Nos. 2021-1757 and 2021-1812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VICTOR B. SKAAR,

Claimant-Cross-Appellant,

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal from the U.S. Court of Appeals for Veterans Claims in
Case No. 17-2574

REPLY BRIEF OF CLAIMANT-CROSS-APPELLANT

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CERTIFICATE OF INTEREST

Counsel for Claimant-Cross-Appellant certifies the following:

1. The full names of every party or amicus represented by me is: Victor B. Skaar.
2. The name of the real party in interest if the party named in the caption is not the real party in interest is: None.
3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.
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 who are expected to appear in this Court, in addition to the counsel who have already appeared in this appeal, are: Danielle Tarantolo, New York Legal Assistance Group; Renée Burbank, Dana Montalto, Supervising Attorneys, Jerome N. Frank Legal Services Organization, Yale Law School; Jacob Bennett, Claire Blumenthal, Kendal Corkle, Lily Halpern, Lauren Lin, Lara Markey, Corey Meyer, Derek Mraz, Molly Petchenik, John Super, Tomoaki Takaki, Law Student Interns, Jerome N. Frank Legal Services Organization, Yale Law School.
5. The following cases are those known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this

Court's decision in the pending appeal: *Wolfe v. McDonough*, No. 2020-1958 (Fed. Cir.).

6. The following information is required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): N/A.

Dated: December 10, 2021

Respectfully submitted,

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SUMMARY OF THE ARGUMENT

The U.S. Court of Appeals for Veterans Claims ("Veterans Court") erred in excluding past and expired claimants from the certified class because it misinterpreted the standards for equitable tolling and waiver of exhaustion. Instead of conducting a flexible, case-specific analysis, the Veterans Court imposed a categorical rule that class-wide tolling is available only when the defendant has engaged in "secretive conduct." The Veterans Court derived its incorrect standard from a misunderstanding of the principles articulated in *Bowen v. City of New York*, 476 U.S. 467 (1986), rather than the tolling considerations set forth by this Court in *James v. Wilkie*, 917 F.3d 1368 (Fed. Cir. 2019). *See* Principal and Resp. Br. of Claimant-Cross-Appellant, ECF No. 27 at 46–49 [hereinafter Opening Br.].

The government insists that the majority's mere quotation of the *James* standard demonstrates that the Veterans Court correctly interpreted the legal standard for class-wide equitable tolling. *See* Resp. and Reply Br. for Resp't-Appellant at 30 [hereinafter Gov't Resp.] (quoting Appx23). In fact, the Veterans Court did just the opposite. It determined *only* whether the Department of Veterans Affairs' (VA) treatment of veterans of the Palomares nuclear clean-up is comparable to the "secretive conduct" at issue in *Bowen*. The Veterans Court thereby "implicitly held that 'secretive conduct' *must* be at issue to trigger equitable tolling" in the class context. Appx41 (Schoelen, J., concurring in part and dissenting in part) [hereafter

"Opinion of Schoelen, J."]. This Court should clarify that "secretive conduct" is not a requirement for class-wide equitable tolling and remand for application of the proper legal test.

Congress' intent to create a uniquely pro-claimant veterans benefits system confirms that a generous and flexible equitable tolling standard is appropriate. *See* Opening Br. at 51–54. The VA's fixation on the *statutory* limitations period is an irrelevant distraction. It ignores case law consistently recognizing the importance of liberal equitable tolling for veterans, as well as the *equitable* nature of equitable tolling, which, by definition, grants relief from time limits established by statute. *Cf.* Gov't Resp. at 33. Adopting the *Bowen* class-wide equitable tolling principles in the veterans context should result in a "uniquely pro-claimant" approach.

Importantly, Mr. Skaar does not dispute that the *James* standard governs this case. Rather, he asks this Court to clarify how its familiar elements—extraordinary circumstances, due diligence, and causation—operate in the Veterans Court class action context. *Bowen* and its progeny confirm that class-wide equitable tolling is appropriate where government action has the practical effect of frustrating appeal, including by leaving reasonable plaintiffs unable to recognize violations of their rights, or otherwise leading them to believe that an appeal would be futile. *See, e.g.*, Appx41 (Opinion of Schoelen, J.). This Court should clarify the tolling standard in the class context and remand for application of the appropriate standard.

The Veterans Court also erred by failing to conduct an exhaustion analysis for past or expired claimants, which should have considered the four purposes of the exhaustion doctrine as articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and clarified by Judge Ginsburg *in Rafeedie v. I.N.S.*, 880 F.2d 506 (D.C. Cir. 1989). *See* Opening Br. at 51–54. The government's efforts to contest the application of the *Salfi* factors in this case, *see* Gov't Resp. at 36–38, aside from being flawed and misplaced in a briefing before this Court, highlight the inadequacy of the Veterans Court's review.

At stake on this cross-appeal is whether aging, disabled veterans who rendered faithful service in cleaning up the Cold War-era nuclear accident at Palomares, and whose disability claims the VA previously rejected based on a flawed and secretive scientific methodology, will have a meaningful chance to be heard before they die. The VA objects to including in the certified class those who applied for benefits but failed to file a timely appeal. But the VA does not offer to help achieve justice through any other means. The VA does not offer to reopen these claims *sua sponte* if it is ultimately unable to justify its reliance on this flawed methodology. It does not offer to contact these veterans or their survivors, many of whom have proceeded *pro se*, to inform them of their right to reapply for consideration based on a valid methodology. Nor does the VA offer to provide contact information to class counsel. The VA appears untroubled by the plight of these sick and disabled veterans whose

claims it has spent decades wrongfully rejecting. Yet the service members with whom Victor Skaar stood shoulder to shoulder in 1966, and who applied for disability benefits at some point in the past, are no less deserving of this country's gratitude; they ate the same food, drank the same water, and shoveled the same radioactive earth. As a practical matter, they will receive the benefits they rightfully earned *only* if they are permitted to participate in this class.

ARGUMENT

I. The Veterans Court Erroneously Interpreted *Bowen* as Imposing a Categorical Rule of Secrecy for Equitable Tolling

In his opening brief, Mr. Skaar demonstrated that the Veterans Court committed legal error by imposing a categorical rule requiring secretive government conduct for class-wide equitable tolling. *See* Opening Br. at 46–49. Instead of "perform[ing] a case-specific analysis of the undisputed facts," *James v. Wilkie*, 917 F.3d at 1373, the Veterans Court majority "implicitly held that 'secretive conduct' *must* be at issue to trigger equitable tolling" on a class-wide basis. Appx41 (Opinion of Schoelen, J.). Such a narrow interpretation of the circumstances that warrant class-wide equitable tolling under *Bowen* is erroneous, *see* Opening Br. at 47–49, a point the government concedes, *see* Gov't Resp. at 32.

The government does not defend this reading of *Bowen*, but instead denies that the Veterans Court created such a categorical rule because it "explicitly stated that an equitable tolling evaluation 'requires a case-by-case analysis and not a

categorical determination.'" Gov't Resp. at 30 (quoting *James*, 917 F.3d at 1373). However, the government's argument, which relies entirely on a single quotation, fails. In *James* itself, this Court admonished, "[w]hen determining whether a court committed legal error in selecting the appropriate legal standard, [the reviewing court] determine[s] which legal standard the tribunal *applied*, not which standard it *recited*." *James*, 917 F.3d at 1373–74 (emphasis added).

A straightforward reading of the Veterans Court's equitable tolling analysis reveals its clear reliance upon a categorical rule requiring secretive conduct. The court considered only whether the VA's actions constituted secretive conduct, and it concluded by refusing to "equate VA's adjudication of Palomares veterans' claims with the secretive conduct the Supreme Court found so reprehensible in [*Bowen*]." Appx24. The government points out that the Veterans Court noted "several example scenarios where equitable tolling might be available." Gov't Resp. at 31–32. However, the Veterans Court analyzed *none* of those other scenarios, let alone the specific, common facts of this certified class. The Veterans Court erred as a matter of law by ignoring the possibility that class-wide "equitable tolling can be appropriate in instances where the conduct complained of falls short of 'secretive.'" *See* Appx41 (Opinion of Schoelen, J.).

The Veterans Court majority appears to have derived its incorrect categorical rule from *Bowen*. However, *Bowen* does *not* require "secretive conduct" to trigger

equitable tolling. Opening Br. at 47–49. Other courts have reached the same conclusion, recognizing that *Bowen*'s animating concerns include fairness and the challenged conduct's practical effect on members of the proposed class' continued pursuit of their claims. *Id.* at 49–50. *See also Canales v. Sullivan*, 936 F.2d 755, 758 (2d Cir.), *on reh'g*, 947 F.2d 45 (2d Cir. 1991) ("[T]his court has rejected the position that equitable tolling is permissible only in misconduct cases.").

Indeed, since *Bowen*, this Court has consistently emphasized the need for flexibility in equitable tolling analyses. *See Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005) ("We again reject the suggestion that equitable tolling is limited to a small and closed set of factual patterns . . . ."); *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005) (holding that equitable tolling is "not limited by the two scenarios presented in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 [] (1990), or those found in our prior cases"). *James* did not alter this principle; this Court made clear that "[u]se of a categorical determination for an equitable tolling analysis finds no support in our precedent." *James*, 917 F.3d at 1375.

Had the Veterans Court understood the appropriate legal standard, its equitable tolling analysis would have examined the common facts specific to this certified class. The Veterans Court would have considered that Palomares veterans spent decades filing Freedom of Information Act (FOIA) requests to obtain information about their radiation exposure, *see* Opening Br. at 3, because detailed

information about the dose estimate methodology—such as the Labat-Anderson Report—was not included in their claims files. *See* Appx42 (Opinion of Schoelen, J.). It would have acknowledged that the veterans needed assistance from a Princeton nuclear physicist to understand the flaws in the methodology on which the VA relied, *see* Appx73, because the methodology involves complex science and is "not easily understood by laypersons," Appx42 (Opinion of Schoelen, J.). It would have recognized that the methodology was developed "behind a veil," which effectively "prevented [the claimants] from realizing that they had valid grounds for seeking administrative review." *Id.* (quoting *McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1090 (1st Cir. 1987)).

The Veterans Court's failure to analyze any of these circumstances blinded it to the reality that the VA's conduct essentially "prevented claimants from even *accessing* the veterans benefits system." Appx42 (Opinion of Schoelen, J.). This conduct does meet the Veterans Court's far-too-narrow understanding of "secrecy," but that is beside the point; an opinion based on the proper legal standard would have at least *considered* these facts to determine if equitable tolling was justified. Because the Veterans Court failed to do this, it read *Bowen* as imposing a categorical rule requiring a narrow definition of "secretive conduct" to access equitable tolling.

At a minimum, even if the Veterans Court did not *intend* to impose this categorical rule, the ambiguity of its opinion, its sparse engagement with *James,* and

the disagreement among the parties and among *the judges on the Veterans Court itself* as to whether such a rule was implied demonstrate the need for this Court to clarify the appropriate legal standard and remand the matter.

II. A More Generous Equitable Tolling Standard is Appropriate Given Congress' Intent to Create a Uniquely Pro-claimant System for Veterans

In his opening brief, Mr. Skaar demonstrated that the Veterans Court's narrow, categorical approach to equitable tolling is inconsistent with congressional intent that the veterans benefits system be uniquely favorable towards claimants. *See* Opening Br. at 53; *see also* Appx40 (Opinion of Schoelen, J.) (quoting *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006)) (emphasizing congressional intent "to award entitlements to a special class of citizens . . ."") (cleaned up). The government expresses "puzzlement" at this argument, saying the statutes, by their plain text, require veterans to file and perfect their appeals within certain time limits. *See* Gov't Resp. at 33. The government need not be puzzled. Equitable tolling is, as its name suggests, an *equitable* remedy—one which, by definition, grants the claimant relief from statutory time limits. *See Equitable Tolling*, *Black's Law Dictionary* (11th ed. 2019) (the "statute is suspended" when equitable tolling is applied). "At its heart, equity is about fairness." *Haggart v. Woodley*, 809 F.3d 1336, 1359 (Fed. Cir. 2016). An equitable doctrine should more generously consider what

is fair in the context of the uniquely pro-claimant veterans benefits systems. *See Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998).

The government's myopic focus on the text of the statutes is thus misplaced. Congress legislates against a background principle that statutes of limitations, even in suits against the government, will generally be subject to equitable tolling. *See Young v. United States,* 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling"'") (quoting *Irwin*, 498 U.S. at 95 (1990)). Courts should not infer Congressional intent to limit equitable tolling simply because statutory text contains a time limit. *See United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015) (presuming Congressional intent to allow equitable tolling even where a "time limit is important," is expressed "emphatically," is "framed in mandatory terms," and the statute declares that untimely claims are "forever barred").

Statutory filing deadlines are generally *procedural* rules designed to "promote the orderly progress of litigation," not substantive bars to a claimant's right to be heard. *See id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). This Court has noted in particular that 38 U.S.C. § 7266 was not intended to foreclose equitable tolling: "[i]n the context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system . . . the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally . . . nothing in the statute or regulations at issue

suggests that equitable tolling should not be available under appropriate circumstances." *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (citation omitted).

The list of circumstances that have justified equitable tolling in the veterans benefits context is long. *See, e.g.*, *Benson v. Wilkie*, 32 Vet. App. 381, 385 (2020) (sexual harassment); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (mental disability); *Arbas*, 403 F.3d at 1381 (physical disability); *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014) (homelessness); *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (incorrect statement by VA official); *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004) (misfiling); *Wolfe v. Wilkie*, 32 Vet. App. 1, 25 (2019) (prevented from appealing due to "legally incorrect language"); *Beaudette v. McDonough*, 34 Vet. App. 95, 105 (2021) (Board refused to accept appeals). Any attempt to list all such circumstances would be necessarily incomplete. *See Mapu*, 397 F.3d at 1380.

The Veterans Court erred by not adopting the *Bowen* court's approach and not considering whether equitable tolling for the past and expired claimants was consistent with Congressional intent. *See* Appx40 (Opinion of Schoelen, J.) ("[The Veterans Court] should endorse a wholesale import of [*Bowen's*] framework."). The Veterans Court noted that the filing deadlines were "'important,'" and then skipped directly to the second step of *Bowen*'s equitable tolling framework. *See* Appx23; *see*

also id. at 40 (Opinion of Schoelen, J.). Congress intends the veterans benefits system to "award entitlements" to "those who risked harm to serve and defend their country." *Barrett*, 466 F.3d at 1044. The inclusion of procedural time limits only serves as evidence of their desire to ensure the "orderly progress of litigation," not to limit equitable tolling. *Kwai Fun Wong*, 575 U.S. at 410 (quoting *Henderson*, 562 U.S. at 435). The Veterans Court should have fully adopted the *Bowen* framework and considered the "uniquely pro-claimant" orientation of the veterans benefits system. *See Hodge*, 155 F.3d at 1363.

III. A More Generous Equitable Tolling Standard is Appropriate in Veterans' Class Actions Challenging Complex and Opaque Government Procedures

In his opening brief, Mr. Skaar asked this Court to elaborate a more generous equitable tolling standard in class action cases. *See* Opening Br. at 51–54. The government accuses Mr. Skaar of being "conspicuously silent regarding the actual factors of an equitable tolling analysis." Gov't Resp. at 36. Mr. Skaar agrees with the government that the principles underlying the factors laid out in *James*—extraordinary circumstance, due diligence, and causation—inform questions of equitable tolling generally. *Id.* at 35 (quoting *James*, 917 F.3d at 1373). Mr. Skaar nevertheless asks this Court to clarify how equitable tolling should be considered in the class context. This Court should clarify that when, as here, circumstances are

extraordinary enough to merit class treatment, the *James* equitable tolling principles must be interpreted generously. *See* Appx43 (Opinion of Schoelen, J.).

In its decision, the Veterans Court expressed concern about how equitable tolling, normally requiring case-by-case analysis of the *James* factors, could be applied to aggregate actions. *See* Appx23 at n.5. It looked to *Bowen* for guidance, but misinterpreted *Bowen* as requiring "secretive conduct" for class-wide equitable tolling. Appx23–24. This Court should articulate a standard in line with *Bowen* and its progeny, which provide that equitable tolling is appropriate in the class context in circumstances where government action has the practical effect of frustrating appeal, including by leaving reasonably prudent plaintiffs unable to recognize that their rights have been violated, or otherwise leading them to believe that an appeal would be futile. *Bowen*, 476 U.S. at 480–81; *see also Dixon v. Sullivan*, 792 F. Supp. 942, 948 (S.D.N.Y. 1992) (citing *Bowen* and explaining that class-wide equitable tolling is appropriate because claimants had "no way of knowing that the decisions in their cases were vulnerable to legal challenge").

By definition, "class actions before [the Veterans] Court are the exception, not the rule." Appx32; *see also* Vet. App. R. 22(a)(3). The exceptional event of a class certification order, therefore, may bear on whether the "extraordinary circumstances" element of tolling has been satisfied for persons who, but for a missed filing deadline, would be members of the same class. An equitable tolling

rule appropriate for the class context should give weight to the rare nature of class certification when evaluating the first *James* factor, extraordinary circumstance.

The exceptional nature of class certification is also evidence that equitable tolling is appropriate for claimants who are similarly situated to other class members but for one thing—their failure to timely appeal VA decisions—because of the Veterans Court's holding that the presumption against class certification can be rebutted when "the putative class has alleged sufficient facts suggesting a need for remedial enforcement." Appx33. The "fact-specific analysis" required under this prong of the Veterans Court's test for class certification, Appx34, will necessarily involve facts that also bear on the "extraordinary circumstance" factor of the *James* test. For example, in this case, the Veterans Court considered as part of this analysis the advanced age and radiogenic disabilities of class members. Appx35.

The Veterans Court might also have considered the complexity of the flawed dose estimate methodology, as Judge Schoelen's concurrence does, *see* Appx42, and the average veteran's inability to individually identify and challenge the flawed dose estimates without access to scientific experts or counsel. The Veterans Court has already found that, in this case, a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" including a precedential decision. Appx32 (quoting Fed. R. Civ. P. 23(b)(3)). The factual circumstances underlying this finding apply equally to past and expired claimants, and the

government does not challenge the Veterans Court's "superiority" finding – at least as to "present" claimants.

Past and expired claimants face the same barriers to justice and need for prompt remedial enforcement that justified the exceptional use of the class action device for present and future Palomares veteran claimants. Individual veterans could not be expected to analyze the flaws in the dose estimate methodology, and are "entitled to believe that their government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States." *Bowen* 476 U.S. at 480. The VA's reliance on the complex, flawed methodology left reasonably prudent plaintiffs unable to recognize that their rights had been violated and that they had any legal basis to appeal their individual claims. This Court should articulate an equitable tolling standard that would recognize that these and other facts that commonly justify class certification also serve as evidence of extraordinary circumstances.

An appropriately generous interpretation of the *James* equitable tolling standard in the class context would also consider whether the second factor—due diligence—is satisfied where government action has the practical effect of preventing appeal, such as in *Bowen* and here, where the class challenges an opaque, complex government action or policy. *See Weinberger v. Salfi*, 422 U.S. at 767 (holding that administrative exhaustion can be excused where it would be futile).

The requirement that veterans exercise due diligence in pursuing appeals to benefit from equitable tolling should also be relaxed where a reasonable veteran would believe an appeal was futile. *See, e.g.*, *Hill v. Sullivan*, 125 F.R.D. 86, 94–95 (S.D.N.Y. 1989) (permitting class-wide equitable tolling because the government's actions, which also made exhaustion futile, were not in bad faith but nonetheless "prevent[ed] plaintiffs from knowing of a violation of [their] rights") (quoting *City of New York v. Heckler*, 742 F.2d 729, 738 (2d Cir. 1984)).

For instance, veterans' ability to exercise due diligence was frustrated in this case, where the VA relied on a methodology carried out "behind a veil," preventing claimants "from realizing that they had valid grounds for seeking administrative review." Appx42 (Opinion of Schoelen, J.) (quoting *McDonald*, 834 F.2d at 1090). The Veterans Court's presumption that past and expired claimants stopped pursuing their claims because of a lack of due diligence does not reflect "respect for the administrative process," as Judge Schoelen explained, but is rather "a statement that a group of vulnerable veterans should not have full and fair hearings because they were not legally savvy enough to challenge a complicated and convoluted dose reconstruction methodology." Appx43 (Opinion of Schoelen, J.).

Contrary to the Veterans Court's concern that equitable tolling cannot be resolved through aggregate action under the *James* standard, Appx23 at n.5, extraordinary circumstance and due diligence need not be an individualized inquiry.

Common, flawed government action toward each class member, which justifies a rare order certifying a class, can both evidence extraordinary circumstance and frustrate a veteran's ability to exercise due diligence. The government, however, summarily contends that past and expired claimants cannot experience extraordinary circumstances or prove that due diligence was frustrated. *See* Gov't Resp. at 31 n.18 and 35 n.20. In doing so, the government makes several incorrect or misleading statements.

First, the government states that past and expired claimants fail the *James* test because "Mr. Skaar's personal view that the dose methodology is flawed, or his belief that it is difficult for lay veterans to prove the flaw . . . does not constitute an extraordinary circumstance." Gov't Resp. at 35 n. 20. But Mr. Skaar's "personal views" are not at issue in this case, and even the Veterans Court itself concluded that the VA had failed to justify its reliance on the much-criticized methodology. *Skaar v. Wilkie*, 33 Vet. App. 127 (2020) (ordering remand on merits of claim).

Second, the government obscures that this case is the result of decades of advocacy, FOIA litigation, and consultation with scientific experts undertaken by Mr. Skaar, other Palomares veterans, and counsel. *See* Appx5–7. It would be difficult for other veterans to prove, or even to know of, the flaw in the dose estimate methodology, creating exactly the type of circumstance in which government action prevented plaintiffs' knowledge of a violation of their rights and thus frustrated their

ability to exercise due diligence. *See Bowen*, 476 U.S. at 481–82. Disparaging the substantial criticism of this flawed methodology as a mere "belief" of Mr. Skaar is simply an attempt by the government to downplay the stakes of this litigation and distract from its refusal to take responsibility for decades of improper rejections of claims.

Third, the government wrongly argues that the Veterans Court cannot consider whether there has been an undiscoverable systematic failure by the VA in its equitable tolling analysis. Gov't Resp. at 31 n.18 (arguing that Mr. Skaar "assumes a systematic failure [of the methodology] that no court has actually found"); *but see Skaar v. Wilkie*, 33 Vet. App. at 143 (holding that VA has failed to justify its reliance on methodology). This contention is legally wrong. The purpose of procedural protections, such as the class action device and the presumption that equitable tolling is available in suits against the government, is to protect plaintiffs *in the case that* allegations are true. *Irwin*, 498 U.S. at 95–96. On remand from the Veterans Court, it will be VA fact-finding that ultimately decides whether there has been any "systematic wrongdoing" in relying on the dose estimates provided by the Air Force.

"Rigorous analysis" of class certification questions will frequently "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Class action procedure therefore provides

that if the facts and law warrant it, a certified class can be modified or decertified. *See* Vet. App. R. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). And if the VA finds that Mr. Skaar's allegations are not true, the equitable tolling determination has no effect, because there will be no relief. Thus, contrary to the government's assertion, Mr. Skaar may present—and the Veterans Court should consider in its equitable tolling analysis—evidence concerning the flawed dose methodology and the extraordinary difficulty of understanding and challenging it.

Finally, the government alleges that Mr. Skaar "has not explained exactly what filing the court would be equitably tolling" because past and expired claimants did not file appeals. Gov't Resp. at 35–36. Mr. Skaar asked the Veterans Court to equitably toll the *deadlines* for past and expired claimants to file appeals, not any specific filings. Appellant's Reply Br. in Supp. of Mot. for Class Certification or Aggregate Resolution, *Skaar v. Wilkie*, No. 17-2574 (Vet. App. Mar. 21, 2018), ECF No. 39 at 3 ("[The Veterans Court] should waive the *deadline*.") (emphasis added). The government's mischaracterization of Mr. Skaar's request should not slow this Court from remanding to the Veterans Court for application of the proper, flexible, and generous *James* factors appropriate in the class context.

IV. The Veterans Court Erred by Ignoring the *Salfi* Factors in its Exhaustion Analysis

Mr. Skaar has demonstrated that the Veterans Court erred by ignoring the policy rationale underlying the exhaustion requirement when considering whether to certify the past and expired claimants. Opening Br. at 51–54. The government responds that Mr. Skaar fails to engage "with the prevailing *equitable tolling* standard" and takes issue with his quotation of then-Judge Ginsburg's concurrence in *Rafeedie v. I.N.S.*, 880 F.2d 506 (D.C. Cir. 1989). *See* Gov't Resp. at 36 (emphasis added). It is unclear to what "prevailing standard" the government seeks to redirect this Court's attention, as the government cites no competing *exhaustion* rule in this section of its brief. *See id.* at 36–38.

The Veterans Court erred by failing to conduct a waiver of exhaustion analysis as to the past or expired claimants, which would include an application of the four purposes of the exhaustion doctrine. *See* Appx23–25. In its analysis of the present-future and future-future claimants, the Veterans Court did cite the three-part test the *Bowen* court drew from *Eldridge*, holding that waiver of exhaustion is proper where: "(i) the challenged conduct is collateral to a claim for benefits; (ii) enforcing the exhaustion requirement would irreparably harm the claimant; and (iii) the purposes of exhaustion would not be served by its enforcement." Appx21 (citing *Bowen*, 476

U.S. at 483–84 (citing *Mathews v. Eldridge*, 424 U.S. 319, 330–31 (1976))).[1] The third *Eldridge* factor requires that courts look to the four "purposes of exhaustion" drawn from *Salfi*. *See Bowen*, 476 U.S. at 484 (citing *Salfi*, 422 U.S. at 765).

These are the same four purposes then-Judge Ginsburg referenced in her concurrence in *Rafeedie*. 880 F.2d at 527–28. Thus, the "binding precedent," Gov't Resp. at 37, on exhaustion in fact requires that the Veterans Court not merely conduct a "mechanical application of the *Eldridge* factors," but that it undertake an "intensely practical" application of the four purposes of the exhaustion doctrine from *Salfi*. *Bowen*, 476 U.S. at 484 (citing *Eldridge*, 424 U.S. at 331 n.11; *Salfi*, 422 U.S. at 765). The Veterans Court erred because it did *not* consider this practical waiver of exhaustion analysis in the portion of its decision addressing the past and expired claimants.

In particular, the Veterans Court erred by failing to conduct a waiver of exhaustion analysis as to the past claimants. The expired claimants exhausted their administrative remedies. *See* Appx23. The past claimants, however, never perfected an administrative appeal to the Board. Appx25. The past claimants would

[1] The government appears to take issue primarily with the third *Eldridge* factor. Gov't Resp. at 36–38 (arguing that this Court should not consider the purposes of exhaustion, but that "Mr. Skaar would still fail to prevail" if this *Eldridge* factor were considered). But the Veterans Court erred by not analyzing *any* of the *Eldridge* exhaustion factors. This Court should remand the case to the Veterans Court for consideration of whether to waive exhaustion under all three *Eldridge* factors.

"generally" be required to exhaust their administrative remedies if doing so would accomplish the goals identified in *Salfi*. 422 U.S. at 765. Where, as here, these purposes are *not* served, however, exhaustion should be waived. *Id*. Without knowledge that they could challenge the dose estimate methodology, it would have been futile for class members to appeal. *See, e.g.*, *Beaudette*, 34 Vet. App. at 105 (waiving exhaustion because attempting to obtain individual review would "amount to a useless act and be futile").

Rather than conduct the *Salfi* exhaustion analysis, the Veterans Court merely stated that including the past claimants in the class would "require equitable tolling of their appellate review windows before VA," and then declined to grant equitable tolling. Appx25. The Veterans Court erred by conducting an improperly narrow equitable tolling analysis for both past and expired claimants, *see supra* Section I, and it further erred by failing even to conduct the required exhaustion analysis for the past claimants.

In his opening brief, Mr. Skaar explained why the Veterans Court should have considered these factors. *See* Opening Br. at 52. While the government correctly points out that the application of exhaustion doctrine to the facts of this case is not within the purview of this Court, *see* 38 U.S.C. § 7292(d)(2), the government then spent the bulk of its response on the question of exhaustion disputing the application of the *Salfi* factors to the facts. *See* Gov't Br. at 36–38. This only serves to illustrate

why the Veterans Court's decision to exclude the past claimants from the class must be vacated, with instructions from this Court to properly apply the waiver of exhaustion analysis to the facts.

V. Equitable Tolling in Aid of Sick and Aging Veterans Does Not "Offend the Notion of Finality" and Does Honor Legislative Intent

In his opening brief, Mr. Skaar demonstrated that a more generous interpretation of equitable tolling and exhaustion standards in the class context aligns with the "special beneficence" that Congress intended to grant veterans. *See* Opening Br. at 51–54. The government complains that the equitable tolling of claims for the past and expired claimants would "resurrect old claims," "skirt finality," and "offend the notion of finality." Gov't Resp. at 32. But equitable tolling is, by definition, an exception to finality rules. Thus, these same concerns could be raised any time there is equitable tolling. Since the government does not appear to contend that equitable tolling should *never* be available in the Veterans Court, *id.* at 33, the government must specifically substantiate its concern in this case. But the government has not established that equitable tolling in this instance would "offend the notion of finality" any more than in other cases where courts have exercised equitable tolling. To the contrary, this is a case where the equities strongly favor tolling.

This Court has recognized "the need for flexibility" and "for avoiding mechanical rules" in courts of equity, and that "in cases of equitable tolling, courts consider the uniquely pro-claimant nature of the veterans benefits system." *James v.*

Wilkie, 917 F.3d 1368, 1373 (Fed. Cir. 2019). The Supreme Court has found that equitable tolling is warranted under a statutory framework that "Congress designed to be 'unusually protective' of claimants." *Bowen*, 476 U.S. at 480 (1986); *see also supra* Section II; *Henderson*, 562 U.S. at 431; *Holland v. Florida*, 560 U.S. 631, 650 (2010) ("[C]ourts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.").

Like in *Bowen*, rather than "offending notions of finality," this is exactly the type of case where the flexible mechanism of equitable tolling is appropriate. The Palomares veterans who did not timely appeal their claims faced a methodology for deriving dose estimates that used "vast amounts of scientific data not easily understood by laypersons," which included inconsistencies. Appx42 (Opinion of Schoelen, J.). That methodology was replaced by one which also had "highly complex measurements and datasets." *Id.* This replacement methodology is also flawed. Indeed, both methodologies were developed "behind a veil," where they were "essentially devoid of oversight." *Id.* These barriers likely "prevented veterans from continuing administrative appeals and pursuing benefits they may have been entitled to." *Id; see supra* Section III. Here, equitable tolling would allow veterans with past and expired claims to obtain the benefits of class adjudication. As this Court recognized in *Monk II*, the class action mechanism "promot[es] efficiency,

consistency, and fairness, and improv[es] access to legal and expert assistance by parties with limited resources." *Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017) (*Monk II*).

A. The Availability of Supplemental Claims Does Not Eliminate the Need for Equitable Tolling.

That veterans can file supplemental claims under 38 U.S.C. § 5108 (permitting supplemental claims based on new and relevant evidence) and 38 U.S.C. § 5109A (allowing claimants to challenge a previous decision as the product of clear and unmistakable error, or CUE) is "of no consequence." Appx42 (Opinion of Schoelen, J.). The availability of a supplemental claim process does not bar the Veterans Court from exercising its equitable powers to toll claims and, in this case, equitable tolling is the vehicle by which claimants can obtain the benefits of efficiency, consistency, and fairness offered by the class action mechanism.[2]

Nothing in the Veterans Judicial Review Act suggests that supplemental claims under 38 U.S.C. § 5108 and revision for CUE under 38 U.S.C. § 5109A are

[2] The government's insinuation that filing supplemental claims may be more efficient is incorrect. *See* Gov't Resp. at 37. The premise that past and expired claimants, who are mainly *pro se*, remain able to continuously monitor decisions and easily file supplemental claims, potentially decades after their claims were wrongly denied, is unsound. Moreover, the VA is not required to notify past and expired claimants of a precedential decision. *See* Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 65 (1994) ("[T]he VA is under no duty to identify those veterans and make them whole.")

the only available avenues of relief for past and expired claimants. As this Court and others have held time and time again, statutory provisions must be construed in favor of veterans. *See Henderson*, 562 U.S. at 430 (presuming "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (same); *Padgett v. Nicholson*, 473 F.3d 1364, 1368 (Fed. Cir. 2007) (same). Given the plain text of 38 U.S.C. § 5108 and 38 U.S.C. § 5109A and the pro-veteran canon of statutory construction, the government is wrong to characterize these provisions as the exclusive avenues for relief for claimants who have been subject to complex and flawed methodologies in their pursuit of benefits.

The government's reliance on *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002), is misplaced, as 38 U.S.C. § 5108 and 38 U.S.C. § 5109A are not sufficient paths to correct the VA's systemic errors. "The purpose of the rule of finality is to preclude repetitive and belated readjudication of veterans' benefit claims." *Cook*, 318 F.3d at 1339. But requiring past and expired claimants to file supplemental claims and CUE petitions would mandate such readjudication for every affected veteran. Once claimants found out about a precedential decision (which is by no means a certainty) they would have to file a supplemental claim and litigate that claim up to the Board of Veterans Appeals.

Moreover, a precedential decision that requires Palomares veterans to follow this arduous process will not provide the same degree of efficiency, consistency, and fairness as the class action mechanism would. *See, e.g.*, *Wolfe v. Wilkie*, 32 Vet. App. 1, 12 (2019) (finding that VA responded to a precedential decision by "essentially readopt[ing] a position [the Court] . . . authoritatively held inconsistent with Congress's command" and acted with "no transparency").[3] Indeed, in including present-future and future-future claimants in the class, the court explained that "class members' age or some other similar factor [could] suggest the need for especially timely relief." *Id*. Past and expired claimants have the same need for prompt remedial enforcement that the Veterans Court found convincing with respect to those Palomares veterans included in the class. *See* Appx35.

Additionally, the government's contention that the supplemental claim mechanism is the exclusive avenue for relief also defeats the very purposes for which the Veterans Court and this Court have found that class actions are useful. *See* Appx31 ("[C]lass actions 'conserve judicial resources by allowing courts to treat common claims together, obviating the need for repeated adjudications of the same issues.'"); *see also Monk II*, 855 F.3d. at 1320–21 (Fed. Cir. 2017). The government's proposed rule would hamper the ability of courts of equity to exercise

[3] The Veterans Court has clarified that "one need not find that the Agency is likely to disobey" a precedential decision to justify a need for the prompt remedial enforcement afforded by class adjudication. Appx34.

their powers flexibly in the context of class actions. Such a rule would also have the predictable effect of reducing the size of potential classes, making it easier for the government to defeat class certification on the basis of numerosity.[4] This Court should avoid the government's proposed interpretation of the supplemental claim statutes, which would limit the availability of class relief and improperly constrict the inherently flexible concept of equitable tolling, thereby depriving veterans of the "special beneficence" they are owed.

B. Equitable Tolling Will Provide the Possibility of Relief for Aging Veterans Exposed to Radiation.

Excluding past and expired claimants from the certified class is unfair to Palomares veterans who are similarly situated to those included in the class but for one thing—their failure to file timely appeals, an action that would have been utterly useless at the time. These veterans, like those included in the class, are seeking compensation for illnesses they contracted due to nuclear exposure fifty-five years ago as a result of their service to our country and would face harsh barriers to pursuing prolonged individual litigation of their claims. These claimants face a

[4] The Congressional Budget Office recently estimated that only 150 veterans and their survivors would be eligible for service-connected disability compensation benefits were the statutory presumption amended to include Palomares veterans as proposed. Cost Estimate for H.R. 3967 at 11 (Dec. 7, 2021), *available at* https://www.cbo.gov/system/files/2021-12/hr3967.pdf. The cost of benefits for these 150 veterans is likely not motivating the government's challenge to class certification in this case, suggesting their intent is to undermine numerosity in this and future cases.

"complicated and convoluted" methodology developed outside of the VA, which proved to be a "flawed factual basis that prevented claimants from even accessing the veterans benefits system." Appx42–43 (Opinion of Schoelen, J.).[5] The past and expired claimants were forced to rely on the Agency's judgment because they "lack[ed] the ability to obtain or understand the information necessary to substantiate their claims." Appx44 (Opinion of Schoelen, J.). The VA owes these veterans fairness, consistency, and efficiency. *See* Appx43 (Opinion of Schoelen, J.) (quoting *City of New York v. Heckler*, 742 F.2d 729, 738 (2d Cir. 1984) ("All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States.")).

Excluding from the class veterans who attempted to obtain their benefits under the difficult circumstances described above would be inequitable and inefficient. Continued individual litigation would be "extraordinarily difficult" for this group of

[5] "Despite the caveats [in the LA Report], the Air Force adopted the Report's dose estimate methodology in full. . . . The Air Force [later] found its methodology, which was based on the Report, 'appeared to underestimate doses for some individuals.'" Appx72. The average layperson would struggle to understand the data. Indeed, "[t]he record in this case . . . contain[s] numerous documents related to technical and scientific matters . . . and decades old records." Appx35.

veterans, *id.* at 44, all of whom have reached *at least* their mid-70s and are battling service-related health issues.

The potential for a precedential decision does not solve this problem. Assuming these veterans learn of a precedential decision (which is by no means a certainty) they would then need to retrieve and file additional, potentially voluminous, documents in support of their supplemental claim. Furthermore, the review time of the supplemental claim would only begin *after* a precedential decision was reached and the materials compiled for submission, a delay that will largely negate the utility of awarding benefits to these aging veterans in the first place. Inclusion in the class for this group is the most efficient way to ensure that these veterans receive the benefits they deserve before it is too late.

CONCLUSION

For the foregoing reasons, the Claimant-Cross-Appellant respectfully asks that this Court VACATE the decision of the Veterans Court excluding the past and expired claimants from the certified class and REMAND for further proceedings.

Dated: December 10, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 6,999 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, Claimant-Cross-Appellant's foregoing Reply Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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