No. 19-2211

In The United States Court of Appeals for the Federal Circuit

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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.

EN BANC BRIEF OF *AMICUS CURIAE*
NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM
SUPPORTING CLAIMANT-APPELLANT

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October 4, 2021

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 19-2211

Short Case Caption Taylor v. McDonough

Filing Party/Entity National Law School Veterans Clinic Consortium

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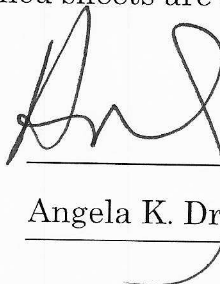
Signature: 

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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
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IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus Curiae National Law School Veterans Clinic Consortium (the "NLSVCC" or "Consortium") submits this brief in support of the position of the Claimant-Appellant, Bruce R. Taylor. The Board of the NLSVCC, a 501(c)(3) organization, authorized the filing of this brief.[1] This Court invited the filing of this brief. Dkt. 37 at 5, ¶ 6 (Jul. 22, 2021).

NLSVCC is a collaborative effort of the nation's law school legal clinics and pro bono attorneys dedicated to addressing the unique legal needs of U.S. military veterans. The Consortium's mission is to gain support and advance common interests with the VA, Congress, state and local veterans service organizations, court systems, educators, and other entities for the benefit of veterans throughout the country.

The NLSVCC exists to promote the fair treatment of veterans. It therefore is keenly interested in this case and is grateful for the opportunity to advocate in support of veterans who have been unfairly impacted by the erroneous interpretation

[1] NLSVCC thanks and acknowledges University of Montana law student Noah Goldberg-Jaffe for sections I and III, University of Missouri-Columbia law students Joel Smith and Emily Bergmann for section II and editing. In addition, we thank University of Florida law students Taylor Oliver, Natalie Alexis, Nina Carella, Amber Sowell, Wesley Backer, and Alexia Harley for cite checks and sections IV and V. Professor Hillary Wandler (Montana) and Professor Judy Clausen (Florida) supervised the research and writing of the brief.

and implementation of 38 U.S.C. § 7261. A decision barring the U.S. Court of Appeals for Veterans Claims ("Veterans Court") from granting equitable relief would preclude countless veterans from fully recovering the benefits earned from honorable military service. In a pro-veteran, non-adversarial system, this is prejudicial, unworkable, and unacceptable, particularly against the statutory backdrop designed to provide fairness to veterans, many of whom suffer severe disabilities as a result of their military service.

STATEMENTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Under Federal Rule of Appellate Procedure 29(a)(4)(E) and Federal Circuit Rule 29(a), the NLSVCC states:

a) No party's counsel has authored this brief in whole or part;

b) No party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and

c) No other person has contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

I. Mr. Taylor's remedy must come from the Veterans Court.

The Federal Government's misconduct—not a mere administrative error or simple negligence—caused injustice in this case. Only the Veterans Court can cure the injustice here because the Secretary's equitable authority, found in 38 U.S.C. § 503, provides no remedy.

Section 503 empowers the Secretary to provide equitable relief for "administrative errors." Section 503(b) refers to "loss as a consequence of reliance," but the scope includes only reliance on "a determination by the Department of eligibility or entitlement to benefits," not reliance on executive branch misconduct that prevented such a determination. 38 U.S.C. § 503(b). This Court has recognized Section 503's limitation on the Veterans Court's equitable powers, but that limitation does not help decide the issue here. *See Burkhart v. Wilkie*, 971 F.3d 1363, 1370 (Fed. Cir. 2020) (recognizing the limitation is defined by those "certain" powers provided in Section 503).

Mr. Taylor's injury was caused by executive branch misconduct but arises within the VA benefits system. Thus, other federal courts do not offer Mr. Taylor a remedy—his remedy must come from the court with jurisdiction to review determinations within the VA benefits system. The Veterans' Judicial Review Act

("VJRA") of 1988 created the Veterans Court to give effect to Congress's long-standing "solicitude for veterans," conferring on it exclusive jurisdiction to review veterans benefits determinations. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432, 440 (2011); 38 U.S.C. § 7252. The Veterans Court's exclusive jurisdiction necessarily empowers it to carry out the tasks mandated by Congress in 38 U.S.C. § 7261.

If this Court holds the Veterans Court lacks authority to provide a remedy, it will close a door long left open by the U.S. Supreme Court and courts across the nation, including both Article III and Article I courts—the power to equitably estop the government in the face of affirmative misconduct. In closing that door, this Court will open a window for the Federal Government to trick its citizens to their detriment and the government's gain, later saying, "the joke is on you." *See Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (noting this message to its citizens is "hardly worthy of our great government" even when the "booby trap" that led to appellants' injury was "unwittingly set"). And by setting the Veterans Court apart as having less power than other Article I courts, it will isolate the very court created to *end* the "splendid isolation" that allowed the VA system to remain, as this Court has described, "unscrutinized and unscrutinizable" for so long. H.R. Rep. No. 100-963, 10, 1988 U.S.C.C.A.N. 5782, 5791 (quoting Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan

L. Rev. 905 (1975), who began his analysis with the absolute power maxim, "Power tends to corrupt, and absolute power corrupts absolutely."); *Gardner v. Brown*, 5 F.3d 1456, 1463–64 (Fed. Cir. 1993), aff'd, 513 U.S. 115 (1994). That this would be "hardly worthy" of our government hardly covers it.

II. The statutory grant of jurisdiction to the Veterans Court does not preclude the Veterans Court's exercise of equitable power.

The starting point for any case of statutory construction is the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Section 7252 provides the Veterans Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." The Veterans Court's scope of review is defined by 38 U.S.C. § 7261. 38 U.S.C. 7252(b) ("The extent of the review shall be limited to the scope provided in section 7261 of this title.").

A. Congress implicitly intended that the Veterans Court could provide equitable relief.

Congress legislated § 7261 against a common law background that recognized equitable powers as an inherent part of judicial powers committed to all federal courts. *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999). "[E]quitable powers are an inherent part of the 'judicial power' committed to the federal courts by Article III." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010). Federal courts' equitable powers include those "traditional powers exercised by English courts of equity[.]" *Fid. & Deposit Co. of Maryland v. Edward E. Gillen Co.*, 926 F.3d 318,

326 (7th Cir. 2019); *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

The Supreme Court instructs that the full scope of a federal court's equitable jurisdiction shall be recognized unless a statute explicitly or by "necessary and inescapable inference" restricts the court's jurisdiction in equity. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This omission is instructive as to Congress's intent regarding the Veterans Court's equitable powers. Nothing in § 7261 explicitly prevents the Veterans Court from using all traditional equitable powers. 38 U.S.C. § 7261 (lacking the word "equity" or "equitable" and addressing none of the traditional equitable remedies).

The Veterans Court is an Article I court, not an Article III court, but Congress intended the Veterans Court to have the equitable powers of any other federal court. *See* Senator Cranston, 134 Cong. Rec. S16632-01 ("Mr. President, the compromise agreement would create the U.S. Court of Veterans Appeals—a judicial tribunal in every sense of the word.").

B. The legislative history of the VJRA supports the Veterans Court's use of equity.

The legislative history of the VJRA indicates that Congress placed judicial review of the Veterans Administration's decisions in the Veterans Court instead of Article III courts due only to concerns regarding consistency of decisions and

conservation of judicial resources. The 1970s and 1980s were replete with attempts by Congress to create judicial review of the Veterans Administration's management of benefits for veterans. *See* S. Rep. No. 100-418 at 29-30 (1988). Four times prior to 1988, the Senate passed legislation that was not taken up in the House. 134 Cong. Rec. S9178-02 (1988). In 1988, the Senate again passed legislation creating judicial review of VA decisions. 134 Cong. Rec. H9370-03 (1988). This time, the House also passed similar legislation. *Id.* The differences between the two bills resulted in a joint committee compromise that gave rise to legislation, signed into law by President Ronald Regan. 134 Cong. Rec. S17351-01 (1988). The 1988 bill generated reports and debate that highlight the intent of Congress when enacting the VJRA.

An issue central to the judicial review debate was the potential impact on the federal courts. *See* H.R. Rep. No. 100-963 at 25 (1988). Congress was concerned about the extensive judicial resources that would be necessary to permit fact-finding outside the expertise of the Veterans Administration. *Id.* ("It is clear from the testimony before the committee that judges do not wish to take on the very technical and specialized task of applying a well established [sic] body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants."). As a result, early in the 1988 sessions, proposals provided for review in federal appellate courts instead of federal district courts. *See* 134 Cong. Rec. S16632-01 (1988) ("[U]nder the original Senate measure

. . . veterans were given the opportunity to appeal claims directly to U.S. courts of appeals[.]"). The prospect of federal appellate court review raised concerns, including from then Judge Stephen Breyer, that the expertise necessary to review such decisions existed at the VA itself and that such expertise was one of the agency's primary purposes. 134 Cong. Rec. E2217-01, Jun. 29, 1988.

Congress debated which VA actions a federal court should be permitted to review. S. Rep. No. 100-418 at 70-71 (1988). Two distinctly different Senate bills were initially proposed. *Id.* at 128-129. The first, S. 2292, was concerned only with review of rules and regulations of the VA. *Id.* at 128. The second, S. 11, was concerned also with review of individual veteran benefits decisions. *Id.* An obvious catalyst for the design of the first bill was the aforementioned resource drain on the federal courts that would accompany opening the door to thousands of veterans to appeal the factual findings of their cases. S. Rep. No. 100-418 at 51 (1988) (expressing concern "that the specific formula chosen must reflect the Committee's intention to retain the BVA as the primary, expert arbiter of VA claims matters.").

To address the concern regarding judicial resource drain, the legislators spent considerable time assessing what standard of review the reviewing court should use for findings of fact. Sen. Rep. No. 100-418 at 55-59 (1988) (explaining that "the Committee's single greatest concern [in framing judicial review provisions] was defining the scope of review to be applied by a reviewing court"). Completely absent

from the discussion was any concern regarding a court's use of equitable powers. S.Rep. No. 100-418 at 55-62 (1988). The Committee designed a new standard of review for findings of fact. S.Rep. No. 100-418 at 59 (1988) ("so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if (the finding) were not set aside"). Having crafted a standard "not patterned after any scope of review provision in any existing statute," the Committee expressed a desire for the newly-created court to look to legislative history for guidance. *Id.* ("Moreover, by framing a new standard of review, the Committee expects that, to the extent the Committee's intentions regarding the scope of review are not plain on the face of the statute, reviewing courts will seek clarification from the legislative history of this legislation[.]"). While, ultimately, the Committee settled on the "clearly erroneous" standard existing today, the time and attention provided to defining the appropriate standard of judicial review over factual findings— without any time being spent on equitable relief—highlights that factual issues were of paramount importance to Congress, not the traditional equitable abilities of federal courts.

Allowing the government's misconduct in this case to serve as a bar to Mr. Taylor's benefits is not in line with Congressional intent. In its report accompanying the bill that resulted in the VJRA, the Senate endorsed the comments of a speaker from the National Veterans Law Center: "The product of the prohibition against

judicial review is mistrust, suspicion and lack of confidence . . . . Review by the courts would provide an explanation of decision-making and a ventilation of the frustration of veterans." S. Rep. No. 100-418 at 50 (1988) (quoting Ronald Simon). The Committee elaborated that it considered providing judicial review "necessary" to achieve "fundamental justice." *Id.* "To continue to inform claimants before the VA that benefits to which they are entitled by law could be wrongly denied and that there is no remedy for such a wrongful denial, is no longer a viable position." *Id.*

In fact, the tenor of the legislative history of the VJRA is an overwhelming concern for fairness. 134 Cong. Rec. S16632-01 ("Everyone's goal, Mr. President, has been to ensure that veterans get a fair shake on their claims for benefits."); 134 Cong. Rec. S9178-02 (1988); 133 Cong. Rec. S201-01 (1988); 134 Cong.Rec. H10342 (1988) ("One of the principal reasons judicial review is needed is to help ensure fairness to individual claimants before the VA."). While arguing for a version of the bill that contained review of individual benefits decisions, which was ultimately adopted, Senator Cranston posed the question, "[d]oes the Congress wish to allow a manifestly unjust result in a VA claims decision to be immune from being challenged and reviewed in court?" S. Rep. No. 100-418 at 129 (1988). Senator Cranston answered, "I believe veterans deserve the opportunity to present such challenges which I believe are fundamental to our system of checks and balances and precepts of basic fairness." *Id.*

Therefore, this Court's interpretation of § 7261 should be informed by the tenor of the legislative history and focus on fairness—the touchstone of equity. The word "fair" appears 41 times in the congressional reports accompanying the VJRA. *See* S. Rep. No. 100-418 (1988); *see also* H.R. No. Rep. 100-963 (1988). Equitable estoppel is, by nature, rooted in fairness, and the Veterans Court must have the power to remedy government misconduct.

C. The pro-veterans canon supports the conclusion that Section 7261 should be read broadly to include equitable relief.

When interpreting veterans benefits statutes, courts apply a pro-veteran canon, placing a "thumb on the scale" in favor of the pro-veteran interpretation. *See generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Courts should apply the pro-veteran canon like any other principle, law, or substantive canon of construction—as a tool that helps courts and agencies discern the true meaning of the regulation or statute.

The pro-veteran canon carries significant weight when the court is faced with ambiguity or silence in a statute, ultimately weighing in favor of any reasonable interpretation "to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115-18 (1994). Here, application of the canon leads to the conclusion that equitable remedies may be provided by the Veterans Court, as Section 7261 does not preclude such power and the legislative history supports such a conclusion.

D. This Court's previous interpretation of Section 7261 does not prevent a finding for Mr. Taylor here.

This Court previously interpreted § 7261 and addressed the Veterans Court's equitable powers in *Burris v. Wilkie*, 888 F.3d 1352 (Fed. Cir. 2018). *Burris* was a consolidated case involving the education benefits of two beneficiaries. *Id.* at 1354. One veteran transferred his benefits to his son after receiving an erroneous certificate of eligibility that instructed the veteran that he had three years of eligibility remaining instead of the correct three months. *Id*. at 1355. As a result, the veteran's son chose to attend the more expensive of the law schools that he was considering. *Id.* When VA later denied the claim, the son was left with a substantial tuition bill. *Id.* The beneficiary in the second case was the son of a permanently disabled Vietnam veteran. *Id.* As a result of his mother's sudden death, the son became the veteran's primary caregiver and had to discontinue his studies for several years. *Id.* VA denied benefits to offset the education expenses incurred prior to his mother's death due to the staleness of the claim and denied benefits to cover the expenses incurred after returning to school due to the son's age. *Id.*

In both cases, claimants requested equitable relief from the Veterans Court. *Id.* The Veterans Court held that it lacked jurisdiction to grant equitable relief. This Court affirmed. *Id.* at 1361. ("[T]he Veterans Court cannot invoke equity to *expand* the scope of its statutory jurisdiction." (emphasis in original)).

This Court's conclusion in *Burris* that granting equitable relief would have improperly expanded the Veterans Court's jurisdiction is not applicable here due to the holding in *Henderson*. In *Henderson,* the Supreme Court held that the filing deadline for an appeal of a benefits claim to the Veterans Court was non-jurisdictional. *Henderson* therefore opened the door to equitable tolling considerations.

Burris explained that *Henderson* does not apply to cases where substantive relief is sought. But like the veteran in *Henderson*, Mr. Taylor is not asking the Veterans Court to expand its jurisdiction. He is asking for procedural claims processing relief, specifically an earlier effective date. The Secretary's position is that Mr. Taylor cannot be granted benefits dating from his date of discharge because he did not file a claim within one year of his discharge. *Taylor v. Wilkie*, 31 Vet. App. 147, 150 (2019).

Notably, Mr. Taylor's entitlement to benefits resulting from a service-connected disability is not in dispute. *Id.* Mr. Taylor's substantive right to benefits is provided by 38 U.S.C. § 1110 (requiring the United States to pay disabled veterans compensation for disabilities "resulting from personal injury suffered or disease contracted in line of duty . . . in the active military . . . during a period of war"). This section is found in Title 38, Part II, ("General Benefits"), Chapter 11 ("Compensation for Service-Connected Disability").

Effective dates, at issue here, are governed by Section 5110. Section 5110 is found in Title 38, Part IV, ("General Administrative Provisions"), Chapter 51 ("Claims, Effective Dates, and Payments"). In short, Section 5110 dictates the procedure by which the veteran exercises his substantive rights arising from Section 1110.

Accordingly, the Secretary's position rests on a missed deadline, not substantive entitlement. *Burris* should not control. Granting an earlier effective date here does not expand the Veterans Court's jurisdiction; it is akin to accommodating a missed Notice of Appeal due to equitable tolling. Like the 120-day deadline to file a notice of appeal in *Henderson*, the Veterans Court should be found to have the power to apply equitable principles to compensate veterans fully.

Finally, in *Burris*, this Court applied the canon of construction that expression of a term in one section of a statutory scheme and exclusion from a different section gives rise to a negative inference that the exclusion indicates intent by Congress. *See Burkhart v. Wilkie*, 971 F.3d 1363, 1370-71 (Fed. Cir. 2020) (discussing *Burris*). Specifically, *Burris* notes that the inclusion in § 503 of equitable power to the Secretary to grant relief in cases of administrative error gives rise to the inference that the lack of mention of equitable relief in § 7261 means the Veterans Court has no equitable powers. *Id.* However, neither § 503 nor the statutory scheme requires such an inference.

The *Burris* court relied on the assertion that § 503 "provides the Secretary with the authority to grant the *precise* relief" that the appellant had requested. *Burris* at 1358 (emphasis added). While § 503 does provide the Secretary authority to grant equitable monetary relief, it is restricted to when a veteran relied "upon a determination by the Department of eligibility or entitlement to benefits" or when benefits had not been provided "by reason of administrative error." 38 U.S.C. § 503. Mr. Taylor did not rely on a determination of the Department, but rather a restriction imposed by the government that rendered it impossible to make an adequate claim for benefits. Mr. Taylor is not claiming administrative error by the Department of Veterans Affairs. Thus, § 503 does not provide the "precise relief" requested, and the inclusion in § 503 of equitable powers should not be interpreted to preclude it from being implied elsewhere.

Burris's narrow reading of the Congressional intent for the availability of equitable relief for veterans seeking benefits is not in line with Congress's liberal design of veterans benefit law as a whole. The implication is that Congress did intend for veterans to have access to equitable relief and crafted § 503 as the vehicle to provide such relief. *See Burris*. The legislative history of § 7621 and overall design of Title 38, however, indicate a claimant-friendly statutory scheme, unique to veterans benefit law. *See* supra section III.B.; *see also* 38 U.S.C. 5107(b) (giving the "benefit of the doubt to the claimant"). That an important tool available to courts in

other areas of law—equity—would not be available in the realm of veteran benefits is contradictory to the entire spirit of Title 38. The Veterans Court was created to address the very concern that veterans needed access to the same level of judicial review that any other citizen receives. Cabining the Veterans Courts jurisdiction on a claims processing issue frustrates this goal.

III. Confronted with affirmative governmental misconduct, Article I courts are empowered to equitably estop the government.

Article I courts have the power to apply the doctrine of equitable estoppel against the government in cases over which they have jurisdiction.

A. The United States Court of Federal Claims

Congress created the United States Court of Federal Claims ("Court of Federal Claims") to hear cases in which a "dispute centers on the parties' mutual contract rights and obligations," against the Government. *Burnside-Ott Aviation Training Ctr. v. United States*, 985 F.2d 1574, 1580 (Fed. Cir. 1993). The court was given essential judicial power in response to President Abraham Lincoln's 1861 Annual Message to Congress, in which he asserted "[i]t is as much the duty of Government to render prompt justice against itself in favor of citizens, as it is to administer the same, between private individuals." United States Court of Federal Claims: The People's Court, available at https://uscfc.uscourts.gov/history-of-the-court (click "Court History Brochure"). The Court's jurisdictional statute broadly empowers the

court to "render judgment upon any claim against the United States," but it does not mention equity or equitable estoppel specifically. Tucker Act, 28 U.S.C. § 1491(a)(1).

Even though the jurisdictional statute does not explicitly refer to equity, this Court and the Court of Federal Claims have repeatedly acknowledged the Court of Federal Claims' authority to equitably estop the government if the doctrine's elements are satisfied. *See Burnside-Ott*, 985 F.2d at 1574 (holding Court of Federal Claims improperly construed *Richmond* too broadly in finding claimant's equitable estoppel claim was barred as a matter of law); *Zacharin v. United States*, 213 F.3d 1366 (Fed. Cir. 2000) (applying an affirmative misconduct standard to the Army's alleged provision of incorrect legal advice to the petitioner); *Allen Eng'g Contractor, Inc. v. United States*, 115 Fed. Cl. 457, 463-64 (2014), aff'd, 611 F. App'x 701 (Fed. Cir. 2015) (applying the affirmative misconduct standard to the Navy's failure to properly investigate a contract payment issue); *Warner v. United States*, 103 Fed. Cl. 408, 414 (2014) (applying the affirmative misconduct standard to the Air Force's alleged failure to adequately counsel the petitioner on the standards used in making EPTS determinations).

B. The United States Bankruptcy Court

The United States Bankruptcy Court ("Bankruptcy Court") is an Article I court created by Congress under the explicit authority of the Constitution to create

"uniform laws on the subject of bankruptcies." U.S. Const. art. I, § 8, cl. 4. The Bankruptcy Court has jurisdiction to "issue any order, process, or judgment that is necessary . . . to carry out the provisions of this title." 11 U.S.C § 105(a) (referring to the Bankruptcy Title of the U.S. Code). Rather than enumerating the Bankruptcy Court's powers or explicitly referring to equity, the jurisdictional statute authorizes the Bankruptcy Court to do what is "necessary" to fulfill its constitutional role in administering the federal bankruptcy system, language the courts have construed as including "equitable powers." *See In re Gurney*, 192 B.R. 529, 537 (B.A.P. 9th Cir. 1996) ("Section 105(a) allows the bankruptcy courts to inject traditional equitable principles into the operation of the bankruptcy system to prevent abuse of the drafter's intent"); *In re CIS Corp.*, 172 B.R. 748, 757 (S.D.N.Y. 1994) (recognizing the Bankruptcy Court's "general equity power under § 105," which is naturally limited by the court's jurisdiction).

The Bankruptcy Court's jurisdictional statute, like the Court of Federal Claims' jurisdictional statute, inherently (rather than explicitly) authorizes the court to apply equitable principles, and so empowers it to apply the doctrine of equitable estoppel against the government when the doctrine's elements are satisfied in a case over which it has jurisdiction. *See Matter of Larson*, 862 F.2d 112, 115 (7th Cir. 1988) (recognizing the Bankruptcy Court's power to apply the doctrine of equitable estoppel to the government, albeit urging "great caution" when doing so); *In re*

Ludlow Hosp. Soc'y, Inc., 124 F.3d 22, 25-28 (1st Cir. 1997) (acknowledging Bankruptcy Court has power to estop the government when "the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code").

C. The United States Tax Court

Like other Article I courts, the United States Tax Court ("Tax Court") exercises judicial power within its limited jurisdiction. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 890-91 (1991) (calling the Tax Court's powers "quintessentially judicial in nature"); 26 U.S.C. § 7442 (noting the Tax Court's jurisdiction and scope of review are contained throughout Title 26 and various other statutory acts). Also like other Article I courts, the Tax Court draws its equitable power from its enabling and jurisdictional statutes, which inherently empower the court to use equitable principles like estoppel when necessary to achieve a just result. *See Bokum v. Comm'r of Internal Revenue*, 992 F.2d 1136, 1140 (11th Cir. 1993) (recognizing the Tax Court's "power to consider an equitable estoppel claim" when the doctrine's application would be "necessary" to decide the case over which it has jurisdiction); *Flight Attendants Against UAL Offset (FAAUO) v. Comm'r of Internal Revenue*, 165 F.3d 572, 578 (7th Cir. 1999) ("We are at a loss to understand why . . . equitable estoppel shouldn't be among the equitable principles applicable to proceedings in the Tax Court. *Bokum v. Commissioner, supra*, holds that they are

among them.”); *see also River City Ranches #1 Ltd. v. Comm’r of Internal Revenue*, 401 F.3d 1136, 1139 (9th Cir. 2005) (noting the U.S. Supreme Court has left the door open for both defensive and equitable estoppel against the government if the doctrine’s elements are satisfied).

In sum, congressionally-created Article I courts, while courts of limited jurisdiction, have inherent authority within that jurisdiction to apply the doctrine of equitable estoppel to protect individual interests against affirmative governmental misconduct.

IV. This case presents a balance of powers conundrum that can only be rectified by equitable relief.

Considering the egregious executive branch misconduct, depriving Mr. Taylor of his benefits from the date of his discharge abrogates the pro-veteran canon and Congress’s explicit pro-veteran statutory scheme. This confluence disrupts the balance of powers. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (stating that the pro-veteran statutory scheme reflects “special solicitude for the veteran’s cause.”)

While the Constitution does not explicitly state “separation of powers” or “balance of powers,” it sets forth a foundation supporting checks and balances. In Articles One through Three, the Framers distributed power between a legislative, executive, and judicial branch. U.S. Const. arts.1-3. Throughout U.S. history, courts have emphasized that balance of powers between the branches is foundational to our

government. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (holding that Executive Order directing Commerce Secretary to take possession of steel plants involved in labor dispute was improper exercise of Presidential power, disrupting the balance of powers; Constitution gave Congress, not President, lawmaking function, and stating "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (stating "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.")

Here, the executive has "aggrandized" its power at the "expense of" the legislature and judiciary because depriving Mr. Taylor decades of benefits undermines the veteran-friendly statutory scheme for benefits. *Buckley*, 424 U.S. at 122. Executive branch misconduct, through threat of court-martial if Mr. Taylor disclosed the human testing program, prevented Mr. Taylor from filing his well-founded Section 1110 disability benefits claim for decades. This executive branch "encroachment" on the legislature's desire to compensate disabled veterans is plain. Further compounding the separation of powers issue, this encroachment frustrates

the judiciary's power to review VA disability benefit decisions. *Buckley*, 424 U.S. at 122.

Separation of powers is threatened when one governmental branch encroaches on another. For example, in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, the Supreme Court found the legislated removal protections for the director of the Consumer Financial Protection Bureau (CFPB) violated constitutional separation of powers. 140 S.Ct. 2183, 2211 (2020). It held that by creating a structure that only allowed for removal of the single CFPB director "for cause," the legislature overreached into the executive's role and violated separation of powers. *Id*. at 2207. In light of this overreaching, the Supreme Court struck the offending portion of the statute.

Just as the legislature improperly intruded into executive functions in *Seila Law LLC*, here, the executive branch improperly overreached into judicial and legislative functions, violating the constitutional separation of powers. *Seila Law LLC*, 140 S.Ct. at 2207. As in *Seila*, where the judiciary needed to rectify the imbalance of powers, this Court must rectify the imbalance of powers by providing that equitable relief exists, to allow Mr. Taylor to recover earned benefits from date of discharge. *Id.* at 2196. In short, when one branch encroaches upon another, violating constitutional separation of powers, the judiciary must rectify the imbalance. *Id.*

Further, denying Mr. Taylor his earned benefits from the date of his discharge disrupts the balance of powers by undermining the veteran-friendly statutory scheme. *See Euzebio v. McDonough*, 989 Fed.3d 1305, 1326 (2021) (stating veterans' benefits system is "not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran . . . who has a valid claim.") Congress created the veterans benefits statutory scheme to be non-adversarial and pro-veteran and a secrecy oath undermines this intent.

V. A review of Veterans Court decisions reveals the need for broad, not constrained, equitable jurisdiction in appropriate cases.

As discussed above, *Henderson* stands for the proposition that the 120-day appeal filing deadline to the Veterans Court is not jurisdictional; as a result, equitable tolling is used to excuse missing the deadline in appropriate cases.[2] Because equitable tolling must be used to determine when an untimely notice of appeal is accepted, *Henderson* stands for the proposition that the Veterans Court must use equity where appropriate.

It seems nonsensical that the Veterans Court may employ equity, in terms of equitable tolling, when it comes to determining if it will hear an appeal, but not use equity, in terms of equitable estoppel when faced with a Board decision furthering

[2] The authors are cognizant of this Court's request to avoid discussing equitable tolling but briefly explore *Henderson* to illustrate that the Veterans Court has equity powers.

affirmative governmental misconduct. Indeed, a review of Veterans Court decisions reveals that the Veterans Court would benefit from a clear pronouncement of its equitable powers to ensure fulfillment of the congressional mandate of a pro-veteran statutory scheme for benefits.

In *Rosenberg v. Mansfield,* Judge Kasold's concurrence outlined the Veterans Court's broad equity power. *Rosenberg v. Mansfield*, 22 Vet. App. 1, 5 (2007). In response to the VA Secretary's misplaced argument that the Veterans Court lacked jurisdiction to review a claim for equitable estoppel, presumably because the Veterans Court did not sit as a court of equity, Judge Kasold reasoned that although the Veterans Court generally has no jurisdiction to review the Secretary's exercise of his equitable authority under 38 U.S.C. § 503 "it does not follow that [the Veterans Court] lacks the authority to review . . . any . . . arguments seeking equitable relief due to error on the part of the Secretary." *Rosenberg*, 22 Vet. App. at 5 (citing *Manio v. Derwinski*, 1 Vet. App. 140, 143 (1991) (stating the Veterans Court's authority to consider equitable defenses), and *Browder v. Derwinski*, 1 Vet. App. 204, 208 (1991) (reviewing the applicability of the equitable doctrine of laches to cases before the Veterans Court)). Additionally, Judge Kasold described other incidences in which the Veterans Court used its equity powers, for example to issue decisions nunc pro tunc when equity warrants. *Rosenberg*, 22 Vet. App. at 5 (citing *Padgett v. Nicholson*, 473 F. 3d 1364, 1371 (Fed. Cir. 2007) (stating such relief is equitable in

nature*)*, and *Seals v. Derwinski*, 2 Vet. App. 190, 191 (1992) (granting such equitable relief)). Furthermore, Judge Kasold stated that it was well-established that the Veterans Court had the same equity powers as "all courts established by an act of Congress" granted by the All Writs Act. *Rosenberg*, 22 Vet. App. at 5. Judge Kasold noted the Veterans Court had previously invoked equitable estoppel against the Secretary, precluding the Secretary from asserting that a claimant's informal claim was not a "cognizable claim for effective date purposes." *Rosenberg*, 22 Vet. App. at 6-7 (citing *Servello v. Derwinski*, 3 Vet. App. 196, 200 (1992). Moreover, Judge Kasold noted that the Veterans Court invoked equity powers in holding that fair process required certain notifications and that "[r]emedial actions such as these are not mandated by statute or regulation; they are all equitable resolutions imposed by the [Veterans] Court." *Rosenberg*, 22 Vet. App. at 7 (citing *Thurber v. Brown*, 5 Vet App. 119, 123 (1993)).

Respectfully, equitable powers should not be parsed out and authorized on a label-by-label approach, that is, "equitable tolling" versus "equitable estoppel." Equity requires that justice be done, and limiting by a label results in confusing law. As Judge Greenberg explained in his dissent in *Bonner v. Wilkie*, the Veterans Court errs when it shies away from "fulfilling express congressional intent of benefiting this nation's veterans" by failing to use broad equity powers. 33 Vet. App. 209, 227 (2021) (Greenberg, J., dissenting) (a case in which the veteran died of cancer

exposure from war, and his widow was denied benefits due to a technical error). Judge Greenberg reasoned that for the Veterans Court to ignore the "obligatory veteran friendly positions" and deny a claimant "deserved benefits" based on a "hypertechnical reason" was a "travesty that plainly conflicts with congressional intent in creating a veteran friendly system." *Id.*

Here, as in *Bonner*, "if there was ever a case for the" Veterans Court to exercise its "equitable powers bestowed upon it by Congress, it is this one," where the executive branch willfully deprived the Veteran of decades' worth of benefits he earned as a result of participation in a secret human testing program. *Id.* In fact, the present case is a far stronger case for the Veterans Court to invoke equity because it involves willful governmental misconduct, not implicated in *Bonner*.

There is a need for broad equitable relief to ensure fulfillment of the congressional mandate behind the entire veterans' benefits system. Problematically, despite *Henderson's* de facto opening of the door to equitable tolling, the quoted provisions from *Rosenberg* and *Bonner*, described above, illustrate that the Veterans Court is unduly constrained in using equitable relief, even where equity is necessary to prevent grave injustice to the claimant. The present case, involving affirmative executive branch misconduct, allows this Court to clarify that the Veterans Court has equity powers that it may use, in appropriate cases, to ensure fulfillment of the broad congressional mandate underlying the present veterans' benefits system.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

In 1990, the Supreme Court left for another day, "whether an estoppel claim could ever succeed against the Government." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990). Three years ago, this Court stated that it had not yet determined "just how far the equitable powers of the Veterans Court, as an Article I tribunal, extend." *Burris v. Wilkie*, 888 F.3d 1352, 1361 (Fed. Cir. 2018). In *Burris,* that question was left for another day.

That day has arrived. Veteran Taylor's case presents the strongest possible facts upon which this Court should determine equitable estoppel against the Government may succeed, and the Veterans Court has the power to provide such relief.

The National Law School Veterans Clinic Consortium respectfully requests that this Court reverse the judgement of the Veterans Court and direct that Mr. Taylor receive an effective date of September 7, 1971 for his disability compensation.

Respectfully Submitted,

October 4, 2021

/s/ Angela K. Drake
Angela K. Drake

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Case Number: 19-2211

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I, Angela Drake, counsel for amici curiae and a member of the Bar of this Court, certify that, on October 4, 2021, a copy of the attached Brief of Amici Curiae National Law School Veterans Clinic Consortium 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 4, 2021

/s/ Angela Drake
ANGELA DRAKE