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.

BRIEF OF MILITARY-VETERANS ADVOCACY INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 19-2211

Short Case Caption Bruce R. Taylor v. Denis McDonough, Secretary of Veterans Affairs

Filing Party/Entity Military-Veterans Advocacy Inc.

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Date: 10/04/2021

Signature: /s/ Melanie L. Bostwick

Name: Melanie L. Bostwick

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Military-Veterans Advocacy Inc.		

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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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).

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STATEMENT OF INTEREST[1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits. It also provides continuing legal education to attorneys practicing in the field of veterans' and service members' rights and benefits.

This case presents a question of utmost importance: Whether federal law and the Constitution allow the executive branch to expose a young soldier to chemical agents as part of a highly classified testing program, prevent him from applying for service-connected disability benefits under a threat of criminal prosecution, and then allow him to receive benefits only from the date, decades later, when he was finally

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[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. The brief is filed pursuant to the Court's authorization. Sua Sponte Rehearing En Banc Order at 5, Dkt. 37.

permitted to submit his application. They do not. To avoid this unlawful result, this en banc Court can, as the panel did, equitably estop the executive from preventing the full receipt of benefits. Alternatively, it can hold that the executive's conduct violates the constitutional right of access.

In a veterans' benefits system that is uniquely pro-claimant, depriving veterans of disability compensation for which they have sacrificed their physical and mental health when, as here, the delay in filing was caused exclusively by the executive's own conduct is an injustice that Congress did not intend and the Constitution does not permit. MVA has a strong interest in this Court preventing that unlawful result and making sure that veterans have adequate, meaningful, and effective access to the benefits processes of the Department of Veterans Affairs.

INTRODUCTION

The Constitution protects the right of individuals to access the courts and administrative processes established by the government for the adjudication of legal disputes and statutory benefits. When the government deprives an individual of that right, a sense of hopelessness

and distrust grows, and our constitutional democracy suffers. Without adequate, effective, and meaningful access to the courts and other adjudicative fora, "in vain would the[] rights" we deem inalienable "be declared, ascertained, and protected by the dead letter of the laws." 1 William Blackstone, *Commentaries*, at *136. For that reason, the Supreme Court has noted repeatedly that the right of access is central to the existence of an orderly society.

The harm inflicted upon our constitutional democracy is uniquely damaging where the government employs its monopoly on police power to intimidate someone who seeks a benefit that the law plainly affords them. Bruce Taylor knows this firsthand. Mr. Taylor volunteered to serve in the Army during the Vietnam War and to participate in a highly classified testing program where our government exposed him to toxic chemical agents. But unlike his fellow service members, when Mr. Taylor was honorably discharged in 1971, he could not apply for the service-connected disability benefits that he was entitled to under federal law—even though the testing he endured left him with long-lasting and disabling effects. Mr. Taylor could not do so because the executive imposed upon him a secrecy oath that prevented him from

sharing his experience with anyone (including VA officials) and then threatened him with criminal prosecution if he violated the oath. To make matters worse, the executive provided no alternative mechanism by which he could apply for these benefits. For decades, the government deprived Mr. Taylor and similarly situated veterans of access to their congressionally guaranteed benefits. Finally, in 2006, the government declassified the names of those who had participated in the Edgewood testing program and permitted them to disclose their participation in seeking treatment from health care providers and claiming benefits from the VA. The constitutional (and deeply personal) injury inflicted upon Mr. Taylor is especially offensive given that the executive has denied him the very rights that Mr. Taylor risked his life to protect in service to his country.

If principles of equitable estoppel do not afford Mr. Taylor a 1971 effective date for his benefits, Mr. Taylor has an actionable claim under the standard described in *Christopher v. Harbury*, 536 U.S. 403 (2002). The undisputed facts in this case demonstrate that he was deprived of a meaningful opportunity to apply for benefits within one year from his discharge. The statute that limits the effective date of those benefits,

38 U.S.C. § 5110, is thus unconstitutional as applied to Mr. Taylor. The Court should therefore hold that § 5110 cannot be enforced against Mr. Taylor in a way that denies him an effective date tied to his September 1971 discharge from service.

ARGUMENT

I. The Government Violated Mr. Taylor's Constitutional Right To Seek Legal Redress In The Courts And The VA.

A. The constitutional right to seek legal redress is deeply rooted in our Nation's history and central to our constitutional democracy.

"In an organized society," the right to seek legal redress "is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). That understanding dates back centuries, tracing its origins to Magna Carta, the common law in England, and the American colonies. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011). For example, "every Englishman" had the "right … of applying to the courts of justice for redress of injuries" and "of petitioning the king, or either house of parliament, for the redress of grievances." 1 Blackstone, *supra*, at *137-39. The nature of these English petitions varied widely, ranging from personal disputes over property and contracts to claims of

unjust imprisonment, sentencing leniency, and arbitrary taxation. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 602 n.150 (1999). The rights of access to courts and to petition would "serve principally as [a] barrier[] to protect and maintain inviolate the three and great primary rights, of personal security, personal liberty, and private property." Blackstone, *supra*, at *136.

American colonists regarded their "petitions to England" and to "their local governmental bodies as a fundamental 'common law' right," which was reaffirmed in colonial charters and the acts of the First Continental Congress. Andrews, *supra*, at 603-04; *see also* Stephen A. Higginson*, A Short History of the Right To Petition Government for the Redress of Grievances,* 96 Yale L.J. 142, 146 (1986) (discussing variety of citizen petitions at the Founding to colonial assemblies). The right was so fundamental to securing their actual enjoyment of life, liberty, and property that the king's efforts to render it hollow—largely by answering the colonists' "repeated Petitions … only by repeated Injury"—resulted in the American Revolution. The Declaration of Independence ¶ 21 (U.S. 1776).

In the wake of the revolutionary war, the Framers understood firsthand what the Supreme Court subsequently observed: "[T]he right to sue and defend in the courts [and to petition the government] is the alternative of force" and thus must be safeguarded for any "organized society" to exist. *Chambers*, 207 U.S. at 148. Unsurprisingly, the Framers drafted a federal Constitution that, like the first state constitutions and declarations of rights, guarantees "the right to seek legal redress for wrongs reasonably based in law and fact," *Harer v. Casey*, 962 F.3d 299, 306 (7th Cir. 2020)—or, as Chief Justice Marshall put it, the "right to resort to the laws of [one's] country for a remedy," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). *See* Andrews, *supra*, at 604-05 (explaining that the "new states … continued to preserve the right to petition" and "viewed the rights of petition and judicial relief as closely linked").

That foundational right to seek legal redress necessarily includes "access to the courts" and "to all departments of the Government." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). It "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."

Guarnieri, 564 U.S. at 387. In fact, the early history of the right is replete with instances of petitions for the adjudication of disputes and for public benefits such as trade and licensing privileges, fishery rights, and land grants. *See* Higginson, *supra*, at 150. And, more recently, courts have faced denial-of-access claims in different contexts, such as the inability to pursue underlying tort claims, *see Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983) (wrongful death), or to pursue claims for statutory benefits—including, as relevant here, service-connected benefits from the VA, *see Broudy v. Mather*, 460 F.3d 106, 117 (D.C. Cir. 2006); *Vietnam Veterans of America v. McNamara*, 201 F. App'x 779, 780-81 (D.C. Cir. 2006).

Consistent with the breadth of the right of access, the Supreme Court has found that right to be grounded "in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (internal citations omitted); *see also* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 741-42 (1999) (explaining that the "right existed before

ratification of the Bill of Rights as a background principle of republican governance").

B. The constitutional right to seek legal redress guarantees adequate, meaningful, and effective access to the courts and government departments.

The right to seek legal redress is not a mere formality. Of course, "in its most formal manifestation," the right protects, for example, the ability to get into court. *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997). "Without more, however, such an important right would ring hollow in the halls of justice." *Id.* The Constitution therefore requires that the "access be adequate, effective, and meaningful." *Broudy*, 460 F.3d at 117; *accord Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Swekel*, 119 F.3d at 1262. And the right may be violated when the government "actively interfer[es] with," or "hinder[s]," a person's "efforts to pursue a [separate] legal claim." *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996).

In *Christopher*, the Supreme Court surveyed the history of cases involving a denial of the right of access and sorted these precedents into two basic categories: "forward-looking and backward-looking access claims." 536 U.S. at 413-14 & n.11. This "bifurcation," the Court

explained, "is a simplification, and not the only possible categorization." *Id.* at 414 n.11. However classified, the "justification" for a denial-of-access claim "is the same": "to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong" that in turn gives rise to a "nonfrivolous, arguable underlying claim." *Id.* at 414-15.

In a forward-looking claim, a plaintiff typically alleges "that systemic official action frustrates a plaintiff … in preparing and filing suits at the present time." *Id.* at 413. Although the "official action is presently denying an opportunity to litigate," the "opportunity has not been lost for all time … but only in the short term." *Id.* For example, a prisoner may bring a forward-looking denial-of-access claim seeking an adequate law library or assistance to prepare a court filing. *Id.* (citing *Lewis*, 518 U.S. at 346-48; *Bounds*, 430 U.S. at 828). Or an indigent plaintiff may bring such a claim seeking waiver of a filing or transcript fee to vindicate her right. *Id.* (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 106-07 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 372, (1971)). The "justification" for this type of claim "is to place the plaintiff in a position

to pursue a separate claim for relief once the frustrating condition has been removed." *Id.*

In a backward-looking claim, a plaintiff alleges that the government has already "caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief." *Id.* at 414 (internal citations omitted). That kind of claim "do[es] 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.* The goal is not to provide the claimant the means to pursue some separate claim, but rather to have "the judgment in the access claim itself" provide the relief that has been rendered unobtainable through other means. *Id.*

Examples abound of claims in each category. In the prisoner context, a prisoner "might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known." *Lewis*, 518 U.S. at 351. Or the prisoner might show that he "had suffered arguably actionable

harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint" within the statute of limitations. *Id.*; *accord Phillips v. Hust*, 477 F.3d 1070, 1078 (9th Cir. 2007) (upholding backward-looking claim where prison librarian's arbitrary "refusal to permit [prisoner] to use the comb-binder … interfered with his efforts to prepare his petition for certiorari"), *vacated on other grounds*, 555 U.S. 1150 (2009).

Other examples involve the cover-up of official misconduct. In *Bell v. Milwaukee*, for example, police officers killed a man and falsely claimed they acted in self-defense. 746 F.2d 1205, 1215-16 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). Bell's father sued for his son's wrongful death and settled for a meager sum. *Id.* Twenty years later, after one of the officers confessed to the cover-up, Bell's father sued again, successfully claiming that the officers' conspiracy effectively denied him access to judicial relief. *Id.* at 1215, 1224-25. The Seventh Circuit sided with the Bell family. *Id.* at 1261. It held that the officers' conduct interfered with their right of access by obstructing the potential for adequate legal redress on their underlying tort claim. *Id.*

Bell is hardly an outlier. In *Ryland v. Shapiro*, the Fifth Circuit similarly confronted allegations that could give rise to a cognizable denial-of-access claim. There, the plaintiffs plausibly alleged that two prosecutors prevented a full investigation into their daughter's shooting and falsely claimed that the daughter had committed suicide, in order to conceal the fact that a fellow prosecutor had killed her. 708 F.2d at 969-70, 973-75. The Fifth Circuit remanded the case to the district court to determine, among other things, if the cover-up wrongfully interfered with the plaintiffs' right to access the state courts to pursue their tort claim. *Id.* at 973-76. Indeed, other courts of appeals have held that "where a plaintiff adduces sufficient evidence of an after-the-fact conspiracy to cover up misconduct, even on an unidentified officer, he may be able to state a claim … for the violation of … the due process right of access to the courts." *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 285 (3d Cir. 2018); *see also Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998).

C. Mr. Taylor has an actionable denial-of-access claim.

1. To state a denial-of-access claim, a plaintiff must plausibly allege that (1) official acts denied (2) a meaningful opportunity, which is

yet to be gained or is already lost, (3) to pursue a non-frivolous, arguable underlying claim for relief. *See, e.g.*, *Christopher*, 536 U.S. at 414-15; *Harer*, 962 F.3d at 308; *Waller v. Hanlon*, 922 F.3d 590, 602 (5th Cir. 2019); *Flagg v. City of Detroit*, 715 F.3d 165, 174 (6th Cir. 2013); *Phillips*, 477 F.3d at 1075-76; *Broudy*, 460 F.3d at 120.

These elements vary slightly depending on whether the denial-of-access theory looks forward to an anticipated claim for relief, or backward to a lost claim. In the context of a forward-looking claim, the government's "official acts" must actively interfere with, or hinder, the plaintiff's present efforts to "seek some particular order of relief" or "[]adequate [resolution] of a meritorious case." *Christopher*, 536 U.S. at 413-14; *Lewis*, 518 U.S. at 351-53 & n.3. By contrast, in the context of a backward-looking claim, the "official acts frustrating the litigation" must have caused "the loss of an opportunity to seek some particular order of relief" or the "inadequate [resolution] of a meritorious case." *Christopher*, 536 U.S. at 413-15. Importantly, the plaintiff must show that there is "a remedy that may be awarded as recompense but [that is] not otherwise available in [a future] suit," as there is "no point in spending time and money to establish the facts constituting [the] denial

of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element." *Id.* at 415.

2. If equitable estoppel does not afford Mr. Taylor the effective date of September 7, 1971, then Mr. Taylor has an actionable denial-of-access claim.

As a threshold matter, there can be no question that Mr. Taylor has a meritorious underlying claim for relief. After all, the VA has already determined that Mr. Taylor is entitled under federal law to health care and service-connected benefits. Appx81. The sole question is whether those benefits should date back to September 1971 (when he was discharged from active-duty military service) or February 2007 (when he was finally able to file a claim without the government's threat of criminal prosecution).

The answer is yes. The government actively interfered with, or at the very least hindered, Mr. Taylor's ability to file a claim within one year of his discharge from service and thus obtain a September 1971

effective date, resulting in decades of lost benefits that he would otherwise be entitled to under federal law.[2]

Looking backward, at least two types of official acts deprived Mr. Taylor of the ability to file a claim for service-connected benefits within one year of his September 1971 discharge: (1) a secrecy oath that "prevented [Mr. Taylor] from seeking health care or filing an application for benefits for 35 years under penalty of court martial or criminal prosecution"; and (2) the government's "fail[ure] to provide any meaningful alternative process that honors Mr. Taylor's rights." Taylor Opening Br. at 53. Without equitable estoppel, Mr. Taylor's denial-of-access claim would be his only opportunity to obtain an order affording him an earlier effective date. That order would be, in the words of the Supreme Court, a "recompense … [that is] not otherwise available in [a future] suit." *Christopher*, 536 U.S. at 415.

3. Mr. Taylor's circumstances stand in stark contrast to those of other plaintiffs who have failed to state a denial-of-access claim largely

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[2] At the time of Mr. Taylor's discharge from service, the provision now codified at 38 U.S.C. § 5110(b)(1) was codified at 38 U.S.C. § 3010(b), but it provided the same one-year application period and effective-date guarantee as the current statute.

because they still had an opportunity to meaningfully pursue their claims for relief.

Broudy is instructive. In that case, a group of veterans sued the VA alleging, among other things, that they were denied a meaningful opportunity to pursue claims for service-connected benefits relating to their exposure to atomic radiation in violation of their constitutional right of access. 460 F.3d at 108-10. Specifically, the plaintiffs alleged that the government refused to produce test results revealing their true exposure to "dangerous levels of atomic radiation" and instead used "dose reconstructions" that were "seriously flawed." *Id.* As a result of the flawed data, the plaintiffs could not receive the benefits that they would otherwise be entitled to under federal law. *Id.*

The D.C. Circuit held that the plaintiffs had failed to state a denial-of-access claim "because the Freedom of Information Act ('FOIA'), and VA regulations that allow for the reopening of prior benefits proceedings, appear to provide them, in tandem, precisely what they claim they have been denied." *Id.* at 121-22. In other words, the plaintiffs could obtain the actual dosage records through FOIA and then invoke the VA regulations regarding reopening of claims to submit this

new and material evidence, which would allow those whose claims had been denied to receive benefits "retroactive[ly] to the date of original filing." *Id.* at 122.

Mr. Taylor does not have such an option. Neither FOIA nor the VA regulations (or any other law) offers him any relief. That is because the success of Mr. Taylor's underlying benefits claim (particularly, his request for an earlier effective date) does not turn on information that the government continues to conceal. Therefore, unlike the plaintiffs in *Broudy*, Mr. Taylor already has the information that he needs for his benefits application and can find no remedy in FOIA or similar disclosure mechanisms. Reopening and clear-and-unmistakable-error claims—the usual options for disabled veterans affected by government errors—are similarly no help to Mr. Taylor, as he is not attempting to correct a prior adjudication of benefits. *See* 38 C.F.R. §§ 3.105, 3.156(a). Nor is Mr. Taylor able to recapture the September 1971 effective date by filing some sort of new claim with the VA. That claim, like the 2007 claim from which this appeal stems, would receive an effective date under the same flawed calculations that governed the pending claim. *See* 38 U.S.C. § 5110; 38 C.F.R. § 3.400(b)(2)(i). In short, Mr. Taylor can

prove what the D.C. Circuit said that the plaintiffs in *Broudy* could not: that, absent a remedy for his constitutional claim (or some equitable remedy), he will suffer the "permanent loss of financial compensation." *Broudy*, 460 F.3d at 123.

For the same reason, this case is also a far cry from *Christopher*. There, the widow of a murdered Guatemalan citizen alleged that federal officials violated her constitutional right of access when they "intentionally deceived her in concealing information" that CIA-paid members of the Guatemalan military had detained, tortured, and killed her husband. 536 U.S. at 405. She argued that the federal officials' cover-up deprived her of the opportunity to bring a lawsuit that might have saved her husband's life. *Id.* The Supreme Court rejected her denial-of-access claim. It explained that this constitutional claim could not afford her the order that would "recompense [her] for the unique loss she claims as a consequence of her inability to bring an … action earlier"—namely, her husband's life. *Id.* at 421-22. Nor did the plaintiff demonstrate that "she can get any relief on the access claim that she cannot obtain on her other [pending] tort claims." *Id.* at 422. After all, the damages award sought as part of the access claim is also

available through the litigation of her tort claims and she "would end up just as well off … without the denial-of-access element." *Id.* at 415.

Here, by contrast, the order of an earlier effective date is precisely the kind of relief that would "recompense" Mr. Taylor "for the unique loss" of being unable to apply for benefits in 1971. That order also is unavailable without the denial-of-access claim, as it cannot be obtained in some suit that has yet to be brought or in any suit that is currently pending.

Relatedly, there can be no question that Mr. Taylor's denial-of-access claim is ripe for resolution. *See Lynch v. Barrett*, 703 F.3d 1153, 1157 (10th Cir. 2013) (concluding denial-of-access claim was ripe once government's obstructive conduct caused plaintiff to lose underlying claim for relief). This is not a circumstance in which the Court must wait for Mr. Taylor to "suffer[] some concrete setback" at the hands of the government to show that his claim for compensation has "been permanently compromised." *Waller*, 922 F.3d at 602-03 (ordering dismissal of denial-of-access claims without prejudice as unripe because underlying claim remained pending); *see also Harer*, 962 F.3d at 311 (same); *Delew*, 143 F.3d at 1222-23 (same). That setback has already

occurred and continues to deny Mr. Taylor the relief that federal law affords him.

II. The Remedy For The Government's Denial Of Access Is To Hold § 5110's Effective-Date Restrictions Unenforceable Against Mr. Taylor.

For all the reasons explained above and in Mr. Taylor's brief, the government violated Mr. Taylor's right of access by obstructing him from filing a claim for benefits for more than 35 years. This Court has asked what remedy is appropriate for this violation. Dkt. 37 at 4. As Mr. Taylor's en banc brief explains, Taylor Opening Br. at 61-65, the remedy is clear: this Court can and should hold that the VA cannot enforce § 5110 against Mr. Taylor to deny him an effective date of September 1971, because doing so would be an unconstitutional application of the statute.

That is the most direct and effective way to cure the harm caused by the government's actions. As discussed above, Mr. Taylor's denial-of-access claim falls into the category of "backward-looking" violations: The government's actions in the past prevented him from filing a claim within one year of his September 1971 discharge from service and thereby securing his right to that effective date for any award of

benefits. Had Mr. Taylor been able to access the VA benefits system and file that claim—or file some sort of placeholder claim, or take advantage of whatever other mechanism the government might have provided to him—it would have "produced a remedy subsequently unobtainable," in the words of the Supreme Court. *Christopher*, 536 U.S. at 414. That remedy is the September 1971 effective date, and there is no way now to go back in time and provide the timely claim that would anchor Mr. Taylor's benefits to his discharge date.

The purpose of a denial-of-access claim is to provide "relief" in just these circumstances, where a remedy is "obtainable in no other suit in the future." *Id.*; *see also id.* at 415 (backward-looking claim seeks "a remedy that may be awarded as recompense but not otherwise available in some suit that might yet be brought"); *supra* 16-21 (discussing Mr. Taylor's inability to obtain relief in another suit). And the way to provide relief in this action is to bar the VA from enforcing the one-year requirement of § 5110 against Mr. Taylor, thereby remedying the government's past unconstitutional acts.[3]

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[3] Mr. Taylor frames this as withholding enforcement of § 5110(a), which provides that the effective date "shall not be earlier than the date of

This is a standard way of remedying a backward-looking constitutional violation. As Mr. Taylor notes, for example, when a prison regulation improperly barred a prisoner from filing a habeas petition, the remedy was to hold the regulation invalid and proceed to consider the merits of the petition. *See Ex Parte Hull*, 312 U.S. 546, 549 (1941); Taylor Opening Br. at 62-63. Likewise, federal courts have suggested that a proper remedy for unconstitutional acts that prevented a timely filing can be remedied by tolling a statute of limitations. *See Swekel*, 119 F.3d at 1264. That is analogous to the relief Mr. Taylor seeks here, which is an order not to apply the "one year from such date of discharge" restriction of § 5110 to remedy the constitutional violations that prevented Mr. Taylor from adhering to that very restriction. Mr. Taylor filed his claim for service-connection in

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receipt of application therefor." Taylor Opening Br. at 64-65. The remedy might also be viewed as refusing to enforce § 5110(b)(1), which provides that "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." Mr. Taylor was unable to comply with this one-year filing period due to the government's unlawful interference. Regardless of how it is framed, however, the basic remedy is to refrain from applying these effective-date provisions in a way that violates Mr. Taylor's constitutional right of access.

February 2007, within one year of the July 2006 notice that removed the threat of prosecution for doing so. *See* Taylor Opening Br. at 14-15; Appx32-37. He thus acted promptly and diligently, applying for benefits as soon as he was able to do so freely. The Court can remedy the constitutional violation simply by holding that the "within one year *from such date of discharge or release*" language in § 5110(b)(1) cannot be enforced against Mr. Taylor in this action.

Beyond the denial-of-access context, this is the ordinary relief for any claim that a statute as applied to an individual claimant works a constitutional harm. "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Fisher v. King*, 232 F.3d 391, 395 n.4 (4th Cir. 2000). The Supreme Court and this Court have remedied all kinds of as-applied constitutional challenges by ordering this relief of selective non-enforcement. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 75 (2000) ("the application of § 26.10.160(3) to Granville and her family violated her due process right"); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-80 (1995) (rejecting enforcement of statute against certain federal employees whose First Amendment rights would

otherwise be violated); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101 (1982) (ruling a statute requiring certain public disclosures could not be enforced against certain minority political parties); *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) (invalidating statute "as applied to Palmer"); *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1577 (Fed. Cir. 1997) (holding that statute "as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports"), *aff'd*, 523 U.S. 360 (1998); *Int'l Bus. Machines Corp. v. United States*, 59 F.3d 1234, 1239 (Fed. Cir. 1995) (holding tax statute "unconstitutional as applied"), *aff'd*, 517 U.S. 843 (1996); *see generally* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 971-974 (2011) (cataloging as-applied constitutional challenges).

That this non-enforcement remedy is sometimes referred to as "enjoining" a statute's application does not render it "equitable" relief akin to an actual injunction, as the VA may argue. *See* Dkt. 15 at 12-16 (government's panel-stage brief characterizing requested due process remedy as a form of equitable relief); Appx6-7 (Veterans Court discussing its inability to provide "equitable relief" in the form of an

earlier effective date). This Court need not enter any injunctive relief requiring the executive to take (or not take) some particular action. Rather, this Court need only hold as a matter of law that the application of a specific federal statute to Mr. Taylor violates the Constitution in this case, and therefore cannot be applied. Such a holding is the quintessential "legal" remedy, because it recognizes the primacy of the Constitution over statutes enacted by Congress. *See Marbury*, 5 U.S. at 180 ("[A] law repugnant to the constitution is void."). Indeed, courts resolving as-applied constitutional challenges have not characterized this relief as "equitable." *Supra* 24-25.

Both the Veterans Court and this Court unquestionably have the authority to provide this remedy. Congress has directed that the Veterans Court "shall" "set aside decisions" of the Secretary or the Board that it finds to be "contrary to constitutional right, power, privilege, or immunity." 38 U.S.C. § 7261(a)(3)(B). Likewise, this Court is empowered to "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof," including by "interpret[ing] constitutional … provisions." *Id.* § 7292(c). It is difficult to see how the courts could exercise this authority without the power to

render a statute inoperative when its application to a given claimant is found to violate the Constitution. And that is exactly the remedy that Mr. Taylor's constitutional claim demands.

Furthermore, even if this remedy for Mr. Taylor's right-of-access claim could fairly be characterized as "equitable," it is not the kind of equitable relief that the Veterans Court is barred from ordering. Both the Veterans Court in its decision and the VA in its panel-stage brief erred in suggesting otherwise. *See* Dkt. 15 at 13; Appx6-7. In *Burris v. Wilkie*—the authority the Veterans Court relied on here, Appx6—this Court explained that the Veterans Court's authority is limited by § 7261 and admonished that the court, as a "creature of statute," is not empowered to grant relief not provided for in that statute. 888 F.3d 1352, 1357-58 (Fed. Cir. 2018). But, as just discussed, § 7261 does allow—indeed, it commands—the relief Mr. Taylor seeks here, setting aside a decision of the Board that is contrary to the Constitution. In contrast, the appellants in *Burris* were seeking relief founded on principles of equity, not based on any legal argument. 888 F.3d at 1356-57 (observing that appellants did not contest that they were ineligible for relief under law).

The discussion of 38 U.S.C. § 503 in *Burris* also does not cause problems for Mr. Taylor's remedy, again contrary to the Veterans Court's reasoning, Appx6. That statute permits the Secretary to provide "such relief … as the Secretary determines equitable" when benefits "have not been provided by reason of administrative error" on the part of the federal government or federal employees. 38 U.S.C. § 503(a). That was "the precise relief" requested by the appellants in *Burris*. 888 F.3d at 1358. As this Court explained, Congress's decision to give the Secretary discretionary authority to provide that relief "suggests that Congress intended for the Secretary to be the exclusive avenue by which a claimant may seek such relief." *Id.* at 1359. But Mr. Taylor's case does not involve the kind of mere "administrative error" that the Secretary may remedy in his discretion under § 503. The actions of the federal government and its employees violated Mr. Taylor's constitutional right to seek from that same government the benefits to which he was entitled by law. The Veterans Court and this Court unquestionably have the statutory authority to set aside a decision by the VA that fails to remedy that constitutional violation.

CONCLUSION

To the extent the Court concludes that equitable estoppel is not available to provide Mr. Taylor with an effective date of September 1971, it can and should hold that § 5110 cannot constitutionally be enforced against Mr. Taylor to deny him that effective date.

October 4, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 29(b), because this brief contains 5747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

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