No. 23-21

IN THE
Supreme Court of the United States

STUART R. HARROW,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our nation's 25 million veterans and active duty personnel with the federal benefits that they have earned through their service to our country.[1] NVLSP accomplishes its mission through litigation; administrative representation of veterans and active duty personnel on claims for benefit; publication of materials that provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled; and service as a national support center that recruits, trains, and assists thousands of lawyer and non-lawyer advocates to represent veterans and active-duty personnel on claims for benefits.

Amicus submits this brief on behalf of Petitioner Stuart Harrow because the rule applied by the Federal Circuit in *Harrow v. Department of Defense*, 2023 WL 1987934 (Fed. Cir. Feb. 14, 2023), denies judicial review of agency decisions that affect *amicus*'s core constituency—United States military veterans. The Merit Systems Protection Board (MSPB), a quasi-judicial body, hears the claims of federal employees and applicants, including veterans' claims under the Veterans Employment Opportunities Act of 1998

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus* or its counsel made such a monetary contribution.

(VEOA)[2] and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)[3] when veterans are denied the rights to which they are entitled by federal employers. Over 600,000 veterans work in federal agencies across the country, comprising nearly one out of every three federal workers.[4]

If allowed to stand, the Federal Circuit's decision would preclude judicial review of claims by veterans, many of whom proceed *pro se*. Such a result would be inconsistent with this Court's decision in *Henderson v. Shinseki*, 562 U.S. 428 (2011), and would contravene the cardinal rule of statutory interpretation that congressional enactments should be read in such a way as to favor veterans.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Harrow has explained the legal errors in the decision below. *Amicus* writes to demonstrate further that Congress did not and could not have intended the Federal Circuit's interpretation of the deadline in 5 U.S.C. § 7703(b)(1)(A) to preclude equitable tolling, nor the adverse consequences to veterans resulting from that interpretation.

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[2] Pub. L. No. 105-339, 112 Stat. 3182 (codified at 5 U.S.C. § 3330a).

[3] Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at 38 U.S.C. §§ 4301–4335).

[4] *See* U.S. Off. of Pers. Mgmt., *Employment of Veterans in the Federal Executive Branch: Fiscal Year 2021* 1 (2021), https://www.opm.gov/fedshirevets/hiring-officials/ved-fy21.pdf.

I. In recognition of the extraordinary sacrifices made by our nation's veterans in military service, "Congress has enacted a number of laws specifically designed to protect the civil rights of servicemembers, both while they are on active duty and after they return to civilian life."[5] When enacting laws that affect veterans, Congress "place[s] a thumb on the scale in the veteran's favor," *Henderson*, 562 U.S. at 440 (citation omitted), and expects that the legislation will "be liberally construed for the benefit of 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 tool of interpretation, the pro-veteran canon, reflects Congress's longstanding commitment to our Nation's veterans.

To further protect, assist, and reward veterans for their service, Congress enacted VEOA and USERRA. VEOA helps veterans readjust to civilian life and rewards them for their service to our country by giving veterans certain advantages in the federal hiring process. *See Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 910 (1986) (plurality opinion) ("Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a longstanding policy of our Federal and State Governments.").

Congress enacted VEOA to strengthen veterans' preference rights, following testimony that "redress for veterans who are wronged is often inadequate." *Veterans Preference: Hearing Before the Subcomm. on*

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[5] U.S. Dep't of Justice Civil Rights Div., *Protecting the Rights of Servicemembers* 3, https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/servicemembers_booklet.pdf (last visited Jan. 2, 2024).

Civil Service of the H. Comm. on Gov't Reform and Oversight, 104th Cong. 1 (2d Sess. 1996) (statement of Rep. John L. Mica). VEOA "provide[s] preference eligible veterans with a method for seeking redress where their veterans' preference rights have been violated in hiring decisions made by the federal government." *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 837 (Fed. Cir. 2007) (en banc).

USERRA guarantees servicemembers expansive rights to take military leave from their civilian jobs, to be reemployed promptly upon returning from military leave, and to be free from discrimination based on their service. 38 U.S.C. §§ 4311–16; *see also* 137 Cong. Rec. H2972, H2978 (daily ed. May 14, 1991) (statement of Rep. Penny) (discussing "the importance of employment and reemployment protection for members of the uniformed services").

Because the statute at issue before the Court in this case concerns the regime pursuant to which veterans may vindicate their rights to federal employment under VEOA and USERRA, the Court should apply the pro-veteran canon here if there were any interpretive doubt.

II. In *Henderson*, this Court explained that statutory filing deadlines should not be interpreted to create jurisdictional bars for litigants unless Congress clearly intended that result. 562 U.S. at 434–35; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 25 n.9 (2017).

Applying the well-established "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *Henderson*, 562 U.S. at 441, the Court concluded that veterans' appeals from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans Claims were subject to equitable tolling, distinguishing such appeals from "appeal[s] from one court to another court," *id.* at 436, held to be jurisdictional in *Bowles v. Russell*, 551 U.S. 205 (2007).

The MSPB hears the claims of veterans denied their benefits from federal employers under VEOA and USERRA. 5 U.S.C. § 3330a(d)(1). The Federal Circuit has exclusive jurisdiction over subsequent appeals by veterans from the MSPB. 5 U.S.C. § 7703(b)(1)(A). The Federal Circuit's decision denying equitable tolling for appeals from the MSPB thwarts Congress's longstanding policy of favorable treatment toward veterans and is inconsistent with the holding and guidance of *Henderson*.

III. A decision that equitable tolling is never permissible in appeals of MSPB decisions to the Federal Circuit would have a devastating impact on veterans with meritorious claims. Although Congress enacted the Civil Service Reform Act (CSRA)[6]—the enabling statute for the MSPB—to protect federal employees, *see* 5 U.S.C. § 7101, that Act's procedural processes are complex, confusing, and difficult to navigate. Traversing the CSRA involves a "procedural maze" and "procedural morass." *Valentine-Johnson v. Roche*, 386 F.3d 800, 802, 805 (6th Cir. 2004) (determining

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

that an Air Force employee "was unsuccessful in navigating the procedural maze for the processing of a mixed case because of erroneous advice given to her by the MSPB Administrative Judge (AJ) hearing her claims").

This Court has emphasized repeatedly that complex remedial systems "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402–03 (2008) (citing *EEOC v. Com. Off. Prods. Co.*, 486 U.S. 107, 124 (1988) (discussing the ADEA and Title VII "remedial scheme[s] in which laypersons, rather than lawyers, are expected to initiate the process")). Yet veterans—who often proceed *pro se* and suffer from cognitive impairments and other challenges as a result of their service that make it difficult to follow procedural formalities scrupulously—are left to wrestle with this "complicated tapestry." *Butler v. West*, 164 F.3d 634, 637 (D.C. Cir. 1999). Equitable tolling is critical to ensure that these veterans receive the benefits that Congress prescribed.

This Court's recent decision in *Arellano v. McDonough*, 143 S. Ct. 543 (2023), does not disturb this conclusion. *Arellano* instead reiterates the importance of application of the pro-veteran canon absent express indication of Congressional intent that equitable tolling does not apply. That indication does not exist with respect to the statute at issue in this case.

ARGUMENT

I. The Veteran Canon Is One of This Court's Traditional Tools of Statutory Interpretation.

The Supreme Court has instructed that courts should construe legislation "liberally … 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). Put another way, legislation involving veterans "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285. This principle has been called "the pro-veteran canon" of construction. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affs.*, 48 F.4th 1307, 1317 (Fed. Cir. 2022).

"[T]he rule that interpretive doubt is to be resolved in the veteran's favor" is a bedrock principle. *Brown v. Gardner*, 513 U.S. 115, 117 (1994); *see also George v. McDonough*, 142 S. Ct. 1953, 1964 (2022) (Sotomayor, J., dissenting) (describing the canon as "venerable"); Chadwick J. Harper, Note, *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 Harv. J.L. & Pub. Pol'y 931, 949 (2019) ("Simply put, the veteran's canon is a traditional tool of interpretation."). This Court has "presume[d] congressional understanding of such interpretive principles." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991).

The pro-veteran canon is deeply rooted and longstanding. The history of Congress's commitment to veterans dates to the founding. *See, e.g.*, Invalid Pensions Act, 1 Stat. 243 (1792). The pro-veteran canon translates the truism that "[t]he solicitude of Congress for veterans is of long standing," *United States v. Oregon*, 366 U.S. 643, 647 (1961), into the judicial practice of statutory interpretation. That is why, in construing statutes in favor of veterans, courts require "Congress itself to speak if it wants to compromise policy that is perceived as generally held." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 334 (2000) (discussing the pro-veteran canon). Here, "the relevant policies are not the judges' own, but have a source in widely held social commitments." *Id.* And because "the legislature presumably has [the pro-veteran canon] in mind when it chooses its language," the rule has "acquire[d] a sort of prescriptive validity." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 583 (1990).

Indeed, Congress over the last century repeatedly has expanded and strengthened protections for veterans reentering the workforce or taking leave from employment to fulfill military obligations. In 1940, Congress established a right to reemployment for draftees and voluntary enlistees in World War II. *See* Selective Training and Service Act, Pub. L. No. 76-783, 54 Stat. 885, 890 (1940). Congress further strengthened these rights by passing the Veterans' Reemployment Rights Act of 1974 (VRR). *See* Vietnam Era Veterans' Readjustment Assistance Act, Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974).

Congress then enacted USERRA in 1994 based in part on a concern that "the VRR law ha[d] become a confusing and cumbersome patchwork of statutory amendments and judicial constructions that, at times, hinder the resolution of claims." 139 Cong. Rec. S5181, S5182 (daily ed. Apr. 29, 1993) (statement of Sen. Rockefeller). USERRA aims "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service." 38 U.S.C. § 4301. To ensure broad application of its protections, Congress made USERRA applicable to public sector employers of all sizes, including federal, state, and local governments. *See id.* §§ 4314 (a), (d).

Congress's commitment to veterans' preference rights is similarly longstanding. Since the Civil War era, veterans applying for federal jobs have been afforded preference. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 n.6 (1979). In 1944, President Roosevelt signed into law the Veterans' Preference Act, Pub. L. No. 78-359, 58 Stat. 387 (1944), which took a comprehensive approach to ensuring that veterans receive preferential treatment in federal employment with federal agencies. *See Mitchell v. Cohen*, 333 U.S. 411, 419 n.12 (1948) ("I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment." (quoting Letter from President Roosevelt to Rep. Ramspeck, quoted in H.R. Rep. No. 78-1289, at 5 (1944))).

Most recently, in 1998, Congress passed VEOA to strengthen and solidify veterans' preference rights, following testimony that "veterans preference is often ignored or too easily evaded, and redress for veterans who are wronged is often inadequate." *Veterans Preference: Hearing Before the Subcomm. on Civil Service of the H. Comm. on Gov't Reform and Oversight*, 104th Cong. 1 (2d Sess. 1996) (statement of Rep. John L. Mica). Through VEOA, Congress sought "to provide preference eligible veterans with a method for seeking redress where their veterans' preference rights have been violated." *Kirkendall*, 479 F.3d at 837. As part of this goal, Congress gave the MSPB "the power to decide cases brought by preference eligibles and certain other veterans who allege a violation of their employment rights." *Veterans' Preference: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affs.*, 110th Cong. 25 (1st Sess. 2007) (statement of Hon. Neil A.G. McPhie).

This Court has consistently interpreted federal statutes in light of Congress's persistent preference for veterans and their rights. Without equitable tolling, veterans risk losing meritorious claims due to cumbersome procedural hurdles—an outcome inconsistent with the longstanding principle of statutory interpretation the pro-veteran canon embodies.

Petitioner demonstrates why the best reading of 5 U.S.C. § 7703(b)(1)(A) is one that permits equitable tolling. But to the extent that the Court sees the provision as ambiguous, it should apply the pro-veteran canon and interpret the statute to favor often-*pro se* veterans attempting to navigate a complex legal system riddled with procedural hurdles.

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

In *Henderson*, this Court held that the deadline for filing a notice of appeal from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans Claims is subject to equitable tolling. 562 U.S. at 436, 441–42. This Court reiterated that filing deadlines are subject to equitable tolling absent a "'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* at 436 (citation omitted). Applying the pro-veteran canon, this Court saw no indication that the time limit was intended to "carry the harsh consequences that accompany the jurisdictional tag." *Id.* at 441. In doing so, this Court explicitly rejected the rule that under *Bowles v. Russell*, 551 U.S. 205 (2007), statutory appeal deadlines are *per se* jurisdictional. *See Henderson*, 562 U.S. at 436. This Court distinguished *Bowles* as involving a special "type" of deadline—for appeals "from one court to another court"—that Congress intended to pose a jurisdictional bar. *Id.*

In *Hamer v. Neighborhood Housing Services of Chicago*, this Court affirmed this distinction, emphasizing that the clear-statement analysis applies unless the time limit concerns an appeal from "one Article III court to another." 138 S. Ct. at 25 n.9.

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

First, as in *Henderson*, there is no clear indication that Congress intended the deadline to be jurisdictional. Rather, the plain language and structure evidence that Congress wanted equitable tolling to apply.

The provision providing the time limit for appeals (including of adverse decisions under VEOA and USERRA), 5 U.S.C. § 7703(b)(1)(A), "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the court. *Cf. Henderson*, 562 U.S. at 438 (interpreting 38 U.S.C. § 7266(a)). Instead, Section 7703(b)(1)(A) states only that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." And this Court made clear in *Henderson* that use of "shall" does not render a time limit jurisdictional. 562 U.S. at 439 ("[W]e have rejected the notion that 'all mandatory prescriptions, however emphatic, are … properly typed jurisdictional.'") (citation omitted).

In addition, as in *Henderson*, the appeal filing deadline here is in a different section of the U.S. Code from the provision conferring subject matter jurisdiction on the Federal Circuit to review final decisions of the MSPB: 28 U.S.C. § 1295(a)(9).[7] *Compare* 5 U.S.C.

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[7] The Federal Circuit has changed its rationale over time. In *Federal Education Association – Stateside Region v. Department of Defense*, 898 F.3d 1222 (Fed. Cir. 2018), the court posited that the *jurisdictional* nature of the appeal filing deadline comes from 28 U.S.C. § 1295, not 5 U.S.C. § 7703. *Fed. Educ. Ass'n*, 898 F.3d at 1225. If such a minimal link were sufficient to make filing time periods jurisdictional and immutable, then *all* of the time periods in sections cross-referenced in Section 1295(a) would be jurisdictional (and equitable tolling inapplicable) notwithstanding that Congress never intended such an extreme result.

§ 7703 ("Judicial review of decisions of the Merit Systems Protection Board") *with* 28 U.S.C. § 1295 ("Jurisdiction of the United States Court of Appeals for the Federal Circuit"); *see also Henderson*, 562 U.S. at 439 (concluding that the deadline's placement in the "Procedure" subchapter, not the "Organization and Jurisdiction" subchapter, indicates that Congress regarded the 120-day limit as a non-jurisdictional rule).

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

In sum, the decision in *Harrow* misapplies the Court's clear indication requirement and overlooks Congress's longstanding solicitude for protecting veterans' rights. That is inconsistent with this Court's decision in *Henderson*.

III. The Elimination of Equitable Tolling Would Thwart Congress's Goal of Ensuring Fair and Equitable Treatment of Veterans.

The Federal Circuit's decision, if not reversed, would contravene Congress's goal of ensuring fair and equitable treatment of veterans. MSPB appeals can present a "procedural morass" for claimants. Veterans often proceed *pro se* and disproportionately face deployment or medical issues that make navigating that morass even more difficult. The doctrine of equitable tolling should be available in such circumstances.

A. Veterans must navigate a "procedural morass" to adjudicate MSPB claims.

The MSPB was established under the CSRA, a remedial regime designed to protect federal employees. *See* 5 U.S.C. § 2301(b)(8)(A) (providing that under governing merit systems principles, "[e]mployees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes"). The CSRA codifies the 60-day time limit for appeals from the MSPB. *See* 5 U.S.C. § 7703(b)(1)(A).

Despite Congress's intent that the CSRA protect federal employees, the statute imposes a complex and confusing set of procedures that are difficult for both courts and parties to navigate. Courts have acknowledged that this process is a "procedural morass" or "procedural maze" for litigants, *Valentine-Johnson*, 386 F.3d at 802, 805, and that "the provisions that structure both administrative and judicial review of adverse personnel actions form a complicated tapestry" of procedural rules, *Butler*, 164 F.3d at 637.

Compounding this complexity, at least 50 percent of claimants proceed through this process *pro se*. *See generally* MSPB, *Congressional Budget Justification FY 2018*, at 12 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants … . Pro se appellants do not generally have equal knowledge of the case filing process or equal access to the information available, especially if they are stationed overseas."). Construing filing deadlines as jurisdictional is "particularly inappropriate" for a system "in which laymen, unassisted by trained lawyers, initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). Rather, these complex remedial schemes "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Express*, 552 U.S. at 403.

Veterans are not trained to navigate the procedural hurdles of the MSPB claims process, and the complex nature of the CSRA can lead litigants to miss filing deadlines through no fault of their own. In *Valentine-Johnson*, for instance, the Sixth Circuit applied principles of equity to allow an Air Force employee's discrimination claims to go forward when the employee "was unsuccessful in navigating the procedural maze for the processing of a mixed case because of erroneous advice given to her by the MSPB Administrative Judge (AJ) hearing her claims." 386 F.3d at 802, 811. Punishing veterans who fail to grasp the CSRA's complex mechanisms undermines Congress's express intent to protect these litigants. The CSRA's many nuances should not preclude merits review by an Article III court when the equities warrant.

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

Fifty-three percent of veterans employed in the federal government are disabled.[8] In particular, veterans disproportionately suffer from diseases, including post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), that can impede their ability to understand and meet rigid filing deadlines. More than 1,200,000 veterans are compensated for PTSD;[9] more than 414,000 veterans and active duty personnel have been diagnosed with TBI since 2000.[10] They are often are significantly impaired in their ability to carry out daily tasks, and may experience intellectual impairment and difficulty with memory, attention, and concentration.[11] Yet, these are the exact capabilities a layperson needs to navigate an unfamiliar "procedural maze" like the CSRA.

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[8] *See* U.S. Off. of Pers. Mgmt., *Employment of Veterans in the Federal Executive Branch: Fiscal Year 2021*, *supra* n.4, at 1.

[9] *See* U.S. Dep't of Veterans Affs., *VA Benefits & Health Care Utilization*, https://www.va.gov/vetdata/docs/pocketcards/fy2021q4.pdf (last updated July 15, 2021).

[10] *See* Dep't of Veterans Affs. Off. of Rsch. & Development, *VA Research on Traumatic Brain Injury (TBI)*, https://www.research.va.gov/topics/tbi.cfm (last visited Jan. 5, 2024).

[11] *See* Nat'l Inst. of Mental Health, *Post-Traumatic Stress Disorder*, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd (last visited Jan. 5, 2024); Erin Bagalman, Cong. Rsch. Serv., R40941, *Traumatic Brain Injury Among Veterans* 3 (Jan 4, 2013).

In addition, many veterans and military servicemembers move frequently or need to travel for medical treatment to address service-related injuries, making it even harder for them to be aware of and fulfill statutory deadlines—especially given that claims before the MSPB can take several years to resolve. Servicemembers seeking military leave benefits, for instance, may be deployed overseas and not able to receive mail regularly at the time of the MSPB's decision. Likewise, veterans with federal civilian jobs on overseas assignment may experience mail delays. And veterans whose medical conditions require hospitalization or rehabilitation may not be able, over a particular 60-day period, to give a jurisdiction-preserving action their immediate attention.

C. The availability of Article III judicial review of MSPB decisions is an important safeguard for veterans' rights.

Given the importance of Article III judicial review for these claims, the availability of equitable tolling is vital to ensure that veterans' claims are heard.

On numerous occasions, the Federal Circuit has reversed MSPB decisions denying veterans' claims under VEOA and USERRA. For instance, a veteran had to appeal twice to the Federal Circuit after the MSPB denied his USERRA discrimination claim and determined that he had waived his rights by failing to assert them while on active duty in an overseas military deployment. *See Erickson v. U.S. Postal Serv.*, 636 F.3d 1353, 1356 (Fed. Cir. 2011). The Federal Circuit reversed both of the MSPB's decisions. *See id.* at 1356, 1359. The veteran in *Erickson* was fortunate to

be represented by counsel, but had he acted *pro se*, as many veterans do, and missed a procedural deadline, judicial review would have been denied and the violation of his USERRA rights left unchecked.

Similarly, in *Lynch v. Department of the Army*, 107 M.S.P.R. 224 (M.S.P.B. 2007), the veterans' preference rights of a disabled veteran were vindicated only after the Federal Circuit reversed the MSPB's summary order denying his request for corrective action under VEOA. *See id.* at 225–26. Had this veteran been hospitalized for his service-related disability when the adverse decision issued, his winning appeal might have been foreclosed under the decision below.

Congress did not intend to deny Article III review in circumstances like these. However, in recent years, the Federal Circuit has routinely dismissed untimely MSPB appeals by *pro se* veterans without considering equitable tolling arguments. *See, e.g.*, *Jones v. HHS*, 702 F. App'x 988 (Fed Cir. 2017), *cert denied*, 139 S. Ct. 359 (2018); *Brenndoerfer v. USPS*, 693 F. App'x. 904 (Fed. Cir. 2017); *Jarmin v. OPM*, 678 F. App'x. 1023 (Fed. Cir. 2017).

Further, under Federal Circuit precedent, the deadline to appeal from the MSPB is even more draconian than the deadline to appeal from a federal district court to a federal appellate court, which permits extensions for "excusable neglect or good cause." *See* 28 U.S.C. § 2107(c). To conclude, as the Federal Circuit did, that appeals from the MSPB under the CSRA—a remedial scheme designed to protect federal employees, including veterans—can never be tolled is not what Congress provided or intended.

D. These arguments are consistent with *Arellano v. McDonough*.

In *Arellano v. McDonough*, 143 S. Ct. 543 (2023), this Court determined that a particular deadline in a veterans benefits statute was not subject to equitable tolling. But *Arellano*'s analysis does not cast doubt on the continued vitality of the pro-veteran canon or on the availability of equitable tolling in the CRSA. The *Arellano* Court based its holding on the unambiguous text and structure of the statute at issue there—which was neither a statute of limitations nor a deadline to appeal to a court. The Court concluded that Congress was clear that it did not want equitable tolling to be available for this deadline. Congress made no such indication in the statutory schemes at issue in this case.

In general, "the effective date of an award of disability compensation to a veteran … 'shall not be earlier' than the day on which the [VA] receives the veteran's application for benefits." *Id.* at 546 (quoting 38 U.S.C. § 5110(a)(1)). *Arellano* concerned one of the exceptions to that rule, pursuant to which the effective date becomes "the date of the veteran's discharge or release" if the VA receives the veteran's benefit application "within one year from such date of discharge or release." *Id.* § 5110(b)(1). Looking to the text and structure of the statute, the Court saw "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Arellano*, 143 S. Ct. at 548.

That is not the case here. Congress enacted both VEOA and USERRA with knowledge of *Irwin v. Department of Veterans Affairs*' settled holding that equitable tolling is presumptively available in suits

against the federal government. *See* 498 U.S. 89, 95–96 (1990). *Arellano* acknowledged the *Irwin* presumption but determined that the presumption was rebutted there because "equitable tolling is inconsistent with the statutory scheme" at issue. *Arellano*, 143 S. Ct. at 547–48. Here, by contrast, Congress subjected veterans' claims under these statutes to the 60-day time limit of 5 U.S.C. §7703(b)(1)(A) with no indication that it sought to restrict the availability of equitable tolling. Indeed, the Federal Circuit previously recognized that because "[t]he purpose of the VEOA is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right … [,] [i]t defies logic to suppose that when Congress adopted the VEOA in 1998, well after the Supreme Court's decision in *Irwin*, it intended" to foreclose equitable tolling to such veterans. *Kirkendall*, 479 F.3d at 841 (holding that equitable tolling applies to the appeal period under the VEOA); *see also id.* at 843 ("Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling.").

The text, history, and structure of the CSRA, VEOA, and USERRA all demonstrate that Congress did not intend to create traps for the unwary or misinformed. Mechanisms to help abate some of the CSRA's complexity are even built into the statute, demonstrating Congress's intent to have these cases heard on the merits. *See* 5 U.S.C. § 7702(f) (savings provision for timeliness purposes when litigant erroneously files in incorrect forum).

Likewise, nothing in Section 7703(b)(1)(A), the provision governing appeals from the MSPB, suggests that Congress wanted to impart harsh jurisdictional consequences. Rather, Congress purposely made the MSPB appeals regime applicable to veterans' claims under VEOA and USERRA—legal regimes intended to be specially protective of claimants and to which the pro-veteran canon of construction indisputably must apply. *Cf. Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("The [VRR] is to be liberally construed for the benefit of the returning veteran.").

Finally, *Arellano* does not cast doubt on the use of the pro-veteran canon. *Arellano bolsters* the canon's pedigree by acknowledging its continued viability and specifying the proper context for its usage. The petitioner contended "that the nature of the underlying subject matter—veterans' benefits—counsel[ed] in favor of tolling." *Arellano*, 143 S. Ct. at 551 (internal quotation marks omitted). The Court agreed that "[i]f the text and structure favored [the veteran], the nature of the subject matter would garnish an already solid argument." *Id.* at 552. That is consistent both with textualism and with *Brown*'s admonition "that interpretive *doubt* is to be resolved in the veteran's favor." 513 U.S. at 117 (emphasis added); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123–24 (2010) ("Substantive canons are in significant tension with textualism, … *insofar as* their application can require a judge to adopt something other than the most textually plausible meaning of a statute." (emphasis added)). If the Court has any doubt about the correct interpretation of the statute, it should apply the pro-veteran canon to conclude that equitable tolling is available.

CONCLUSION

The pro-veteran canon is a traditional tool of statutory interpretation. Congress's repeated enactment of legislation to assist veterans and to provide them with means of redress demonstrates its intent that legal matters affecting veterans' rights be subject to equitable considerations such as equitable tolling.

Henderson compels this conclusion, and *Arellano* does not disturb it. The Federal Circuit's decision in *Harrow* impedes Congress's goal to permit veterans to appeal their VEOA and USERRA claims, to obtain core statutory preferences and benefits to which they are entitled, frustrating Congress's intent to secure and protect veterans' rights. This Court should correct the Federal Circuit's continued misapplication of this Court's clear-statement requirement, especially given the pro-veteran canon's applicability. This Court should therefore reverse the decision of the Federal Circuit.

Respectfully submitted,

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