No. _____

IN THE
Supreme Court of the United States

LEWIS B. JONES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

10 U.S.C. § 1201 provides, in relevant part, that a member of the armed forces is entitled to retirement pay when the Secretary of Veterans Affairs assigns him a disability rating of at least 30 percent. 10 U.S.C. § 1201(a), 1201(b)(3)(B). Petitioner Lewis B. Jones ("Jones") was separated from service in 1988 with a 10 percent disability rating based on migraines, after being struck in the eye by the door of an armored personnel carrier. Years later, after advances in medical technology, it was determined that the accident had, in addition to migraines, also caused Traumatic Brain Injury with Post-Traumatic Stress Disorder. Jones' disability rating was increased, but Jones, in 2020, was denied retirement pay. In what dissenting Judge Newman termed "a significant change in law and policy," the United States Court of Appeals for the Federal Circuit found that Jones' 2020 suit to obtain retirement pay accrued in 1988 and was therefore time-barred under the Tucker Act, even though: (i) Jones' disability rating was far below 30 percent in 1988; and (ii) it was not until 2020 that Jones was denied retirement benefits while having a disability rating of at least 30 percent. Moreover, the Federal Circuit held that subsequent advances in medical technology cannot suspend the accrual of a claim for retirement pay. The questions presented are as follows.

1. Whether a cause of action for retirement pay can accrue and for the statute of limitations to run before a service member receives a disability rating of at least 30 percent, as the Federal Circuit held, or

whether such a cause of action may instead be brought after the service member is denied retirement pay after attaining the requisite 30 percent disability rating.

2. Whether the Federal Circuit erred in holding that the "accrual suspension rule"—i.e., the principle that the accrual of a cause of action against the United States is suspended during the period of time that the nature of the injury is inherently unknowable—is categorically inapplicable to veterans' injuries that were previously unknowable due to insufficient medical knowledge or technology, or to injuries that were otherwise undiagnosable at the time of a service member's discharge from the Armed Services.

PARTIES TO THE PROCEEDING

Petitioner is Lewis B. Jones, who was Plaintiff-Appellant below.

Respondent is the United States.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

STATEMENT OF RELATED PROCEEDINGS

- *Jones v. United States*, No. 1:20-cv-00520-MMS, United States Court of Federal Claims. Judgment entered on August 25, 2020.

- *Jones v. United States*, No. 20-2298, United States Court of Appeals for the Federal Circuit. Judgment entered on August 11, 2021 and vacated on March 31, 2022. Judgment entered on March 31, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lewis B. Jones ("Jones") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

INTRODUCTION

Federal statute provides that a member of the armed forces with less than 20 years of service may obtain retirement pay only if the Secretary of Veterans Affairs has assigned him a disability rating of at least 30 percent. Jones—a service member with less than 20 years of service—was separated from the military in 1988 after an in-service blunt-impact injury, with a disability rating of 10 percent based on a diagnosis of migraines. Years later, after advances in medical technology revealed that Jones' in-service injury also caused traumatic brain injury ("TBI") with post-traumatic stress disorder ("PTSD"), Jones' disability rating was increased. In 2020, Jones was denied retirement pay, despite having a disability rating in excess of 30 percent. Jones promptly filed suit. Nevertheless, the Court of Federal Claims dismissed Jones' suit as time-barred by the Tucker Act's six-year statute of limitations. This decision was based on the conclusion that the statute of limitations began to run upon Jones' discharge in 1988. In a divided decision that drew a dissenting opinion from Judge Newman, the Federal Circuit concluded that a service member's suit for retirement pay will accrue regardless of whether the statutory prerequisites of such retirement pay have been met. The Federal Circuit further reached the novel conclusion that Jones'

Tucker Act claims were not subject to the "accrual suspension rule" because a lack of sufficient medical technology is categorically ineligible to be the basis for delaying the accrual of the claim. Because both conclusions are inconsistent with federal statute-of-limitations principles and this Court's pro-veteran canon of statutory interpretation, certiorari should be granted.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 30 F.4th 1094 and reproduced at App. 1-31. The panel's prior vacated opinion is reported at 7 F.4th 1376 and reproduced at App. 36-52. The opinion of the Court of Federal Claims is reported at 149 Fed. Cl. 703 and reproduced at App. 53-68.

JURISDICTION

The court of appeals entered judgment on March 31, 2022. On June 17, 2022, the court of appeals denied a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

10 U.S.C. § 1201 is reproduced at App. 73-75. 28 U.S.C. § 2501 is reproduced at App. 75.

STATEMENT OF THE CASE

Jones entered active-duty service in the United States Air Force in 1981. App. 3. In 1982, while

serving in Germany, he was struck in the eye by the door of an armored personnel carrier. App. 3. The impact resulted in several injuries, including but not limited to intense headaches (migraines) and Traumatic Brain Injury with PTSD. Suppl. Appx. 32.[1]

In October 1988, Jones was referred to a Medical Evaluation Board, which diagnosed Jones with migraines but failed to diagnose his additional Traumatic Brain Injury. App. 4; Suppl. Appx. 26. Jones asserts—and the Government has not disputed—that the technology necessary to diagnose Jones' Traumatic Brain Injury was not available then. *See* Fed. Cir. Rec. 9 at 2. Based on the standard schedule of rating disabilities in use by the U.S. Department of Veterans Affairs at the time, Jones was assigned a 10 percent disability rating associated with migraines. App. 12; 38 C.F.R. § 4.124a (1964). Disability ratings for migraines were based solely on the frequency of the migraines.

In November 1988, the Medical Evaluation Board referred Jones' case to a Physical Evaluation Board to consider whether Jones' medical condition rendered him physically unfit to serve in the Air Force. App. 4. The Physical Evaluation Board then recommended that Jones be discharged from the Air Force. App. 5. On December 29, 1988, Jones was honorably discharged from the Air Force with severance pay. App. 6.

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[1] "Suppl. Appx." refers to pages from the supplemental appendix filed with the court of appeals at docket entry 17.

In 2016, Jones was finally diagnosed with Traumatic Brain Injury with PTSD, and he was assigned a 30 percent disability rating for that injury alone, in addition to his separate disability rating for migraines. Suppl. Appx. 32. By 2017, Jones' Traumatic Brain Injury with PTSD was rated 70 percent disabling, and in combination with his other injuries, he was overall rated 100 percent disabled. App. 6; Suppl. Appx. 32, 34.

In January 2020, the Air Force Board for Correction of Military Records denied Jones' request for retirement pay. App. 6. On April 23, 2020, Jones filed a complaint in the Court of Federal Claims seeking review of that decision. App. 6. The Court of Federal Claims granted the Government's pre-answer motion to dismiss, holding the complaint time-barred under the Tucker Act, 28 U.S.C. § 2501. App. 7; App. 53-68. In a 2-1 decision, the Federal Circuit affirmed. App. 1-31.

REASONS FOR GRANTING THE WRIT

I. Because the Federal Circuit's Misinterpretation of 10 U.S.C. § 1201 Departs from This Court's Precedents, Certiorari Should Be Granted on Question 1

A. The Federal Circuit's Decision Conflicts with Federal Statute-of-Limitations Principles

A Tucker Act claim must be filed "within six years after such claim first accrues." 28 U.S.C. § 2501. The Federal Circuit's conclusion that Jones' cause of action accrued in 1988—at a time when he had neither been statutorily entitled to retirement pay nor had been denied retirement pay—conflicts with longstanding and fundamental limitations principles. As noted above, 10 U.S.C. § 1201 unambiguously provides that a disabled service member is not entitled to retirement pay unless the Secretary has determined that the service member's disability is at least 30 percent. 10 U.S.C. §§ 1201(a), 1201(b)(3)(B). And the Federal Circuit has correctly recognized that a Tucker Act claim for entitlement to disability retirement does not accrue until the appropriate board has finally denied the claim or refused to hear it. *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990). Therefore, Jones' claim could not have accrued until: (i) Jones obtained a disability rating of at least 30 percent; and (ii) the appropriate board finally denied Jones' claim for retirement pay. These conditions did not exist simultaneously until 2020. Accordingly,

Jones' 2020 complaint was timely filed. The panel majority's conclusion to the contrary is inconsistent with this Court's longstanding precedent. Certiorari should be granted to review this issue.

In concluding that Jones could have brought suit at a time when he lacked a disability rating of at least 30 percent, the Federal Circuit misinterpreted 10 U.S.C. § 1201. App. 15-17. Section 1201 unambiguously provides that a service member with a physical disability is entitled to retirement pay "if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b)." 10 U.S.C. § 1201(a). Moreover, subsection (b) provides, in relevant part, that "[d]eterminations referred to in subsection (a) are determinations by the Secretary that . . . the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." 10 U.S.C. §§ 1201(b), (b)(3)(B). When the plain language of a statute is unambiguous, a court's "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (internal quotation mark omitted).

Here, the plain language of § 1201 makes clear that Jones was statutorily precluded from bringing a claim for retirement pay without a disability rating of at least 30 percent. Nevertheless, the Federal Circuit concluded that Jones could have brought his claim in 1988, at a time when his disability rating was only 10 percent. App. 15-17. This conclusion conflicts with the unambiguous language of § 1201. Accordingly, as

Judge Newman correctly recognized in her dissenting opinion, the panel majority erred in "hold[ing] that Mr. Jones' claim became time-barred during the period when, by statute, he could not have brought the claim." App. 23. Although the panel majority cites cases in which service members have challenged their disability ratings (App. 15-16), these cases do not address the critical question presented here: whether a cause of action for retirement pay under 10 U.S.C. § 1201 can accrue in the absence of a determination by the Secretary that the service member is at least 30 percent disabled. The unambiguous statutory language provides that it cannot.

Because Jones' action for retirement pay under 10 U.S.C. § 1201 could not have accrued without Jones having a disability rating of at least 30 percent, the Federal Circuit's decision conflicts with federal statute-of-limitations principles. As this Court has recognized, the Tucker Act does not "create[] a special accrual rule for suits against the United States." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002). And precedent makes clear that a statute of limitations will not begin to run before the cause of action accrues.

"Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (internal quotation marks omitted). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Tr.*

Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997). "Although the standard rule can be displaced such that the limitations period begins to run before a plaintiff can file suit, [this Court] will not infer such an odd result in the absence of any such indication in the text of the limitations period." *Green v. Brennan*, 578 U.S. 547, 554 (2016) (internal quotation marks omitted); *cf. Franconia Assocs.*, 536 U.S. at 145-49 (applying standard federal statute-of-limitations principles in the context of the Tucker Act). The text of the limitations period here contains no indication that the time to file suit for retirement pay starts to run before the statutory prerequisite for such pay has been satisfied. Accordingly, the Federal Circuit erred in holding that a veteran must sue for retirement pay before obtaining the statutorily required 30 percent disability rating.

By holding that Jones' Tucker Act claim accrued in 1988—before Jones obtained a disability rating of at least 30 percent and was denied retirement pay—the Federal Circuit contravened this Court's statute-of-limitations principles outlined above. *Bay Area Laundry* is instructive. There, this Court considered when the statute of limitations began to run on a pension fund's action to collect unpaid withdrawal liability. 522 U.S. at 195. In rejecting the argument that the statute of limitations begins to run from the date the employer withdraws from the plan, this Court explained that "[s]uch a result is inconsistent with basic limitations principles" because "[a] plan cannot maintain an action until the employer misses a scheduled withdrawal liability payment." *Id.* at 200-01. Accordingly, this Court held

that "[t]he statute of limitations does not begin to run" until the employer misses a payment. *Id.* at 201. Similarly here, the statute precludes an award of retirement pay unless the service member obtains a disability rating of at least 30 percent. Therefore, a cause of action for retirement pay cannot accrue—and the statute of limitations cannot begin to run—until the service member is denied retirement pay after obtaining a disability rating of at least 30 percent.

Green is similarly instructive. There, this Court considered when the statute of limitations begins to run for a constructive-discharge claim. *Green*, 578 U.S. at 549-50. This Court concluded that "such a claim accrues only after an employee resigns." *Id.* at 554. In so holding, it observed that constructive-discharge claims contain two elements: (i) employment discrimination "to the point where a reasonable person in [the employee's] position would have felt compelled to resign[;]" and (ii) resignation of the employee. *Id.* at 555. "Only after both elements are satisfied can he file suit to obtain relief." *Id.* Therefore, this Court held that the statute of limitations begins to run when the employee resigns, which is when "he has a complete and present cause of action." *Id.* at 556.

The Federal Circuit's decision contravenes this Court's precedents, as it holds that the statute of limitations began to run decades before Jones had "a complete and present cause of action." As noted above, the right to retirement pay under § 1201 is not triggered until the Secretary has assigned the service member a disability rating of at least 30 percent.

Because Jones' disability rating was only 10 percent in 1988, the Federal Circuit erred in concluding that Jones' action accrued—and that the statute of limitations began to run—in 1988.

Judge Newman's dissenting opinion is persuasive. App. 28 (recognizing that "[b]y statute, entitlement to disability retirement requires at least 30% disability or 20 years of service" and explaining that "[s]ince such events had not occurred in 1988, the Tucker Act statute of limitations cannot have accrued in 1988"). Nothing in the text of § 1201 or in the Tucker Act suggests that a disabled service member is entitled to sue for retirement pay prior to obtaining a rating of at least 30 percent. Because the Federal Circuit's decision departs from fundamental limitations principles, certiorari should be granted.

B. The Federal Circuit's Decision Further Conflicts with This Court's Admonition that Any Ambiguity in a Statute Governing Veteran Benefits Should Be Construed in Favor of the Service Member

This Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n. 9 (1991)). For example, in *Henderson*, this Court used this canon in concluding that the time to appeal a decision to the Court of Appeals for Veterans Claims is not a jurisdictional time limit.

Henderson, 562 U.S. at 441. The Federal Circuit's decision here flaunts this longstanding canon. Rather than recognizing that § 1201 does not provide a cause of action for retirement pay until the service member has at least a 30 percent disability rating and is denied retirement pay, the Federal Circuit instead concluded that Jones had a ripe claim long before he obtained the requisite rating, based largely on its conclusion that Jones should have known of the severity of his injuries in 1988. App. 17-18. In addition to contravening the plain language of the statute, the Federal Circuit's statutory interpretation is at war with the pro-veteran canon. Certiorari should be granted to address this issue.

II. Because the Federal Circuit's Interpretation of the Accrual-Suspension Rule Departs from This Court's Precedents Regarding the Construction of Veteran-Benefit Statutes and the Discovery Accrual Rule, Certiorari Should Be Granted on Question 2

A. The Federal Circuit's New Medical-Technology Exception to the Accrual-Suspension Rule Conflicts with This Court's Recognition that Veteran Benefits Should Be Construed In Favor of the Service Member

It is well established that "the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should

have known that the claim existed." In rejecting Jones' accrual-suspension arguments, however, the Federal Circuit held for the first time that veterans' disability claims that become knowable due to advancements in technology are not entitled to accrual suspension:

> To grant Mr. Jones relief in the circumstances of this case would, we believe, impermissibly open the door to the resurrection of previously decided disability retirement claims simply because medical knowledge advanced after the claims were first decided by the military service involved.

App. 21. This new and unprecedented medical-technology exception to the accrual-suspension rule leaves veterans who have major-but-hidden or undiagnosable injuries with little or no recourse under 10 U.S.C. § 1201. The Federal Circuit's only cited support for this limitation on the accrual-suspension rule is the language in 10 U.S.C. § 1201 requiring the Secretary of Veterans Affairs to assess disability based on the "standard schedule of rating disabilities in use by the [VA] at the time of the determination." App. 21-22. This provision, however, in no way prohibits the operation of the accrual-suspension rule. And neither the VA nor the courts below have considered whether the VA Schedule at the time of Jones' discharge would have entitled him to disability retirement if his Traumatic Brain Injury with PTSD,

whether under that label or another, had been properly diagnosed at the time of Jones' discharge.[2]

The Federal Circuit's reading of § 1201 to create a limitation on the suspension of veterans' claims under § 2501 conflicts with this Court's precedent recognizing: (i) that in judicial review of VA decisions, the service member is to be given great solicitude, and; (ii) that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor. For example, in *Henderson*, this Court reiterated that "[t]he solicitude of Congress for veterans is of long standing", and that this solicitude "place[s] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." 562 U.S. 428, 440 (2011) (quoting *United States v. Oregon*, 366 U.S. 643 (1961); *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009)). And the Court further noted that 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 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991) and citing *Coffy v. Republic Steel Corp.*, 447

[2] For example, the VA Schedule in place at that time provided for a diagnosis of "chronic brain syndrome associated with brain trauma" (diagnosis code 9304). 38 C.F.R. § 4.124a (1964). Under this diagnosis, anything more than "slight impairment of social and industrial adaptability" would have entitled Jones to at least a 30% disability rating. 38 C.F.R. § 4.124a (1964). The courts below had no occasion to consider this issue or any others because the Court of Federal Claims dismissed the case on a pre-answer motion to dismiss and did not provide an opportunity for Jones to develop the record through discovery.

U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

As Judge Newman aptly articulated, "if medical knowledge indeed has advanced in a way relevant to a veteran's claim, surely the door should be opened wider—not slammed shut." App. 30. Here, the language of § 1201 does not contain a restriction on the accrual suspension of veterans' disability claims, and Petitioner is not aware of any other class of plaintiff whose Tucker Act claims are subject to such a restriction. Accordingly, the Federal Circuit erred by construing § 1201 as restrictively as possible against veterans. *See Henderson*, 526 U.S. at 440-441.

Because the Federal Circuit's decision conflicts with the pro-veteran solicitude recognized by this Court, and because it departs from the well-established principle that the accrual of a Tucker Act claim is suspended where a party does not know or should not reasonably have known that there was a legal injury, certiorari should be granted to address this issue.

B. The Federal Circuit Erred in Finding that Jones Could Have Petitioned for Redress at the Time of His Discharge for a Then-Undiagnosable Injury

Jones asserts and the Government has not disputed that: (i) at the time of Jones' discharge, the medical technology or knowledge to diagnose Jones' Traumatic Brain Injury with PTSD did not exist; and

(ii) Jones did not learn that he had a Traumatic Brain Injury with PTSD until more than 27 years later. Fed. Cir. Rec. 9 at 2; Suppl. Appx. 32. At the time of his discharge, the Medical Evaluation Board failed to diagnose Jones' Traumatic Brain Injury with PTSD. Instead, it diagnosed Jones with "migraines" only, which is a separate injury for which Jones has always maintained a separate disability rating. Suppl. Appx. 32. The Federal Circuit found that Jones "could have sought earlier redress" by petitioning for a higher disability rating at the time of his discharge because he knew that his symptoms were "incapacitating" and "would positively hinder his future employment." App. 20-21 (quotations omitted). This determination misapprehends the process by which disability ratings are assigned and conflicts with this Court's precedents.

First, this Court has recognized that "in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). It was therefore the discovery of Jones' legal injury—i.e., that he had a separate undiagnosed wound that would have entitled him to retirement—that should have started the clock here. As Judge Newman correctly explained, "[t]he accruing of a statutory bar requires that the barring events were known or reasonably knowable." App. 27. The Federal Circuit's conclusion that Jones could have petitioned for relief conflicts with this Court's finding in *Rotella* because it is undisputed that neither Jones nor any medical professional discovered or could have

discovered his Traumatic Brain Injury with PTSD at the time of his discharge. Thus, Jones could not have discovered the legal injury entitling him to relief until there was sufficient technology to diagnose his Traumatic Brain Injury with PTSD. *See Rotella*, 529 U.S. at 555.

Second, the Federal Circuit incorrectly stated that Jones could have sought a higher disability rating to account for his separate Traumatic Brain Injury with PTSD. App. 20-21. Veterans' disability ratings are strictly dictated by the "standard schedule of rating disabilities in use by the Department of Veterans Affairs" (see 10 U.S.C. § 1201), otherwise known as "38 CFR Book C" or the "VA Schedule." The VA Schedule does not permit ratings for undiagnosed conditions, and Jones only diagnosis at the time of his discharge was his separate "migraine" injury. As set forth in § 4.124a of the VA Schedule, Jones' migraine disability rating was to be based solely on the frequency of his migraines, and could not be increased to account for Jones' other symptoms or his undiagnosed Traumatic Brain Injury with PTSD:

> **8100**..... Migraine:
> With very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.....50
> With characteristic prostrating attacks occurring on an average once a month over last several months..... 30
> With characteristic prostrating attacks averaging one in 2 months over last several months..... 10
> With less frequent attacks..... 0

38 C.F.R § 4.124a (1988). There is no evidence in the record that would have entitled Jones to a higher disability rating for his "migraine" diagnosis at the time of his discharge, regardless of how "incapacitating" he believed those migraines to be. Accordingly, Jones could not have sought a higher "migraine" disability rating to account for his then-undiagnosable Traumatic Brain Injury with PTSD.

Because Jones' additional injuries were not diagnosable at the time of his discharge, there was no possibility that Jones could have received a rating for his Traumatic Brain Injury with PTSD, and the Federal Circuit was incorrect to conclude that Jones "could have sought earlier redress" in view of his migraine symptoms. As noted above, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. Under the accrual-suspension rule, this could not occur until after April, 2016, when Jones was finally diagnosed with his Traumatic Brain Injury with PTSD. *Id.*

Finally, the Federal Circuit erred in holding Jones to a higher standard than the Medical Evaluation Board that diagnosed him. Jones is not a doctor and lacked the knowledge to diagnose his own injuries. Jones reasonably relied on the trained medical professionals who evaluated Jones and had full knowledge of his symptoms. Holding Jones to a higher standard than these medical professionals again runs contrary to the solicitude in favor of service

members that this Court recognized in *Henderson*. *See Henderson*, 526 U.S. at 440-41.

Certiorari should be granted to address these issues.

III. This Case Is the Proper Vehicle to Decide These Important Questions

This case is an excellent vehicle to decide the important questions of veteran's law presented by this case. With respect to the first question presented, the Federal Circuit has misinterpreted the plain language of a statute that was designed to provide service members with retirement pay when they are seriously injured in the line of duty. There is no dispute that Jones had only a 10 percent disability rating in 1988. Yet under the Federal Circuit's interpretation of 10 U.S.C. § 1201, Jones' time to file suit started running then, even though the statute precludes retirement pay when the disability rating is less than 30 percent. As Judge Newman's dissenting opinion aptly states, the majority's decision is "a significant change in law and policy." App. 31. Because this change in law and policy is irreconcilable with the statutory text and improperly shuts Jones (and all other service members similarly situated) out of court, certiorari is warranted.

With respect to the second question presented, the Federal Circuit's creation of a novel and unsupported exception to the accrual-suspension rule that is applicable only to veterans violates the long-standing canon that statutes governing service-

member benefits are to be construed in favor of the service member. The panel majority's new rule improperly shuts out of court those service members who—due to a lack of sufficient medical technology to diagnose their service-related injuries—are unable to establish a right to retirement pay at the time of their discharge. Additionally, the panel majority has misapprehended the process by which disability ratings are assigned, and the Federal Circuit's decision improperly requires service members to seek judicial review of their rating for injuries that are not then-diagnosable. This essentially abrogates the accrual-suspension rule for veterans with latent service-related injuries. For these reasons, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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