No. 19-2211

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRUCE R. TAYLOR,

Claimant-Appellant,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent–Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Vet. App. No. 17-2390, Judge William S. Greenberg, Judge Amanda L. Meredith, and Judge Joseph L. Falvey, Jr.

AMICUS BRIEF OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES SUPPORTING CLAIMANT-APPELLANT

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CERTIFICATE OF INTEREST

Counsel for National Veterans Legal Services Program certifies the following:

1. The full name of every party or amicus represented by us is:

   National Veterans Legal Services Program

   Swords to Plowshares

2. The name of the real party in interest represented by us is:

   National Veterans Legal Services Program

   Swords to Plowshares

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or amicus curiae represented by us are:

   National Veterans Legal Services Program is a trade association with no parent corporation and with no publicly held company funding 10 percent or more of its stock.

   Swords to Plowshares is a trade association with no parent corporation and with no publicly held company funding 10 percent or more of its stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   Jennifer S. Swan
   Howard W. Levine
   DECHERT LLP

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not

include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable

Date: October 4, 2021

Respectfully submitted,

/s/ Jennifer S. Swan

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I. INTEREST OF THE AMICI CURIAE

Many of our nation's veterans and their families depend on disability benefits, which they earned through service to their country. Benefits earned, however, can be difficult for many veterans to obtain, and thus veterans are greatly assisted through organizations such as the National Veterans Legal Services Program ("NVLSP") and Swords to Plowshares ("Swords").[1]

The NVLSP is one of the nation's leading organizations advocating for the rights of veterans and their families. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs ("VA") dedicated to ensuring that the government honors its commitment to our nation's twenty-five million veterans and active-duty personnel. NVLSP prepares, presents, and prosecutes veterans' benefits claims before the VA, pursues veterans' rights legislation, and advocates before this and other courts. As a result of these efforts, NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families since 2010.

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[1] NVLSP and Swords respectfully submits this brief as amici curiae pursuant to Federal Rule of Appellate Procedure 29, Federal Circuit Rule 29, and the Court's July 22, 2021 en banc order (*see Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021)) 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, prepare, or submit the brief.

The issues in this en banc order from the Court lie at the core of NVLSP's experience and expertise. NVLSP has extensive experience representing veterans before the VA and in this Court. *See, e.g.*, *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1351 (Fed. Cir. 2020); *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) (on appeal from *Haas v. Nicholson*, 20 Vet. App. 257 (U.S. 2006)), *reh'g denied*, *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008); *Richard ex rel. Richard v. West*, 161 F.3d 719, 721 (Fed. Cir. 1998).

Swords, founded in 1974, is a community-based, not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. Swords promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. The Swords Legal Department targets its services to homeless and other low-income veterans seeking assistance with VA disability benefits claims, character of discharge determinations, and with military discharge upgrades.

Swords has a unique interest in this case because of its previous role in landmark litigation on behalf of Edgewood Veterans. In 2009, in an effort to hold the U.S. Government responsible for testing chemical and biological weapons on U.S. servicemembers without informed consent, Swords, along with the Vietnam Veterans of America and several Edgewood Veterans, sued the U.S. Army and

other federal agencies seeking declaratory and injunctive relief. *See generally Vietnam Veterans of Am. v. CIA*, 288 F.R.D. 192 (N.D. Cal. 2012). After this lawsuit, Edgewood Veterans were released from their secrecy oaths, and the U.S. Army was required to provide notice and medical care to impacted veterans.

The NVLSP and Swords have a strong interest in the "uniquely pro-claimant" policy explicitly adopted by Congress in the Veterans' Judicial Review Act, among other laws, and the pro-veteran canon of statutory interpretation. *See, e.g.*, *Euzebio v. McDonough*, 989 F.3d 1305, 1326 (Fed. Cir. 2021) (quoting *Sullivan v. McDonald*, 815 F.3d 786, 791 (Fed. Cir. 2016)). Both organizations are intimately familiar with the VA claims process, the challenges veterans often face raising their claims with precision, and the challenges of appealing a denial of those claims.

II. STATEMENT OF RELEVANT FACTS

Mr. Bruce R. Taylor, a decorated United States Army veteran, was a human subject in the classified experiments performed at the Edgewood Arsenal facility in Maryland. *Taylor v. McDonough*, 3 F.4th 1351, 1356-58 (Fed. Cir. 2021). As a requirement for participation in this testing, Mr. Taylor was forced to sign a secrecy oath that prevented his disclosure of his participation in these experiments, including exposure to "EA-3580 (a nerve agent akin to VX and sarin), EA-3547 (also called CR, a tear gas agent), and other chemical agents." *Id.* at 1356-57. Mr.

Taylor suffered numerous side effects, including hallucinations, nausea, jumpiness, irritability, sleepiness, dizziness, impaired coordination, and difficulty concentrating. *Id.* at 1357-58.

Both before and after his discharge, however, Mr. Taylor was not able to seek help for symptoms of what he later learned was post-traumatic stress disorder ("PTSD") because he was not able to disclose his participation in these experiments. *Id.* at 1358-59. He was further prevented from discussing them as an extenuating circumstance when he was court martialed. *Id.* at 1358.

The testing on human subjects at the core of this case was eventually ended by Congress as a result of concerns of apparent abuses. *See id.* The names of the subjects who participated in these experiments were declassified in 2006 and the VA sent a letter to impacted veterans informing them that they were permitted to disclose their participation in the Edgewood Program to their health care providers. *Id.* Mr. Taylor was among them. *Id.*

In 2011, the United States Department of Defense issued its own memorandum "releasing veterans in part or in full from secrecy oaths that they may have taken in conjunction with [Edgewood Arsenal] testing." *Id.* at 1358 n.5 (quoting *Vietnam Veterans of Am. v. CIA*, No. C 09-0037 CW, 2013 WL 6092031, at *6 (N.D. Cal. Nov. 19, 2013); Memorandum from the Deputy Secretary of

Defense on Release from "Secrecy Oaths" Under Chemical and Biological Weapons Human Subject Research Programs (Jan. 11, 2011).

Mr. Taylor filed a claim for service-connected benefits for PTSD in 2007. *Taylor*, 3 F.4th at 1358. Mr. Taylor's condition, including PTSD and major depressive disorder, stemmed from his participation in these experiments as was determined by the VA doctor who examined Mr. Taylor in 2007. *Id.* at 1358-59. Notably, Mr. Taylor had previously sought VA medical treatment for this disorder prior to the declassification of the experiment and was turned away on the basis that he was fabricating his participation in these experiments. *Id.* at 1359. Further, the government did not create any procedures with the VA for Mr. Taylor to establish that he had participated in such experiments.

Mr. Taylor was granted VA benefits in July of 2007, with an effective date of February 28, 2007, the date the Government received his PTSD claim. *Id.* Mr. Taylor appealed this effective date determination and explained he was precluded from obtaining benefits earlier because of the secrecy oath. *Id.* Mr. Taylor asserted his effective date should be September 7, 1971, the date he was discharged from the Army, because that was when the entitlement arose from his participation in chemical experiments as a human subject but his secrecy oath had forbidden him from filing a benefits claim at that time. *Id.* The Board of Veterans Claims

("Board") rejected Mr. Taylor's claim because there was no communication by Mr. Taylor prior to 2007 that could be construed as a claim. *Id.*

Mr. Taylor appealed to the United States Court of Appeals for Veterans Claims. *Taylor*, 3 F.4th at 1359. The Veterans Court reversed and remanded back to the Board for further determinations related to the secrecy oath. *Id.* The Board considered the information in the secrecy oath but maintained the effective date of 2007 because it found Mr. Taylor could have presented claims for PTSD without disclosing the circumstances that led to his condition. *Id.* at 1359-60. The case was referred to the Veterans Court, who determined in a split opinion that the Veterans Court did not have the statutory authority to extend Mr. Taylor's effective date beyond the date he filed his claim. *Id.* at 1360.

Mr. Taylor then appealed to the Federal Circuit. On June 30, 2021, the Federal Circuit reversed the Veterans Court's decision, finding that it erred in determining it lacked equitable authority to extend Mr. Taylor's effective date. *Id.* at 1363. As the Federal Circuit correctly noted, concluding that the Veterans Court may not apply equitable estoppel would be contrary to the entire statutory mandate of the Veterans Court, which was created expressly to help veterans obtain benefits they deserve. *Id.* at 1365-1366.

After reversing and remanding the case back to the Veterans Court, however, the Federal Circuit sua sponte issued an Order on July 22, 2021, vacating

the unanimous panel opinion and ordering reconsideration by the en banc court. *Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021).

III. ARGUMENT

The Edgewood Arsenal Program was an immoral, unethical, and inhumane project that ended in a justified scandal over how this nation had used thousands of civilians and soldiers as human test subjects for dangerous and debilitating chemical warfare agents for more than twenty years. *See generally* En Banc Brief of Claimant-Appellant at 6-8, *Taylor v. McDonough*, No. 2019-2211 (Fed. Cir. 2021); *Vietnam Veterans*, 2013 WL 6092031, at *2. This case threatens to deepen the scars from this Program. Denying Mr. Taylor an earlier effective date permits the Government to effectively punish Edgewood participants like Mr. Taylor for decades of secrecy that the Government itself imposed.

As an initial matter, the Court of Appeals for Veterans Claims has the equitable powers to correct this injustice, as the Panel's decision and Mr. Taylor's brief convincingly and clearly explain. *See generally*, *Taylor v. McDonough*, 3 F.4th 1351 (Fed. Cir. 2021); En Banc Brief of Claimant-Appellant, *Taylor v. McDonough*, No. 2019-2211 (Fed. Cir. 2021). The Panel's decision granting Mr. Taylor claim of entitlement to an earlier effective date under the doctrine of equitable estoppel correctly applied the statutory framework and the court's equitable powers. Applying equitable estoppel to Mr. Taylor's claim also accords

with the mandate of the Veterans Court and the VA's fundamental purpose to "care for [those] who shall have borne the battle." *See generally Forshey v. Principi*, *2*84 F.3d 1335, 1365 (Fed. Cir. 2002) (citing Second Inaugural Address of Abraham Lincoln (Saturday, March 4, 1865), *in Inaugural Addresses of the Presidents of the United States from George Washington 1789 to George Bush 1989, at 143* (U.S. Gov't Printing Office, Bicentennial ed. 1989)). This Court should thus restore the Panel decision.

Nonetheless, amici curiae NVLSP and Swords submit this brief to address some of the questions raised in the Court's July 22, 2021, en banc order to explain why this injustice also violates Mr. Taylor's constitutional rights. In particular, Mr. Taylor's constitutional rights to petition the Government and to due process have been denied, and his claim for an earlier effective date can be upheld on that basis alone.

A. The Constitutional Right of Access to the Courts Includes a Right to Meaningfully Seek Disability Benefits from VA

This Court's question 3.B. asks: "If equitable estoppel does not afford Mr. Taylor the effective date he claims, does Mr. Taylor have a claim for denial of a constitutional right of access to VA processes for securing disability benefits for which he met the eligibility criteria, considering authorities such as *Christopher v. Harbury*, 536 U.S. 403 (2002), that address a constitutional right of access to courts and other government forums of redress?"

In short, the answer is "Yes."

1. The Constitutional Right of Access Is Fundamental and Inherent to Our System of Government

Courts have long recognized an unambiguous constitutional right of access to the Courts. Indeed, the "the right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Broudy v. Mather*, 460 F.3d 106, 117 (D.C. Cir. 2006) (quoting *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907)).

So fundamental is the right of access that it runs through several constitutional provisions. As the U.S. Supreme Court has explained, this right implicates the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Harbury*, 536 U.S. at 415 n.12.

In terms of the First Amendment, the Supreme Court in *Harbury,* expressly relied on *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). *Id.* There, the Supreme Court explained that "[p]etitioners, of course, have the right of access to the agencies and courts to be heard on applications . . .. That right, as indicated, is part of the right of petition protected by the First Amendment." *Cal. Motor Transp.*, 404 U.S. at 513. The First Amendment protects

the right "to petition the Government for a redress of grievances." U.S. CONST. amend. I. Petitioning the government includes not just the right to access courts but also to access and make applications or submit claims to agencies, including to the VA's benefits claim system. *California Motor Transport* extended the immunity "to administrative agencies . . . and to courts." *Cal. Motor Transp.*, 404 U.S. at 510. Indeed, this Court is well aware of the First Amendment right to petition elaborated in *California Motor Transport* and has applied it, for example, in the context of patent litigation. *See, e.g., Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l. Ass'n*, 776 F.3d 1343, 1349-50 (Fed. Cir. 2014) (citing *Cal. Motor Transp.*, 404 U.S. at 511 and stating that "a person's act of petitioning the government is presumptively shielded from liability by the First Amendment against certain types of claims").

Similarly, the right to access is also supported by the Fifth Amendment Due Process Clause. *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989). Due process requires that judicial access is "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). This means, for example, that the Government may not: prevent prisoners from filing writs of habeas corpus (*Ex parte Hull*, 312 U.S. 546, 549 (1941)); require docket fees for indigent prisoners (*Burns v. Ohio*, 360 U.S. 252, 257 (1959)); require docket fees for indigent civil litigants seeking divorce (*Boddie v. Connecticut*, 401 U.S. 371, 374 (1971)); prevent prisoners from

assisting each other in appeals (*Johnson v. Avery*, 393 U.S. 483, 490 (1969)); or fail to provide adequate legal libraries and access to legal services to prisoners (*Bounds*, 430 U.S. at 817).

Equal access to courts and agencies also derives from the right to equal protection. As early as 1885, the Supreme Court explained that one purpose of the Fourteenth Amendment was that all people "should have *like access to the courts* of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contract …." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). Although the Fifth Amendment does not include an Equal Protection Clause, the same right to equal protection applies to the Federal government through the Fifth Amendment's Due Process Clause. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.") (citations and internal quotation marks omitted). Moreover, this principle has been expressly recognized in the context of veterans' disability claims. *See Gray v. McDonald*, 27 Vet. App. 313, 327 (2015) (acknowledging that a veteran-claimant "'challenging a law on equal protection grounds may make out a prima facie case of purposeful

discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose'") (quoting *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986)).

2. The Constitutional Right of Access Extends to VA Benefits Claims

The constitutional right of judicial access extends to a right to adequately and meaningfully submit claims to the VA for benefits. As discussed above, the right of access to courts has long encompassed the right to access agency proceedings. *See Cal. Motor Transp.*, 404 U.S. at 510.

Indeed, the "strongly and uniquely" pro-Veteran canon confirms that a constitutional right of judicial access should extend to Mr. Taylor and other similarly situated plaintiffs and allow them to seek the maximum benefits available for disabilities incurred during periods of military service. *See Anania v. McDonough*, 1 F.4th 1019, 1026 (Fed. Cir. 2021) (quoting *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)). Since the passage of the Veterans' Judicial Review Act of 1988, 38 U.S.C. §§ 7251-98, more than three decades ago, "access to courts and to meaningful judicial review" has been recognized as "fundamental to the civil rights of veterans."[2]

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[2] Michael J. Wishnie, *"A Boy Gets Into Trouble:" Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1730 (2018). *See also* James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later:*

(continued…)

This Court itself has consistently recognized that Fifth Amendment Due Process protections "apply to the proceedings in which the [VA] decides whether veteran-applicants are eligible for disability benefits." *See Gambill v. Shinseki*, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009) (citing *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009)). These protections would logically include "'[r]emoving [deterrents to seeking judicial review],'" which this Court has emphasized "'is imperative in the veterans benefits context, which is intended to be uniquely pro-claimant….'" *Wagner v. Shinseki*, 640 F.3d 1255, 1258-1259 (Fed. Cir. 2011) (quoting *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006)). Moreover, any other result would be fundamentally disconsonant with the veterans benefits systems' broad "'solicitude for the claimant,'" which contemplates the relaxation of claims requirements "to *benefit,* not penalize, claimants." *AZ v. Shinseki*, 731 F.3d 1303, 1322 (Fed. Cir. 2013) (citing *Walters v. Nat'l Ass'n of Radiation Survivor*s, 473 U.S. 305, 311 (1985)) (emphasis in original).

Thus, the constitutional right to access the Courts includes the right to adequate, meaningful, and effective access to VA processes to obtain disability benefits. As set forth below, Mr. Taylor was denied that right.

(…continued)
Confronting the New Complexities of the Veterans Benefits System, 66 N.Y.U. ANN. SURV. AM. L. 251, 265 (2010) ("The changes brought by the VJRA have had a radical impact on the efficiency and accuracy of VA's ability to adjudicate claims.").

B. There are Two Types of Denial of Access Claims—Forward and Backwards Looking Claims

The U.S. Supreme Court has stated that there are two distinct types of denial of access claims. The first, generally referred to "forward" looking claims, is when the "official action is presently denying an opportunity to litigate for a class of potential plaintiffs. The opportunity has not been lost for all time, however, but only in the short term." *Broudy*, 460 F.3d at 117 (quoting *Harbury*, 536 U.S. at 413). The goal of these type of claims "is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id*. (quoting *Harbury*, 536 U.S. at 413). This, however, is not the situation Mr. Taylor finds himself in.

Instead, Mr. Taylor's claim for denial access is what is termed a "backwards" looking claim. "These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." *Id*. at 118 (quoting *Harbury*, 536 U.S. at 414). The goal of these backwards claims is not a judgment in a subsequent lawsuit, but judgment in the access claim itself to obtain relief that is not obtainable in a suit in the future. *Id*. Examples of backwards looking claims "include cases where a cover-up 'caused the loss or inadequate settlement of a meritorious case,' or where a cover-up

caused 'the loss of an opportunity to sue' because it extended through the limitations period." *Id*. (internal citations omitted).

This is precisely what happened to Mr. Taylor. Due to the Government's conduct and secrecy requirements, Mr. Taylor was prevented from seeking redress for his injuries for over thirty-five years. Although Mr. Taylor was eventually permitted to seek benefits starting in 2007, a denial of an earlier effective date means that he was barred from receiving benefits for the full scope of time he was injured because he was prevented from filing his claim until the Government's secrecy requirements were removed. His access to seek the benefits he was owed from 1971 to 2007, however, was thwarted by the Government's use of its sovereign power to require secrecy from Mr. Taylor on threat of criminal prosecution.

The D.C. Circuit and Ninth Circuit have similar three-part requirements for plaintiffs to successfully establish a backward-looking denial-of-access claim. Amici curiae respectfully submit that this Court should adopt the Ninth Circuit's formulation, but Mr. Taylor prevails under either test.

Under the D.C. Circuit's case law, first, the plaintiff must identify a non-frivolous underlying claim. *Broudy*, 460 F.3d at 120. Second, the plaintiff must show not only that they have been denied a remedy for the underlying claim, but also that the remedy has been completely foreclosed. *Id*. If the plaintiff can still

obtain the desired remedy in a suit that can be brought in the future, then the plaintiff cannot meet the elements of the test. *Id.* Third, the plaintiff must show that it was the Government's "actions that have cut off their remedy." *Id*. (citing *Harbury v. Deutch*, 244 F.3d 956, 957 (D.C. Cir. 2001).[3]

The Ninth Circuit's test is similar but not identically framed, examining whether the plaintiff can establish a "1) the loss of a 'nonfrivolous' or 'arguable' underlying claim; 2) the official acts frustrating the litigation; and 3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit." *Phillips v. Hust*, 477 F.3d 1070, 1076 (9th Cir. 2007), *vacated on other grounds*, 555 U.S. 1150 (2009) (citing *Harbury*, 536 U.S. at 413-14). The Ninth Circuit further explained the official act factor, stating a plaintiff "must show that the alleged violation of his rights was *proximately caused* by … the state actor." *Phillips*, 477 F.3d at 1077 (emphasis added).

Although both circuits require an "official act" to substantiate a claim, the Ninth Circuit provides a more administrable test by explaining that the Government's actions must be the *proximate cause* of the loss of the plaintiff's

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[3] Concurrent with its application, the D.C. Circuit expressly recognized that courts have jurisdiction to address the substance of the underlying claim, as nothing in the VA's governing statutes and regulations "require[s] the Secretary, *and only the Secretary*, to make all decisions related to laws affecting the provision of benefits." *Broudy*, 460 F.3d at 113 (quoting *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000) (emphasis in original).

remedy. *See id.* This is a common legal standard well within this Court's expertise to apply and is an appropriate and workable test to apply here. *See, e.g.*, *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-04 (Fed. Cir. 2020) (applying the proximate cause test). Requiring the Government's action to proximately cause the alleged loss requires determining "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id*. at 1304 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)). Similarly, in the veterans context, this Court has specifically utilized the proximate cause standard. For example, in interpreting the "proximate clause" language of 38 U.S.C. § 1151(a)(1)(A)—a statute providing disability benefits to veterans who are injured due to the Government's "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault" in furnishing medical care[4]—this Court has explained "[p]roximate cause limits legal responsibility to "those [but-for] causes which are so closely connected with the result . . . that the law is justified in imposing liability." *Ollis v. Shulkin*, 857 F.3d 1338, 1344 (Fed. Cir. 2017). One of the touchstones for proximate cause is "foreseeability," and extends causation to only "those foreseeable risks created by

[4] *See Viegas v. Shinseki*, 705 F.3d 1374, 1377 (Fed. Cir. 2013) (delineating the prerequisites for obtaining disability compensation under 38 U.S.C. § 1151 (2004)).

the negligent conduct." *Id*. Here, in applying the test for an official act that frustrated access to VA processes, the Court should examine whether the Government's conduct proximately caused Mr. Taylor to be denied meaningful, effective, and adequate access to the VA claims procedure for conditions caused by his participation in the Edgewood Arsenal project. That is, was the Government's conduct requiring and enforcing a secrecy oath sufficiently related to the subsequent harm, and was that harm foreseeable under the circumstances?

For this reason, in response to this Court's question "C" of the en banc order, amici curiae NVSLP and Swords respectfully submit that the "active interference" test that is "undue," as suggested by *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011), is not the correct test. The "undue interference" test does not have the same longstanding application as "proximate cause" and is rife with ambiguity. For example, what are acts of "interference" and how "undue" must such undefined acts of "interference" be? While such a test might have some applicability in the prisoner context –where plaintiff prisoners reside in a total institution in facilities wholly controlled by the Government and plaintiffs' incarcerated status could subject them to "*active interference* by prison officials" (*Id. at* 1097 (emphasis in original)) – it should not apply in the context of veterans' cases.

C. Application of the Test to Mr. Taylor

Applying this test to Mr. Taylor's circumstances demonstrates that he possesses a meritorious backwards-looking denial of access claim. First, Mr. Taylor plainly had a non-frivolous underlying claim for service-connection benefits related to his injury. In many of the cases, where a denial of access to the court's claim has been denied, this is the factor of the test that is usually not satisfied. For example, in *Harbury* itself, the Court explained "the complaint failed to identify the underlying cause of action that the alleged deception had compromised, going no further than the protean allegation that the State Department and NSC defendants 'false and deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress.'" *Harbury*, 536 U.S. at 418. Here, by contrast, there can be no reasonable debate that Mr. Taylor had a meritorious claim and could have pursued it if not for the Government's prevention. When Mr. Taylor was finally free to pursue a claim with the full benefit of his Edgewood Arsenal participation being declassified, he quickly obtained VA disability benefits. *Taylor*, 3 F.4th at 1359.

Second, the Government was plainly the proximate cause of Mr. Taylor's inability to pursue his remedy. Alternatively, under the D.C. Circuit's test, Mr. Taylor has been completely foreclosed from pursing this claim due to the Government's requirement that Mr. Taylor maintain the secrecy of this claim. The

Government threatened Mr. Taylor with criminal prosecution, the repercussions of which extend beyond even military service. *Id.* at 1362–63. The stakes of a court martial are incredible high for a veteran who has honorably served, and even the prospect of a dishonorable discharge is a serious barrier from violating the Government's secrecy order and discussing his service-related condition with his physicians in a timely manner. In fact, a court martial resulting in a dishonorable discharge likely would have precluded Mr. Taylor from *ever* obtaining service-connection benefits for his PTSD. *See Gardner v. Shinseki*, 22 Vet. App. 415, 419 (2009) (acknowledging that "the receipt of a discharge from a sentence of a general court-martial usually bars entitlement to VA benefits" under 38 U.S.C. § 5303 (2021) and 38 C.F.R. § 3.12 (2008)).

The foreseeable consequences of the Government's conduct were that Mr. Taylor could not discuss his injuries with his physicians or earlier pursue his claim. The Government's conduct was plainly the proximate cause of Mr. Taylor's inability to earlier pursue his claim.

Last, the proposed remedy – an earlier effective date – may be awarded as recompense but is not otherwise available in a future suit. Unlike other cases where the sought-after remedy could be obtained through, for example, a FOIA

request,[5] Mr. Taylor has no such remedy absent a constitutional claim or the application of equitable doctrines to his 2007 claim. Mr. Taylor's remedy is very easily identified—disability benefits backpay in accordance with 38 C.F.R. § 3.151 (2019). Accordingly, the answer to the en banc Court's question D.i. is "yes."

Further, as set forth in the en banc Order, question D.ii., the Government lacked a sufficient justification for not affording Mr. Taylor an alternative mechanism for obtaining the requested relief after Mr. Taylor submitted his 2007 service-connected claim. This omission—as opposed to active interference—committed by the VA in this case is a particularly egregious example of what often occurs in Veterans' jurisprudence.

Moreover, the VA has itself recognized that its own systematic failures can result in the unjust denial of access to adjudication—including for veterans who, like Mr. Taylor, were constrained from submitting benefits claims because of the covert nature of their service. For example, the VA has implemented procedures for veterans to establish their involvement in Special Operations Forces classified

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[5] *Vietnam Veterans of Am. v. McNamara*, 201 F. App'x 779, 781 (D.C. Cir. 2006) ("Like the plaintiffs in *Broudy*, the plaintiffs' backward-looking claims are not 'completely foreclosed' because the Freedom of Information Act ('FOIA') and VA regulations that allow for the reopening of prior benefits' proceedings provide them, in tandem, precisely what they claim they have been denied -- a meaningful opportunity to pursue their underlying benefits claims."). This is the exact opposite of Mr. Taylor's situation.

missions or obtaining related classified documents. *See* Department of Veterans Affairs Fast Letter 09-52 on Verification of Participation in "Special Operations" Incidents (Dec. 9, 2009). Such procedures could have been established for individuals in Mr. Taylor's circumstances but were not. These prejudicial omissions are yet further grounds to extend Mr. Taylor the judicial relief that he seeks in this appeal.

Accordingly, if the en banc Court were to ultimately decide that Mr. Taylor was not entitled to pursue his claims due to equitable estoppel, amici curiae NVLSP and Swords believe that he should be able to pursue a meritorious claim for denial of access to the courts.

IV. CONCLUSION

For all the reasons noted above, amici curiae NVLSP and Swords respectfully submit that the en banc Court should reinstate the Panel's well-reasoned decision. Alternatively, the en banc Court should find that Mr. Taylor was deprived of his Constitutional right of access to the courts and the case should thus be remanded for further proceedings consistent with that opinion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing AMICUS BRIEF OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES SUPPORTING CLAIMIANT-APPELLANT were served upon registered counsel by operation of the Court's CM/ECF system on this 4th day of October, 2021, and by e-mail upon counsel listed as below:

October 4, 2021 *Jennifer S. Swan*

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1. This brief complies with the type-volume limitation of Federal Circuit Rule 29(b). This brief contains 5115 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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October 4, 2021 *Jennifer S. Swan*