that "legal duty," long after many Edgewood survivors had passed away. In 2006, the VA finally sent letters to Edgewood veterans informing them that the Department of Defense had partially released them from their secrecy oaths. *Taylor v. McDonough* (*Taylor II*), 3 F.4th 1351, 1358 (Fed. Cir.), *vacated, reh'g en banc granted*, 4 F.4th 1381 (Fed. Cir. 2021) (*Taylor III*). But that only went so far: *Andrews* effectively rewarded the government's misconduct by ensuring that those benefits could start only as of the date a veteran applied for benefits once the veteran had received the VA's belated notification.

2. Mr. Taylor.

Mr. Taylor was at his mother's side when, in the summer of 1968, she learned that her older son had been killed in action in Vietnam. Claimant-Appellant's En Banc Br. 8, *Taylor v. McDonough*, No. 19-2211 (Fed. Cir. Sept. 20, 2021), ECF No. 41. Although his brother's death exempted Mr. Taylor from service in Vietnam, he felt duty-bound to enlist. *Id.* at 9. He joined the Army in January 1969, at the age of 17. *Id.*

While Mr. Taylor was assigned to the 608th Ordnance Company in Fort Benning, Georgia, the Army requested volunteers for the testing program at Edgewood Arsenal. *Id.* He volunteered because he thought that was where the Army needed him most. *Id.*

After undergoing a psychological evaluation, Mr. Taylor reported to Edgewood in August 1969. *Id.* Upon Mr. Taylor's arrival at Edgewood, the Army subjected him to

a separate series of psychological tests and required him to sign a secrecy oath. *Id.* The Army then exposed him to some of the deadliest chemicals in the government's stockpile. *Id.* These compounds included, among others, EA-3580, a nerve agent similar to sarin and VX gas, and EA-3547, a tear gas agent. *Id.* at 9–10. According to the Army's own records, these human experiments caused Mr. Taylor to suffer "hallucinations, nausea, jumpiness, irritability, sleepiness, dizziness, impaired coordination, and difficulty concentrating." *Taylor II*, 3 F.4th at 1357–58 (citation omitted).

As if this were not enough, however, upon returning to his unit, the Army deployed Mr. Taylor to Vietnam, where he served two combat tours. *Id.* at 1358. While in service, Mr. Taylor suffered continuing symptoms from the Edgewood experiments. *Id.* When he sought treatment for those symptoms, medical personnel treated him as a liar and a malingerer because the secrecy oath prevented him from discussing the experiments that had caused them. Claimant-Appellant's En Banc Br. 12, *Taylor v. McDonough*, No. 19-2211 (Fed. Cir. Sept. 20, 2021), ECF No. 41. The Army honorably discharged Mr. Taylor in 1971. *Id.*

For decades afterwards, Mr. Taylor battled PTSD and major depressive disorder. *Taylor II*, 3 F.4th at 1358–59. But he suffered in silence because the Army had forced him to sign "an oath vowing not to disclose his participation in or any information about the study, under penalty of court martial or prosecution." *Id.* at 1373 (citation omitted). Mr. Taylor reasonably believed that oath to bar him from seeking disability benefits from the VA. *Id.* Even if he had sought benefits, the continued secrecy of the Edgewood Program would have prevented him from providing

evidence of his participation. *Id.* at 1359; *see also Viet. Veterans I*, 288 F.R.D. at 199–200.

This went on for 35 years until the VA finally informed Mr. Taylor in June 2006 that the Department of Defense had granted Edgewood veterans permission to apply for benefits. *Taylor II*, 3 F.4th at 1358. Mr. Taylor filed a *pro se* claim for service-connected PTSD in February 2007. *Id.* The VA's own examiner acknowledged in June 2007 that Mr. Taylor's symptoms were "a cumulative response to his participation as a human subject in the Edgewood Arsenal experiments and subsequent re-traumatization in Vietnam"—symptoms he had experienced since discharge. *Id.* at 1358–59. But the VA awarded benefits only as of February 2007, the date of his initial application. *Id.* at 1359.

The delays endemic to the veterans' benefits system then imposed another decade of suffering and delay on Mr. Taylor. *See Martin v. O'Rourke*, 891 F.3d 1338, 1341–42 (Fed. Cir. 2018). When the Veterans Court finally decided his appeal in 2019, it recognized that Mr. Taylor "'felt constrained from filing for VA benefits by secrecy agreements' until he received VA's letter" and that he felt he was "precluded from obtaining disability benefits because the U.S. Government withheld necessary supporting evidence due to secrecy issues" for more than three decades. *Taylor v. Wilkie* (*Taylor I*), 31 Vet. App. 147, 150 (2019) (citation omitted). According to the Veterans Court, however, this egregious wrong had *no* remedy: Citing *Andrews*, the court held that it could not equitably toll the effective date of Mr. Taylor's benefits award. *Id.* at 154–55. The Federal Circuit panel, bound by *Andrews*, agreed. *Taylor II*, 3 F.4th at 1372 n.13.

The Federal Circuit panel did, however, grant Mr. Taylor the benefits he sought under the doctrine of equitable estoppel, because "the Government has affirmatively and intentionally prevented veterans such as Mr. Taylor from seeking medical care and applying for disability benefits to which they are otherwise entitled under threat of criminal prosecution and loss of the very benefits sought." *Id.* at 1371. But the *en banc* Federal Circuit vacated the panel opinion and ordered the parties to brief and argue the issue of whether equitable estoppel or constitutional right of access to the courts could apply. *Taylor III*, 4 F.4th at 1381–82. These questions remain unresolved: After the Federal Circuit heard oral argument in Mr. Taylor's case, this Court granted certiorari in Mr. Arellano's case, which prompted the Federal Circuit to stay Mr. Taylor's appeal.

As a result, fifty years after his discharge, and fifteen years after applying for benefits, Mr. Taylor still awaits the benefits to which he was entitled. None of this would be necessary if not for *Andrews*; as even the VA admitted at oral argument before the Federal Circuit, "Mr. Taylor would have a very colorable case for equitable tolling." Oral Argument at 57:18-41, *Taylor v. McDonough*, No. 19-2211 (Fed. Cir. Feb. 10, 2022), ECF No. 89, *available at* https://tinyurl.com/ycksfmkk. Mr. Taylor's loss of more than thirty years of disability benefits—benefits he could not have sought earlier because the Army had sworn him to secrecy—traces back to one source: *Andrews*.

3. Mr. Raybine.

Mr. Raybine's story is tragically similar. He served honorably in the Army from February 1961 to September 1963. Appellant's Br. 5, *Raybine v. Wilkie*, No. 20-1218

(Fed. Cir. Mar. 9, 2020), ECF No. 12. Mr. Raybine then served as a civilian in the Navy for over 20 years. *Id.*

In late 1962, he too was one of the Army's test subjects at Edgewood Arsenal. *Id.* at 7. And the Army also forced him to sign a secrecy oath that prevented him from discussing his experiences with anyone—including those in the military. *Id.*

Having guaranteed his silence, the Army exposed Mr. Raybine to VX gas, "as well as antidotes atropine and PAM chloride." *Id.* Not only did these experiments make Mr. Raybine violently ill, but he also learned afterwards that they had nearly killed him. *Id.* at 8. He is still "haunted by the memories of the gas" and "relives the experience" to this day. *Id.* (citation omitted).

At the time he left the Army in 1963 (before medicine and the law had formalized diagnoses like PTSD), Mr. Raybine's military discharge medical evaluation noted "depression and worry." *Id.* Bound by the secrecy oath, however, he could not tell his discharge interviewer why he was feeling that way. *Id.* Over the following decades, he experienced heart-related issues and anxiety, for which he obtained treatment starting in the 1970s. *Id.* But the secrecy oath prevented him from discussing the root of the issues—his PTSD from the Edgewood experiments—with medical professionals and even his family. *Id.* at 9–10. As one medical professional noted, Mr. Raybine "could not tell anyone what it was that he was most afraid of." *Id.* at 10.

Finally, after 40 years of waiting in silence, Mr. Raybine learned from the VA's letter in 2006 that he could tell his medical providers about the cause of his symptoms. *Id.* When he sought treatment, however, the VA's doctors had never heard of the Edgewood experiments

and had no idea where to find the records of what chemical agents the Army had used on Mr. Raybine. *Id.* at 12. For years, Mr. Raybine told his doctors that he had been subjected to chemical experiments, but the VA failed to adequately treat him. *Id.* at 12–15.

Only in 2013 did the VA first schedule Mr. Raybine for a comprehensive "medical examination to determine the nature and etiology" of his symptoms. *See id.* at 18. In that evaluation, for the first time, the VA diagnosed Mr. Raybine with PTSD related to the Edgewood experiments. *Id.* The VA therefore granted Mr. Raybine disability benefits for his PTSD and the associated psychological symptoms. *Id.* But it set the effective date for these benefits at July 9, 2010—three years after he first sought the VA's help, and after almost 45 years of government-enforced silence. *Id.* at 7, 12, 18.

Mr. Raybine appealed, first to the Board of Veterans' Appeals, and then to the Veterans Court. *Id.* at 18–27. His appeal is now before the Federal Circuit. *Andrews* precluded these courts from considering whether the section 5110(b) deadline should have been equitably tolled for the decades during which the Army prevented Mr. Raybine from applying for benefits.

B. Many factors can prevent veterans from seeking benefits within a year of their discharges.

The Edgewood Arsenal program exemplifies how callous our government can be at times towards those who devoted their lives to this country. The Federal Circuit's inflexible interpretation of section 5110, in turn, exemplifies the legal system's unthinking cruelty toward those it is meant to help. Although Edgewood veterans embody an extreme example of this cruelty, they are by no means

the only victims of it; *Andrews* has denied numerous veterans in a variety of contexts even an opportunity to *try* to show that section 5110(b)'s one-year time period should be tolled. This means that the very individuals that deserve the most solicitude under the veterans' benefits system receive its harshest treatment.

1. The very mental and physical injuries that necessitate benefits may cause veterans to miss the one-year time limit.

Section 5110's one-year clock starts ticking on the day the military discharges a veteran. This comes at a time of great upheaval in a veteran's life. For most, the military is not just a job. It is a way of life. It is a combination of work, family, friendship, and service, all rolled into one. For many veterans, the military becomes integral to their very identity. *See generally* Roland Hart & Steven L. Lancaster, *Identity Fusion in U.S. Military Members*, 45 Armed Forces & Soc'y 45 (2019).

Discharge abruptly severs veterans from the structure that had become part of their identity.[4] This sudden separation is particularly harsh for veterans who suffer from service-connected disabilities. Often these veterans must leave the military *because of* the same injuries for which they need benefits.

For example, in the post-9/11 world, traumatic brain injury ("TBI") is distressingly common. Researchers note that there have been close to 350,000 instances of diagnosed TBI in the military since 2000. Between 11% and

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[4] *See generally* Meaghan C. Mobbs & George A. Bonanno, *Beyond War and PTSD: The Crucial Role of Transition Stress in the Lives of Military Veterans*, 59 Clin. Psych. Rev. 137 (2018).

23% of veterans that deployed to Iraq or Afghanistan suffered a TBI. This "has been called a 'signature injury' of the Iraq and Afghanistan conflicts."[5] TBIs can have lasting effects on our country's veterans and can prevent them from timely filing for benefits.

Mental illness is not unusual among veterans, either. A quarter of the nearly 4.5 million veterans who received primary care treatment through the VA between 2010 and 2011—more than 1.1 million veterans—were diagnosed with at least one of anxiety, depression, substance-use disorder, PTSD, bipolar disorder, and schizophrenia.[6] For some veterans, their mental illness means leaving the service long before they intended. For others, it means leaving the service on profoundly alienating terms, feeling betrayed by the institution that was duty-bound to protect them. And yet many of these veterans cannot avail themselves of equitable tolling when they need it.

To be sure, many veterans overcome all of these obstacles and still apply within the one-year period. And some apply after the period has elapsed, even though they knew the clock was ticking. But other veterans do not apply for disability benefits within the one-year period because of some inequity, like lack of capacity or knowledge that benefits are even an option.

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[5] Lisa K. Lindquist et al., *Traumatic Brain Injury in Iraq and Afghanistan Veterans: New Results from a National Random Sample Study*, 29 J. Neuropsychiatry & Clinical Neuroscience 254, 254 (2017).

[6] *See* Ranak B. Trivedi et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among US Veterans*, 105 Am. J. Pub. Health 2564, 2565 (2015).

Suppose that a servicemember suffered a traumatic brain injury in service and was discharged. Suppose further that just one day after her discharge, the veteran endured repeated TBI-induced seizures that put her in a coma. If the veteran remained in the coma for 365 days and had no family members or caregivers who could apply for her benefits, *Andrews* would deprive her of benefits for that entire year. That is true even if she awoke on the 366th day and applied for disability benefits that day. Even assuming the veteran had no dependents, she still would lose nearly $40,000 in benefits at current VA 100% disability rates. U.S. Dep't of Veterans Affs., *2022 Veterans Disability Compensation Rates*, https://tinyurl.com/ybfa9bb5 (last visited May 18, 2022).

This is not a hypothetical concern.[7] For all practical purposes, this scenario is no different from what befell

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[7] *See, e.g.*, *Savage v. Wilkie*, No. 18-6687, 2020 WL 1846012, at *1–2 (Vet. App. Apr. 13, 2020) (refusing to consider equitable tolling for veteran with service-connected "bipolar disorder and panic disorder with agoraphobia" that "rendered [him] incapable of the ability to function in society, have rational thought patterns, or [engage in] deliberate decision making" (citation omitted)); *Kappen v. Wilkie*, No. 18-3484, 2019 WL 3949462, at *1, *3 (Vet. App. Aug. 22, 2019) (refusing to consider equitable tolling of section 5110(b) for a twenty-year Air Force veteran who explained that "he lacked competence" for several months of the one-year period); *Ross v. Wilkie*, No. 18-2845, 2019 WL 2291486, at *1–2 (Vet. App. May 30, 2019) (refusing to consider equitable tolling of section 5110(b) for a Marine Corps veteran who was led to believe that he could not apply for benefits for his skin condition that ultimately led to a disability rating); *Ford v. McDonald*, No. 15-3306, 2016 WL 4137532, at *1–4 (Vet. App. Aug. 3, 2016) (refusing to consider equitable tolling for veteran whose "mental condition rendered him unable to file a claim in the years immediately following his discharge from service"); *Apgar v. McDonald*, No. 14-2212, 2015 WL 4953050, at *1 (Vet. App. Aug. 20, 2015) (refusing to consider

Mr. Arellano, whose mental illness prevented him from applying for benefits, or Messrs. Taylor and Raybine, whose secrecy oaths had the same effect. The result is a perverse windfall for the government: the more severe a veteran's service-related disability, the less likely the VA will be required to pay full benefits for it, all because *Andrews* deprives veterans of even the chance to argue for equitable relief.

2. *Andrews* compounds veterans' suffering from military sexual trauma.

A related but distinct issue further underscores the need for equitable tolling: military sexual trauma ("MST"). *See* Appellant Br. 47. MST "refers to sexual assault or sexual harassment experienced during military service." U.S. Dep't of Veterans Affs., *Military Sexual Trauma (MST)*, https://tinyurl.com/uxl7929 (last visited May 18, 2022); *see also* 38 U.S.C. § 1720D(a)(1). MST is not itself a service-connectable condition, but veterans who suffer from PTSD or other disabilities following MST are entitled to benefits. *See Military Sexual Trauma*, *supra*.

Sexual assault is an epidemic in the military. A 2007 study indicated that "approximately 22% of female veterans and 1% of male veterans who" rely on the VA for

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equitable tolling for veteran who was led to believe "he was not entitled to any benefits . . . because he had served less than 24 months"); *Smith v. McDonald*, No. 14-1400, 2015 WL 402632, at *2 (Vet. App. Jan. 30, 2015) (refusing to consider equitable tolling for a Marine Corps veteran who had received a medical board decision prior to his discharge telling him that his disability was not "incurred in []or aggravated by active military service" (alteration in original) (citation omitted)).

healthcare services experienced MST.[8] And the problem is getting worse. In 2018 (the last year for which full statistical data is available),[9] the Department of Defense estimated that "20,500 Service members, representing about 13,000 women and 7,500 men, experienced some kind of contact or penetrative sexual assault in 2018, up from approximately 14,900 in 2016," a more than 35% increase in just two years.[10] About "65% of male victims and 45.9% of female victims of sexual assault experience a lifetime struggle with PTSD."[11]

Critically for present purposes, MST-related PTSD may not surface immediately after the underlying trauma, which makes it harder for veterans to recognize, understand, and then seek help for their symptoms.[12] Once a

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[8] Rachel Kimerling et al., *Military Sexual Trauma and Patient Perceptions of Veteran Health Administration Health Care Quality*, 21 Women's Health Issues S145, S145 (2011).

[9] The Department of Defense did not conduct a Workplace and Gender Relations Survey of the Active Duty Military in 2020 because, given operational changes related to the COVID-19 pandemic, the survey results "would [have] likely [been] skewed and difficult to interpret." Letter from Virginia S. Penrod, Acting Under Secretary of Defense, to Hon. Adam Smith, Chairman, Comm. on Armed Servs., U.S. House of Representatives (May 6, 2021), *available at* https://tinyurl.com/25mact6j.

[10] U.S. Dep't of Defense, *Annual Report on Sexual Assault in the Military* 3 (2019), *available at* https://tinyurl.com/y88k7fbr.

[11] Kaylee R. Gum, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 Wm. & Mary J. Women & L. 689, 691 (2016).

[12] *See* Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 McGill J. Med. 111, 113–15 (2006).

veteran recognizes that she may be experiencing MST-related PTSD, it still may take some time before she receives an MST-based diagnosis and care, and thereby a service-connectable diagnosis.[13]

Even as the VA claims to have made MST-related treatment a priority in recent years,[14] veterans face waiting lists for mental health providers at the VA.[15] Until the veteran understands she suffers from MST-related PTSD and receives a diagnosis, she might not apply for disability benefits—and, in that time, the one-year time period likely would have expired.

Even after receiving a diagnosis, veterans face a host of additional barriers to applying for MST-related PTSD benefits. Gum, *supra*, at 704–07; Kimerling, *supra*, at S148–49. For example, MST-related PTSD often coexists with other mental-health and substance-use problems, which also can prevent a veteran from seeking help.[16] As with other sexual-assault survivors, MST survivors often feel deep shame and so blame themselves and hide their

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[13] *See* Kayla Williams, Ctr. for a New Am. Sec., *Supporting Survivors of Military Sexual Trauma: VA Must Redouble Efforts to Improve* 2–4 (2020), https://tinyurl.com/yxpwgydh.

[14] *See* Veterans Health Admin., Dep't of Veterans Affs., VHA Directive 1115(1): Military Sexual Trauma (MST) Program (2021), https://tinyurl.com/y49xjb4p.

[15] Comm. to Evaluate the Dep't of Veterans Affs. Mental Health Servs., Nat'l Acads. of Scis., Eng'g, & Med., *Evaluation of the Department of Veterans Affairs Mental Health Services* 218 (2018), *available at* https://tinyurl.com/y5byt32l.

[16] Amanda K. Gilmore et al., *Military Sexual Trauma and Co-Occurring Posttraumatic Stress Disorder, Depressive Disorders, and Substance Use Disorders Among Returning Afghanistan and Iraq Veterans*, Women's Health Issues, Sept.–Oct. 2016, at 546–54, *available at* https://tinyurl.com/y49mdcwc.

trauma.[17] This, too, can prevent them from seeking help during the one-year application period.

The betrayal MST survivors endured in service can prevent them from seeking within the required year the benefits they most certainly deserve. Yet here again, *Andrews* bars them from any chance for equitable relief, exacerbating that betrayal.

3. The VA itself can cause veterans to miss the presumptive cutoff.

Even if a veteran's mental illness or service-related trauma does not prevent him from knowing and understanding the one-year time period, shortcomings in VA mental-health care may prevent him from diagnosing a mental-health disability in the first place.[18] Without that diagnosis, even as veterans struggle to define and understand their suffering, *Andrews* allows the one-year clock to tick unabated and unrelieved.

In addition, the VA itself sometimes misleads a veteran into missing the one-year cutoff. By law, the Secretary must notify discharged veterans of their right to benefits. *See* 38 U.S.C. § 6303(b). But in some circumstances, the Secretary does not, or worse, somehow prevents the veteran from applying. It happened to Mr. Raybine, it occurred in *Apgar*, *see* 2015 WL 4953050, at *1, and it recurred in at least one other case, *see Butler v. Shinseki*,

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[17] Kathryn K. Carroll et al., *Negative Posttraumatic Cognitions Among Military Sexual Trauma Survivors*, J. Affective Disorders, Oct. 1, 2018, at 88, *available at* https://tinyurl.com/yxpdy4ys.

[18] *See, e.g.*, Hector A. Garcia et al., *A Survey of Perceived Barriers and Attitudes Toward Mental Health Care Among OEF/OIF Veterans at VA Outpatient Mental Health Clinics*, 179 Mil. Med. 273, 274–77 (2014) (examining attitudinal and logistical barriers to veterans' mental health care).

603 F.3d 922, 924–26 (Fed. Cir. 2010) (per curiam) (accepting the pro se appellant's contention that "the advice of VA personnel had prevented him from filing [his] claim within one year of his discharge" and "that such action was 'unlawful'" but nevertheless denying equitable tolling under *Andrews*).

Veterans are particularly vulnerable when this happens, because they often must navigate the benefits system and the appeals process without the benefit of counsel. *See* U.S. Dep't of Veterans Affs. Board of Veterans' Appeals, *Annual Report Fiscal Year 2021*, at 39 (noting that more than 75% of veterans are not represented by counsel before the VA). Both Messrs. Taylor and Raybine, as well as four of the other veterans discussed above, appeared pro se at some stage while seeking benefits. *See, e.g.*, *Raybine v. Wilkie*, 31 Vet. App. 419, 420 (2019); *Savage*, 2020 WL 1846012, at *1; *Ford*, 2016 WL 4137532, at *1; *Apgar*, 2015 WL 4953050, at *1; *see also, e.g.*, *Butler*, 603 F.3d at 923. This makes it all the more unreasonable that a filing cutoff should be applied so rigidly, formally, and without regard for the circumstances of the individual veteran whom the system should benefit.

4. Without equitable tolling, veterans' families and caregivers also needlessly suffer.

Beyond the harms to veterans themselves, *Andrews*' inflexible application of the one-year limit causes veterans' families and caregivers to suffer, as well. This is true

of Mr. Arellano's parents and brother.[19] Other veterans' family members have faced similar obstacles.[20]

While veterans suffer without benefits, their families and caregivers have to invest untold dollars, time, and heartache over years or even decades to ensure these veterans receive the help they need.[21] But *Andrews* means that when the veteran finally can pursue benefits, only a small part of those burdens—her financial costs from the date of application forward—may be redressed, regardless of the equities.

II. Depriving veterans of equitable tolling contravenes the veterans' disability benefits scheme.

A. *Andrews* flouts law favoring veterans.

That *Andrews* effectively singles out veterans among all others for maltreatment is especially perverse. "The solicitude of Congress for veterans is of long standing."

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[19] *See* Joint Appendix at Appx507, *Arellano v. Wilkie*, No. 20-1073 (Fed. Cir. Mar. 20, 2020), ECF No. 22 ("[T]he Veteran's representative, who is his brother, has candidly acknowledged that it was not until after their father, who was the Veteran's principal source of support, died in December 2010 that the Veteran, having no income, was able to be convinced by his brother and his psychiatrists to file the June 3, 2011 application . . . .").

[20] *See, e.g.*, Appellant's Informal Br. 14, *Savage v. Wilkie*, No. 18-6687 (Vet. App. Oct. 29, 2019) (noting that Mr. Savage's mother could not file an application for benefits before his formal diagnosis in 2009 because she did not have authorization to access his medical records).

[21] Research shows that over 50% of unpaid caregivers of younger adults (age 18 to 49) report financial strain in demanding care situations, with many caregivers using up savings, taking on debt, adjusting work hours, putting off retirement, or struggling to pay for basic needs. AARP & National Alliance for Caregiving, *Caregiving in the U.S. 2020: A Focused Look at Family Caregivers of Adults Age 18 to 49* at 19–20 (2020), *available at* https://tinyurl.com/bdfd49fn.

United States v. Oregon, 366 U.S. 643, 647 (1961). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Veterans also incur "the economic and family detriments which are peculiar to military service." *Johnson v. Robison*, 415 U.S. 361, 380 (1974). In recognition of these sacrifices, Congress has chosen to favor "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). That is, they have seen fit to "provide[] for him who has borne the battle, and his widow and his orphan." *Walters*, 473 U.S. at 309 (citation omitted).

From top to bottom, the scheme Congress constructed demonstrates its—and this Nation's—particular esteem for veterans. The VA claims process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Id.* at 311. When a veteran files a claim, "the adjudicatory process is not truly adversarial." *Sanders*, 556 U.S. at 412. "[T]he veteran is often unrepresented during the claims proceedings," and "VA has a statutory duty to help the veteran develop his or her benefits claim." *Id.* "[I]n evaluating [the] evidence" supporting the claim, "the VA must give the veteran the benefit of any doubt." *Henderson*, 562 U.S. at 440.

In other words, Congress "has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits," particularly for "service-connected disability compensation." H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5795. The system was intended to slant in favor of those that had been "called to the colors." *See Tilton v. Mo. Pac. R.R. Co.*, 376 U.S. 169, 171 (1964) (citation omitted). The refusal in *Andrews* and its progeny to allow equitable tolling

of section 5110(b)'s one-year bar fundamentally undermines these principles.

B. Permitting equitable tolling dovetails with the doctrines that favor veterans.

As Justice Scalia once memorably noted, solicitude toward veterans is "more like a fist than a thumb" on the scale, which, Justice Scalia commented, is "as it should be." *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1 (Summer 2013), *available at* https://tinyurl.com/y5lkblqx. But *Andrews* embodies the very opposite of solicitude. It amounts, in fact, to a fist on the scale in the *government's* rather than the veteran's favor.

This Court's precedents on whether equitable tolling applies to statutory time limits like those in section 5110(b) turn on factors that all should favor veterans. For example, the Court instructs the lower courts to consider whether the time limit resides within a benefits scheme that is "'unusually protective' of claimants" or if the scheme is "one 'in which laymen, unassisted by trained lawyers, initiate the process.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 160 (2013) (citations omitted). Not only are veterans statutorily entitled to the VA's assistance in filing their claims, they also are entitled to the "benefit of the doubt" when their claim is finally adjudicated. *See* 38 U.S.C. §§ 5103A, 5107. This "'unique' standard of proof is lower than any other in contemporary American jurisprudence." *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014). It is a reflection of "the high esteem in which our nation holds those who have served in the Armed Services." *Id.* (citation omitted). And the vast majority (over 75%) of veterans are not represented by counsel before the VA. *See Annual Report Fiscal Year 2021*, *supra*, at 39. Given these realities, not allowing equitable

tolling metes out harsh justice in a system designed to be anything but harsh.

Nor, for that matter, would equitable tolling impose any great burden on the VA. The VA and its regional offices have substantial expertise in adjudicating individualized claims. They can efficiently consider veterans' arguments as to whether equitable tolling should apply. Courts likewise have substantial experience in applying the doctrine, and "courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990). That being the case, the primary cost to the government will be to pay the benefits in select cases where, as a matter of equity, it should have paid already.

C. *Andrews* treats veterans worse than other litigants.

Under this Court's precedents, equitable tolling is the baseline, not the exception. No doubt for that reason, it is available in other government benefits contexts. *See Irwin*, 495 U.S. at 95–96 ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.").

As Mr. Arellano notes, courts have permitted equitable tolling of benefits filing deadlines for Assistant United States Attorneys, manufacturing workers, and private-sector retirees, among others. *See* Appellant Br. 40–42. The Federal Circuit also permits equitable tolling in the materially analogous National Childhood Vaccine Injury Act of 1986, which requires a petition for relief to be filed within thirty-six months of "the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of [an] injury." 42 U.S.C. § 300aa-

16(a)(2); *see Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc).

That veterans are treated worse than civil-service employees, manufacturing workers, and Vaccine Act petitioners is troubling. It also is a far cry from the system Congress intended. Indeed, so rigid is *Andrews*' unjust rule that it persists even when the VA fails to fulfill its statutory duty to inform a veteran that disability benefits are available, *see* 38 U.S.C. § 6303(b), and even if veterans are actively prevented from applying for benefits under threat of criminal prosecution, *see, e.g.*, *Taylor II*, 3 F.4th at 1372 n.13. In short, veterans, for whom Congress has expressed the most solicitude, get the worst treatment under the law courtesy of *Andrews*. That cannot be right.

CONCLUSION

The same disabilities and circumstances that earned veterans their disability benefits often prevent veterans from timely seeking them. This is true for Mr. Arellano. And it is true for Mr. Taylor, Mr. Raybine, and other veterans like them who were likewise "called to the colors," *Tilton*, 376 U.S. at 171 (citation omitted), but denied the ability to seek recompense for a range of reasons. This places veterans at a disadvantage to other classes of litigants, even as veterans are supposed to get the best treatment the law can afford. And it all stems from one source: *Andrews*.

This precedent cannot be squared with the nature of equitable tolling or with the purpose and structure of the veterans' benefits scheme. It is uniquely in this Court's province to right the wrong that *Andrews* has wrought. *Amici* urge the Court to do so without delay.

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Respectfully submitted,

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