Appeal No. 20-1073

In the United States Court of Appeals for the Federal Circuit

ADOLFO R. ARELLANO,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

On Appeal from the United States Court of Appeals for Veterans Claims,
No. 18-3908, Judge Michael P. Allen

BRIEF OF AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF CLAIMANT-APPELLANT AND REVERSAL

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, undersigned counsel for amici curiae certifies the following:

1. The full names of the amici curiae represented by me in this case are the National Veterans Legal Services Program and the National Organization of Veterans' Advocates.

2. The names of the real parties in interest represented by me are the same.

3. The amici curiae represented by me are nonprofit corporations.

4. Amici curiae did not participate in proceedings in the lower tribunals. The names of all law firms and the partners or associates that appeared for the amici now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are: None.

5. The following cases known to counsel are pending in other courts or agencies that will directly affect or be directly affected by this Court's decision in the pending appeal: *Taylor v. Wilkie*, Case No. 19-2211 (Fed. Cir.).

OCTOBER 13, 2020

/s/ Liam J. Montgomery
LIAM J. MONTGOMERY

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The National Veterans Legal Services Program and the National Organization of Veterans' Advocates respectfully submit this brief as amici curiae pursuant to Federal Rule of Appellate Procedure 29, Federal Circuit Rule 29, and the Court's August 5, 2020 Order authorizing amicus briefs in this case. No party's counsel has authored any portion of this brief, and no party or person other than amici curiae and their counsel has contributed money to fund preparing or submitting the brief.

INTEREST OF AMICI CURIAE

Many of our nation's veterans and their families depend on disability benefits, which they earned through service to their country. These benefits can be a matter of literal life or death. But the same disabilities that earned veterans those benefits can prevent veterans from pursuing them.

Veterans suffer from traumatic brain injuries, severe psychological damage, and alienation from the service and their country through military sexual trauma, among other obstacles to filing. They even sometimes receive misleading advice from the Department of Veterans Affairs itself. As a result, it can often take years before veterans are able to pursue the benefits their nation owes them.

It is crucial, therefore, that the law afford veterans the opportunity to pursue equitable tolling of the timing provision in 38 U.S.C. § 5110(b). Equitable tolling is the default rule available to many other categories of litigants. But even as Congress and the courts have emphasized time and again that the law favors veterans, this Court's precedent excludes them without justification from that default rule, depriving them of benefits they earned and need. If this Court does not correct that precedent, veterans and their caregivers will continue to suffer hardship and injustice.

These veterans and their families include many that NVLSP and NOVA have served. Since its founding in 1981, NVLSP has worked to ensure that the government delivers to our nation's 22 million veterans, active duty personnel, and their families and caregivers the benefits to which their military service entitles them. NVLSP publishes the *Veterans Benefits Manual*, the authoritative guide for advocates who help veterans and their families obtain benefits from the VA. NVLSP also provides pro bono representation to thousands of individual veterans and classes of veterans and participates as amicus curiae in cases across the country to help ensure veterans get the benefits they have earned.

NOVA is a not-for-profit educational membership organization that was incorporated in 1993. It is comprised of nearly 650 individual attorneys and agents actively engaged in representing our nation's military veterans, their families, and their survivors before the VA and federal courts. NOVA's bylaws include as its purpose the development of veterans' law and procedure through research, discussion, and participation as an amicus before this Court. NOVA works to develop high standards of service and representation for all people seeking veterans' benefits.

INTRODUCTION

Appellant Adolfo R. Arellano is one of many veterans whose disability prevented him from seeking the benefits he earned. In July 1980, Mr. Arellano was working on the flight deck of the *U.S.S. Midway* when a merchant vessel collided with it at sea. The impact nearly crushed Mr. Arellano and swept him overboard. A number of his shipmates working nearby were injured or killed. The accident caused Mr. Arellano severe mental trauma, so much so that his VA treating psychiatrist opined that "the psychiatric symptoms resulting from this well documented trauma rendered [Mr. Arellano] 100% disabled since 1980." Appx529.

These are the words of the VA's own doctor, writing in support of Mr. Arellano's June 2011 application for benefits. In that application, all of the VA psychiatrists who have treated Mr. Arellano since his honorable discharge in 1981 explained that his psychoses, delusions, schizoaffective disorders, paranoia, and anxiety were so severe that he did not understand (1) that he was suffering from a mental illness that had rendered him 100% disabled and (2) that he had a right and need to apply for the disability benefits that he earned as a result of his service. Appx557–558. In fact, Mr. Arellano only revealed his repressed memory of the 1980 *Midway* tragedy to his treating physicians in 2011, the same year he applied for benefits. Appx558.

Mr. Arellano's brother, who represented him before the Board of Veterans' Appeals, argued that the effective date for Mr. Arellano's service-connected benefits should be when he incurred his disabilities, not when he applied for benefits in June 2011. Appx508. But neither the BVA nor the Court of Appeals for Veterans Claims even reached whether the effective date for Mr. Arellano's claim *should* be earlier because they both held that this Court's precedent dictated that they never *could* reach that issue. They did so by reading *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), to foreclose to

veterans something that is routinely available to non-veteran litigants: equitable tolling. Appx4; Appx508–509.

Mr. Arellano nearly gave his life in service to his country. He will never be the same as a result. There is no good reason why the law should bar Mr. Arellano—and other service-disabled veterans like him—from making a case for equitable tolling. To the contrary, the law demands the opposite. This Court should revisit *Andrews* and prevent this ongoing injustice to veterans and their caregivers.

ARGUMENT

A. 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 this Court held that "principles of equitable tolling, as claimed by Andrews, are not applicable to the time period in § 5110(b)(1)." 351 F.3d at 1137–38. Relying on that precedent, the BVA and

the Veterans Court have denied equitable tolling to *every* service-disabled veteran as an entire class, regardless of the veteran's individual circumstances. That blanket policy has disastrous effects for the service-disabled veterans who need the benefits that their country promised them.

1. *Andrews* inflicts systemic injustice on veterans.

The extreme injustice inflicted on Mr. Arellano is not unique. To the contrary, examples abound, underscoring that this Court's decision affects many veterans, not just Mr. Arellano.

Bruce Taylor. Take *Taylor v. Wilkie*, 31 Vet. App. 147 (2019). Bruce Taylor served in the Army from January 1969 to September 1971, including in Vietnam. *Id.* at 149. In 1969, during his service, Mr. Taylor "volunteered to participate in chemical agent exposure studies at the Edgewood Arsenal in Edgewood, Maryland." *Id.*

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." *Public Health: Edgewood/Aberdeen Experiments*, U.S. Dep't of Veterans Aff., https://tinyurl.com/ya67e8wr (last visited Oct. 12, 2020) (emphasis added). The chemicals the Army used on these human beings included sarin nerve gas, mustard agents, nerve agent antidotes, psychoactive agents

like LSD or PCP, and riot control agents. *Id.* The VA now 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.*

To borrow the VA's euphemism, Mr. Taylor was a "human test subject," and he suffered greatly as a result. For decades after his discharge, Mr. Taylor battled PTSD and major depressive disorder. *Taylor*, 31 Vet. App. at 149–50. But obtaining benefits for his suffering was not so simple. Because the military classified his participation in the Edgewood program until 2006, Mr. Taylor was forced 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 149 (emphasis added).

As a result, Mr. Taylor reasonably interpreted his secrecy oath to bar him from seeking VA disability benefits from the VA, and 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 150; *see also Vietnam Veterans of Am. v. CIA*, 288 F.R.D. 192, 199–200 (N.D. Cal. 2012) (quoting a 2011 Department of Defense memorandum acknowledging that

"non-disclosure restrictions, including secrecy oaths," associated with the Edgewood Program may have prevented "chemical or biological agent research volunteers" from seeking VA disability benefits).

The VA finally sent Mr. Taylor a letter in June 2006 advising that, because the Department of Defense had declassified the names of the servicemen and women who had volunteered for the Edgewood Program, he could disclose his involvement in the program to health providers and seek benefits for chronic health problems related to his condition. *Taylor*, 31 Vet. App. at 149. Mr. Taylor soon filed a benefits 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 the appellant's participation in the Edgewood Program and his experiences in Vietnam." *Id.* at 150 (citation omitted).

The VA granted his claim, but awarded benefits effective only as of February 2007, when Mr. Taylor had applied. *Id.* The Veterans Court 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. *Id.* (citation omitted).

Nevertheless, citing *Andrews*, the Veterans Court held that it could not equitably toll the effective date of Mr. Taylor's benefits award. *Id.* at 154–55. The court therefore denied Mr. Taylor more than thirty years of disability benefits—benefits he could not have sought earlier because the Army had sworn him to secrecy.[1]

One can hardly imagine a greater injustice than (1) subjecting a serviceman to human testing for some of the most dangerous chemicals in the world, (2) swearing that serviceman to secrecy under penalty of law, (3) withholding evidence necessary to establish entitlement to disability benefits, and yet (4) denying that serviceman even a chance at equitable tolling of the time period he was effectively *ordered* to ignore.

Sean Savage. Sean Savage suffered a fate similar to Mr. Arellano's. *Savage v. Wilkie*, No. 18-6687, 2020 WL 1846012 (Vet. App. Apr. 13, 2020).

[1] Mr. Taylor's appeal of the Veterans Court's decision is pending before this Court. *Taylor v. Wilkie*, No. 19-2211 (argued June 4, 2020). A favorable ruling in this case could therefore help Mr. Taylor as well as Mr. Arellano.

While on active duty in the Navy in 2001, Mr. Savage began experiencing severe psychiatric symptoms, including disturbed moods, impaired impulse control, anxiety, and depression. Appellant's Informal Br. at 5, *Savage v. Wilkie*, No. 18-6687 (Vet. App. Oct. 29, 2019). In October 2001, Mr. Savage told a chaplain that he "fe[lt] like jumping off the ship," and a clinical psychologist reported that Mr. Savage was "withdrawn, forgetful, distracted, irritable, not sleeping" and that his "personality disintegrated over [the] last 4 months." *Id.* The Navy honorably discharged Mr. Savage the next month. *Savage*, 2020 WL 1846012, at *1.

The VA later concluded that Mr. Savage's service-connected "bipolar disorder and panic disorder with agoraphobia" were so severe that they rendered him incapable of functioning in society, having rational thought patterns, or exercising deliberate decision making, leading to a 100% disability rating. *Id.* at *1–2. He also lacked medical insurance or consistent access to medical care. *Id.* at *2.

With his mother's assistance, in October 2009, Mr. Savage filed a claim seeking service connection for his bipolar disorder. *Id.* at *1. The VA granted the claim, but with an effective date of October 2009—nearly eight years after his honorable discharge. *Id.*

Proceeding pro se (as many veterans do), Mr. Savage appealed repeatedly. The Veterans Court ultimately rejected his argument, but not without acknowledging his awful predicament and the legal rule that had exacerbated it. *Id.* at *2. The court expressed its "profound sympathy for appellant and his family and their collective struggles with mental illness. We do not question that appellant suffered from a severe mental illness during the period after his separation from service and when he filed a claim for VA benefits." *Id.* But the Veterans Court concluded that it could not "provide the relief sought in this appeal under the law that binds us"—namely this Court's decision in *Andrews*. *Id.*

Christopher Ford. Christopher Ford's situation presents another illustration of *Andrews*' unfortunate impact. *Ford v. McDonald*, No. 15-3306, 2016 WL 4137532 (Vet. App. Aug. 3, 2016). Mr. Ford served on active duty in the Marine Corps in the 1980s. *Id.* at *1. Suffering from "a combination of 'a delusional disorder and a depressive disorder,'" Mr. Ford applied for VA benefits for a service-connected psychiatric disability in April 2001. *Id.* at *1 (citation omitted). The VA rated him 100% disabled and awarded benefits effective April 2001, the date of his application. *Id.* at *1–2.

Mr. Ford appealed pro se, arguing that his "psychiatric condition rendered him incapable of filing a claim for VA benefits" and "that he was misled by [the] VA in 1996 with respect to the filing of a claim for service connection." *Id.* at *2. Again, citing *Andrews*, the Veterans Court was unable even to consider Mr. Ford's equitable-tolling claim. *Id.* at *4.

William Apgar. William Apgar also suffered unfairly under *Andrews*. *Apgar v. McDonald*, No. 14-2212, 2015 WL 4953050 (Vet. App. Aug. 20, 2015). Mr. Apgar began active-duty service in the Navy in November 1988. Appellee's Br. at 2, *Apgar v. McDonald*, No. 14-2212 (Vet. App. Apr. 13, 2015). In October 1989, Mr. Apgar received treatment for "vague suicide ideation" and alcohol abuse. *Id.* at 2–3. The following month, Mr. Apgar again sought treatment "for physical injuries following a military sexual assault that was 'allegedly a part of a divisional initiation.'" *Id.* at 3. In January 1990, he again received treatment for "chronic suicide ideation as a reaction to stress" and alcohol abuse. *Id.* The examining physician recommended "expeditious administrative separation" because he posed "some risk of harm to self, others, or property." *Id.* The Navy discharged him honorably later that month. *Id.* at 2–3.

Mr. Apgar "tried to file a claim for benefits after exiting service in 1990, but was repeatedly told that he was not entitled to any benefits, because he had served less than 24 months." 2015 WL 4953050, at *1. In 1994, the VA medical center wrote Mr. Apgar stating that he was "not entitled to any VA benefits, including hospital treatment." *Id.* (citation omitted).

Mr. Apgar filed a claim for benefits in 2011. *Id.* In May 2014, Mr. Apgar's VA physician opined that, "[a]s a result of his military sexual trauma, he has been unable to maintain steady employment due to anger issues interfering with work relationships as well as interfering with personal relationships." Appellee's Br. at 9–10, *Apgar v. McDonald*, No. 14-2212 (Vet. App. Apr. 13, 2015). The VA finally granted Mr. Apgar a 100% disability rating for his service-connected disability—but with an effective date of June 2011, years after the onset of his disability. *Id.* at 10.

On appeal to the Veterans Court, Mr. Apgar contended that he should have received benefits dating back to his discharge because the VA misdiagnosed him and actively misled him about his eligibility for benefits. 2015 WL 4953050, at *1. The Veterans Court acknowledged that the VA's letter could have caused Mr. Apgar "some confusion," but found that he had "fail[ed] to

demonstrate that VA personnel obstructed his right to file a claim for disability benefits." *Id.* The Veterans Court also held that, in any case, Mr. Apgar could not show "that any confusion or misleading advice warrants an equitable remedy of an earlier effective date," again citing *Andrews*. *Id.*

Taylor, *Savage*, *Ford*, and *Apgar* demonstrate the inhumanity of such an inflexible interpretation of Section 5110. And those are by no means the only veterans who have been denied even an opportunity to show that Section 5110(b)'s one-year time period should be tolled.[2] The very individuals that deserve the most solicitude under the veterans' benefits system receive the harshest treatment under the *Andrews* regime.

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[2] *See, e.g.*, *Kappen v. Wilkie*, No. 18-3484, 2019 WL 3949462, at *1, 3 (Vet. App. Aug. 22, 2019) (denying equitable tolling of § 5110(b) to 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) (denying equitable tolling of § 5110(b) to a Marine Corps veteran who was told before his discharge that he could not apply for benefits for his skin condition that ultimately led to a disability rating); *Smith v. McDonald*, No. 14-1400, 2015 WL 402632, at *2 (Vet. App. Jan. 30, 2015) (denying equitable tolling of § 5110(b) to 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)).

2. Barring veterans and caregivers from any opportunity for equitable tolling causes real suffering.

Section 5110's one-year clock starts ticking on the day the military discharges a veteran. This comes at a time of great upheaval and even trauma 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), *available at* https://tinyurl.com/y47mqoba.

Discharge abruptly rips veterans from the structure that had become their identity. 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 some, this means leaving the service long before they intended. For others, such as those who suffered military sexual trauma, this means leaving the service on profoundly alienating terms, feeling betrayed by the institution that was duty-bound to protect them.

a. Veterans may miss the one-year time period for numerous reasons outside their control.

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 as the examples above demonstrate, some 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 or because the VA misled them into not applying.

These veterans are not mere statistics. They are human beings. Bruce Taylor. Sean Savage. Christopher Ford. William Apgar. And, in the case before this Court, Adolfo Arellano. Veterans like these do not ask for special treatment. They ask only that they get the same equitable opportunity other categories of litigants get: the opportunity to explain to a court why they were unable to meet this presumptive cutoff and have that court consider relieving them of the deadline as a result.

Consider how *Andrews* affects veterans who most need the benefits. As this case, *Savage*, and *Ford* demonstrate, *Andrews* deprives veterans of equitable tolling when they are *mentally* unable because of their disabilities to apply within the time period. *Andrews* would bar equitable tolling even when a veteran's disability *physically* prevented her from applying in time, too.

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. This is no small potatoes: Even assuming the veteran had no dependents, she still would lose more than $37,000 in benefits at current VA 100% disability rates. *2020 Veterans Disability Compensation Rates*, U.S. Dep't of Veterans Aff., https://tinyurl.com/ybfa9bb5 (last visited Oct. 9, 2020).[3]

Sound extreme? It is not. For all practical purposes, this scenario is no different from what befell Mr. Arellano, whose mental illness prevented him from applying for benefits, or Mr. Taylor, whose secrecy oath had the same

[3] In the post-9/11 military, TBI is hardly an academic concern. Researchers estimate that some 175,000 veterans—between 11% and 23% of those deployed—suffer from TBI resulting from service in Iraq, Afghanistan, Syria, and other places around the world where the military has deployed them. 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), *available at* https://tinyurl.com/yxuyehmk.

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 from a deadline they simply could not meet.

The mental trauma suffered by Mr. Arellano and Mr. Savage is not unusual among veterans. A quarter of the nearly 4.5 million veterans who visited VA medical centers in 2010 and 2011—more than 1.1 million veterans—reported one or more mental illnesses, including anxiety, depression, substance-use disorder, PTSD, bipolar disorder, and schizophrenia. *See* Ranak B. Trivedi et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among US Veterans*, 105 Am. J. Pub. Health 2564, 2566 (2015), *available at* https://tinyurl.com/y7s7vhug. Mental illness ravages veterans, and yet they cannot avail themselves of equitable tolling when they need it and when other litigants are entitled to it.

b. Severe shortcomings in VA mental-health services further exacerbate the problems imposed by *Andrews*.

Even if a veteran's mental illness does not prevent him from knowing and understanding the one-year time period, shortcomings in VA mental-health care may prevent him from knowing he has the mental-health disability

in the first place. *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 (2014), *available at* https://tinyurl.com/y5euj7p4 (examining attitudinal and logistical barriers to veterans' mental health care). Without that diagnosis, even as veterans struggle to define and understand their suffering, the one-year clock continues to tick unabated and unrelieved under *Andrews*.

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

A related but distinct epidemic underscores the need for equitable tolling: military sexual trauma (MST). MST refers to "psychological trauma, which . . . resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training." 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 (MST)*, U.S. Dep't of Veterans Aff., https://tinyurl.com/uxl7929 (last visited Oct. 9, 2020).

Sexual assault is epidemic in the military. "[E]stimates consistently indicate that . . . just over 20% of females and 1% of males are sexually assaulted

in a physical manner during their service." Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 Colum. J. Gender & L. 343, 343–44 (2014), *available at* https://tinyurl.com/y6zt8h8z. And the problem is getting worse. In 2018 alone, 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. U.S. Dep't of Defense, *Annual Report on Sexual Assault in the Military* 3 (2019), *available at* https://tinyurl.com/y88k7fbr. About "65% of male victims and 45.9% of female victims of sexual assault experience a lifetime struggle with PTSD." Kaylee R. Gum, Note, *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, 702–03 (2016), *available at* https://tinyurl.com/yy8elsxx.

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. *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), *available at* https://tinyurl.com/yal5dnow. Once a 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. *See* Kayla Williams, Ctr. for a New Am. Sec., *Supporting Survivors of Military Sexual Trauma: VA Must Redouble Efforts to Improve* 2–3 (2020), https://tinyurl.com/yxpwgydh.

Even as the VA claims to have made MST-related treatment a priority in recent years, *see, e.g.*, Veterans Health Admin., Dep't of Veterans Aff., *VHA Directive 1115: Military Sexual Trauma (MST) Program* (2018), https://tinyurl.com/y49xjb4p, veterans face waiting lists for mental health providers at the VA, *see, e.g.*, Comm. to Evaluate the Dep't of Veterans Aff. Mental Health Services, Nat'l Acads. of Scis., Eng'g, & Med., *Evaluation of the Department of Veterans Affairs Mental Health Services* 199–220 (2018), *available at* https://tinyurl.com/y5byt32l. Until the veteran understands she suffers from MST-related PTSD and receives a diagnosis, she cannot 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. Seamone & Traskey, *supra*, at 345–46; Gum, *supra*, at 704–07. For example, MST-related PTSD often coexists with other mental-health and substance-abuse problems, which also can prevent a veteran from seeking help. 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. As with other sexual-assault survivors, MST survivors feel deep shame and so often blame themselves and hide their trauma. 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. 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.

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

Perhaps worst of all, 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. 38 U.S.C. § 6303(b). But suppose the Secretary does not, or worse, somehow prevents the veteran from applying. This is not hypothetical. It occurred in *Apgar* (discussed earlier at pp. 12–14) and in at least one other case. *See Butler v. Shinseki*, 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 must often navigate the benefits system and the appeals process without the benefit of counsel. In at least three of the cases discussed above, for example, the appellants appeared pro se. *See, e.g.*, *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 cruel 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.

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

Beyond the harms already discussed to veterans themselves, the inflexible application of the one-year limit demanded by *Andrews* also leads to suffering by their families and caregivers. This is true of Mr. Arellano's parents and brother, as well as Mr. Savage and his mother. *See* Appx507 ("[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 . . . ."); Appellant's Informal Br. at 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).

While veterans suffer without benefits, their families and caregivers have to invest untold dollars, time, and heartache caring for them at their own expense, over years or even decades. But *Andrews* means that when the vet-

eran finally realizes that she can get benefits, only a small part of those burdens—her financial costs from the date of application forward—may be redressed, regardless of the equities.

B. Depriving veterans of equitable tolling is at odds with the veterans' disability benefits scheme.

1. *Andrews* impermissibly disfavors veterans even though the law should favor them.

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

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." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). 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 th[e] evidence" supporting the claim, "VA must give the veteran the benefit of any doubt." *Henderson* v. *Shinseki* (*Henderson II*), 562 U.S. 428, 440 (2011).

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. "This entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (citation omitted).

Recognizing this solicitude, the Supreme Court has "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson II*, 562 U.S. at 441 (internal quotation marks omitted). That is, when "interpretive doubt" exists in a statute or regulation governing veterans' benefits, the veteran's interpretation generally should prevail. *Brown* v. *Gardner*, 513 U.S. 115, 117–18 (1994). Once

described as a "thumb on the scale" in favor of veterans, *Sanders*, 556 U.S. at 416 (Souter, J., dissenting), the veterans' canon is perhaps better viewed as "more like a fist than a thumb, as it should be," *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1 (Summer 2013), *available at* https://tinyurl.com/y5lkblqx.

The veterans' canon helps ensure that veterans'-benefits legislation is "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); *see also, e.g.*, *Procopio v. Wilkie*, 913 F.3d 1371, 1383–84 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (discussing the pro-veteran canon of statutory construction). The refusal in *Andrews* and its progeny to allow equitable tolling of Section 5110(b)'s one-year bar fundamentally undermines these principles.

2. Permitting equitable tolling dovetails with various doctrines that favor veterans.

Andrews denies benefits to many of the service-disabled veterans who need them most. This is the very opposite of "solicitude" or "beneficence." In fact, it is a thumb or even a fist on the scale leveled especially *against* veterans.

And here, there is no "interpretive doubt." *Gardner*, 513 U.S. at 117–18. The Veterans Court appears to read *Andrews* as drawing a clear line between

statutes of limitation (which are subject to the *Irwin* presumption and thus equitable tolling) and claims-processing rules (which are not). *See, e.g.*, *Taylor*, 31 Vet. App. at 154; *Noah v. McDonald*, 28 Vet. App. 120, 127–29 (2016). But the Supreme Court discourages courts from creating such "categorical rule[s]." *Henderson II*, 562 U.S. at 436–38.

Instead, the Supreme Court has explained that whether a statutory time period is subject to equitable tolling turns on factors such as whether it 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, 159–60 (2013) (citations omitted). Both of these factors strongly favor allowing veterans equitable tolling.

In fact, this Court has explicitly said so, holding that "the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process." *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002)[4]; *see also Butler*, 603

[4] Although this Court's *en banc* decision in *Henderson v. Shinseki* (*Henderson I*), 589 F.3d 1201, 1203 (Fed. Cir. 2009), overruled the panel decision in *Jaquay*, the Supreme Court's subsequent reversal, *Henderson II*, 562 U.S. 428, has led the Veterans Court to recognize that *Jaquay* remains binding

F.3d at 927–28 (Newman, J., concurring in the result) (distinguishing *Andrews* and explaining why the one-year limit in § 5110(b) should be subject to equitable tolling); Appx5 ("If we were writing on a blank slate, [Mr. Arellano's] arguments would be worth exploring."). Before *Andrews* tied the Veterans Court's hands, it held so, too. *See Smith v. Derwinski*, 2 Vet. App. 429, 433–34 (1992) (holding § 5110(b) subject to equitable tolling under *Irwin*). Resolving any doubts—if they exist—against service-disabled veterans hardly comports with the "special beneficence" underlying the veterans benefit system. *Barrett*, 363 F.3d at 1320.

On the other side of the scale (the side that does not get a thumb or fist in its favor), equitable tolling will impose no 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 for a particular veteran. And courts have substantial experience in applying the doctrine, as well. As the Supreme Court has noted, "courts have typically extended equitable relief only sparingly." *See Irwin v. Dep't of Veterans Aff.*, 495 U.S. 89, 96 (1990). That being the case, the

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precedent. *See, e.g.*, *Threatt v. McDonald*, 28 Vet. App. 56, 60 (2016) (per curiam).

primary cost to the government will be to pay the benefits that, as a matter of equity, it should have paid already.

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

Equitable tolling is the rule, not the exception. It is unsurprising, therefore, that 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.").

For instance, as Mr. Arellano observes, civil-service employees who retire due to disability must file their application for disability benefits within one year of their retirement, not unlike veterans. 5 U.S.C. § 8337(b). But unlike for veterans, this Court permitted equitable tolling of that deadline for an Assistant United States Attorney whom the government failed to inform that he could seek disability benefits for his bipolar disorder. *Winchester v. Off. of Pers. Mgmt.*, 449 F. App'x 936, 938–39 (Fed. Cir. 2011).

Manufacturing workers who lose their jobs due to the effects of international trade also have one year to apply for benefits under the government's trade adjustment assistance program. 19 U.S.C. § 2273(b)(1) (2002). But the Court of International Trade has allowed workers who were not informed of

that program to equitably toll the one-year deadline. *Former Emps. of Fisher & Co. v. U.S. Dep't of Labor*, 31 C.I.T. 1272, 1277–79 (2007).

And post-*Irwin*, courts weighing equitable tolling of the one-year statutory deadline to file for retroactive Social Security disability insurance benefits, 42 U.S.C. § 423(b), have suggested that courts also can equitably toll that statute. *See, e.g.*, *Levy v. Astrue*, No. CV 07-6412-JWJ, 2009 WL 2163512, at *7 (C.D. Cal. July 16, 2009) (remanding for the ALJ to consider whether the plaintiff should be granted an earlier filing date because he "was given misinformation about his eligibility for benefits which caused him not to file a disability application on an earlier date"); *Henry v. Comm'r of Soc. Sec.*, No. 2:09-CV-206, 2010 WL 11523750, at *8 (D. Vt. July 26, 2010) (noting that "equitable tolling of limitations periods" may be permissible in certain circumstances but denying it in this instance). This Court has held that veterans deserve better treatment than social-security claimants. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (holding that, because "the character of the veterans' benefits statutes is strongly and uniquely pro-claimant," the Veterans Court had erred by importing a test applicable to the "system through which social security benefits are awarded . . . [which] is not similarly designed"). Yet *Andrews* means they get the opposite.

So rigid is this 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). 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 very disabilities imposed by their service to our country often prevent veterans from timely seeking benefits. This is true for Mr. Arellano, and it is true for numerous other veterans. Adding insult to injury by denying them equitable tolling wreaks havoc not just on their lives, but on the lives of their family members and caregivers, too. It 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 cannot be squared with the nature of equitable tolling generally and with the purpose of the veterans' benefits scheme particularly. It is uniquely in this Court's province to right the wrong that *Andrews* has wrought. It must do so without delay.

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CERTIFICATE OF SERVICE

I, Liam J. Montgomery, counsel for amici curiae and a member of the Bar of this Court, certify that, on October 13, 2020, a copy of the attached Brief of Amici Curiae National Veterans Legal Services Program and National Organization of Veterans' Advocates was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

OCTOBER 13, 2020

/s/ Liam J. Montgomery
LIAM J. MONTGOMERY

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Liam J. Montgomery, counsel for amici curiae and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Brief of Amici Curiae National Veterans Legal Services Program and National Organization of Veterans' Advocates is proportionately spaced, has a typeface of 14 points or more, was prepared using Microsoft Word, and contains 6,671 words.

OCTOBER 13, 2020

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