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Jillian Berner

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No. 2020-1073

IN THE
**United States Court of Appeals
for the Federal Circuit**

ADOLFO R. ARELLANO,
Claimant-Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs
Respondent-Appellee.

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

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

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October 14, 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2020-1073
Short Case Caption Adolfo R. Arellano v. Robert Wilkie
Filing Party/Entity National Law School Veterans Clinic Consortium

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/13/2020

Signature: *Jillian Berner*

Name: Jillian Berner

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>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.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>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.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>National Law School Veterans Clinic Consortium</p>		

Additional pages attached

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).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

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

None/Not Applicable Additional pages attached

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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, Adolfo R. Arellano. The Board of the NLSVCC, a 501(c)(3) organization, authorized the filing of this brief.¹ All parties have consented to the filing of this brief. In addition, the Court authorized filing of this brief. Dkt. 45 at 3, ¶ 4 (Aug. 5, 2020).

The NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. 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 all 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

¹ This brief’s writers are identified in the signature block. NLSVCC thanks and acknowledges law students Mackenzie Stout, Juwan Parrish, Cameron P. Beilly, Brennan Monaco, Bethany Gartner, and Adam Morelli and attorneys Blair Thompson, Judy Clausen, and Colleen Miller for their valuable help in researching and editing the brief.

opportunity to advocate in support of veterans who have been unfairly impacted by the erroneous interpretation and implementation of 38 U.S.C. § 5110(b)(1). The bar against the application of equitable tolling precludes countless veterans from fully recovering benefits. In a pro-veteran, non-adversarial system, this is prejudicial, unworkable, and unacceptable, particularly against the statutory backdrop and the scope of the VA's duty to assist the veteran, many of whom suffer severe consequences due to their service and resultant mental and physical conditions.

**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. Veterans With Service-Connected Posttraumatic Stress Disorder (PTSD) May Be Prevented From Applying For VA Disability Compensation Within One Year After Discharge Due to Circumstances Outside of Their Control, Such as Lack of Awareness of Eligibility, Perceived Stigma, or Symptoms of PTSD.

a. Recent Changes in Law Indicate that Veterans Historically Have Not Been Sufficiently Aware of their Eligibility for VA Disability Compensation.

Research shows that, regardless of whether they have a service-connected mental health condition, Veterans may still not be aware of their eligibility for VA disability compensation benefits. The 2010 National Survey of Veterans (NSV), a “comprehensive nationwide survey[] designed to help [VA] plan its future programs and services for Veterans,” revealed that only “[s]omewhat more than 21 percent of Veterans reported that they have applied for disability compensation.”

WESTAT, NAT’L SURVEY OF VETERANS xiii (2010),

<https://www.va.gov/SURVIVORS/docs/NVSSurveyFinalWeighted>

Report.pdf. Of the Veterans who indicated that they had not applied for disability benefits, 17.1 percent indicated that they were not aware of the VA service-connected disability benefits program. *Id.* Notably, the 2010 NSV revealed that “[m]ore recent Veteran cohorts generally report

greater understanding of benefits and services and have more awareness of the various benefits and services,” with those serving in September 2001 or later showing the highest level of understanding. *Id.* at xi.

Congress has recognized that some Veterans were unaware of the benefits available to them. Accordingly, it implemented legislation to help address the problem. In 2006, Congress passed the Veterans' Housing Opportunity and Benefits Improvement Act of 2006. 120 Stat. 397, 109 P.L. 233. Within that act, Congress implemented an outreach services program, now codified at 38 U.S.C. §§ 6301 *et seq.* “[T]he outreach services program authorized by this chapter is for the purpose of charging the Department [of Veterans Affairs] with the affirmative duty of seeking out eligible veterans and eligible dependents and providing them with such services.” 38 U.S.C. § 6301(a)(2). The law required VA to “reach[] out in a systematic manner to proactively provide information, services, and benefits counseling to veterans” and to their dependents who may be eligible for benefits. 38 U.S.C. § 6301(b)(1). The statute requires the Secretary to mail individual notice of all potential VA benefits to new Veterans at the time of their discharge from service and to establish in-person or telephone contact with Veterans who do not

have a high school education at the time of their discharge from service. 38 U.S.C. § 6303(b). The law also requires the Secretary to address the needs of eligible dependents of Veterans. 38 U.S.C. § 6307(a),(b).

Congress continued to address this issue in further legislation. The VOW (Veterans Opportunity to Work) to Hire Heroes Act in 2011, which made the Transition Assistance Program (TAP), a pre-separation counseling program, mandatory for all servicemembers with at least 180 continuous days of active duty. VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, Pub. L. No. 112-56, 125 Stat. 711 (2011). TAP provides “information, resources, and tools,” including a course on VA Benefits and Services, to servicemembers as they transition from military to civilian life. U.S. DEPT. OF VETERANS AFFAIRS, TRANSITION AND ECONOMIC DEVELOPMENT, <https://www.benefits.va.gov/transition/tap.asp> (last visited Oct. 11, 2020).

Veterans discharged prior to the implementation of the outreach services program in 2006 and the mandatory transition program in 2011 did not have the benefit of formally learning about their eligibility for VA benefits—including disability compensation—prior to discharge or

immediately following discharge. A large group of Veterans continue to face a lack of awareness of their eligibility for VA benefits.

b. Veterans with PTSD May Be Prevented From Applying For VA Disability Compensation Within One Year After Discharge Due to Perceived Stigma Surrounding PTSD.

In addition to the lack of awareness among Veterans about their VA disability compensation eligibility, Veterans with service-connected mental health conditions, such as PTSD, may face additional obstacles to applying for VA disability compensation within one year after discharge. Initially, it should be noted that PTSD was not even added to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) until 1980. Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 21-30 (2011). Therefore, Veterans discharged prior to 1980 were not able to even apply for VA disability compensation for PTSD until after 1980. This is a large group of Veterans, including those who served in the Vietnam War, 33 percent of whom meet the DSM criteria for PTSD. *Id.* at 22.

In addition to the late inclusion of PTSD in the DSM, other barriers exist for Veterans with PTSD face which impede their ability to apply for VA disability compensation within one year after discharge. Ironically,

several of these barriers relate to military service. In 2011, the Government Accountability Office (GAO) identified key barriers that hinder Veterans from accessing VA mental health care. GAO, GAO-12-12, VA MENTAL HEALTH: NUMBER OF VETERANS RECEIVING CARE, BARRIERS FACED, AND EFFORTS TO INCREASE ACCESS 11 (Oct. 2011), *available at* <https://www.gao.gov/assets/590/585743.pdf>. One key barrier is the stigma associated with mental health care. *Id.* The report noted that Veterans may be concerned that “by accessing mental health care they will be perceived as weak or having lost control.” *Id.* Veterans may believe that their social networks, including the military community, have “values and priorities that conflict” with accessing mental health care. *Id.*

Similarly, in 2018, researchers found that “military socialization, command structure influences, and institutional attitudes” (e.g., the “suck it up” mentality) reinforce the attitudes that seeking help is “a sign of weakness” among Veterans. Ann M. Cheney et al., *Veteran-Centered Barriers to VA Mental Healthcare Services Use*, BMC HEALTH SERVICES RESEARCH 11 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6069794/pdf/12913_2018_Article_3346.pdf. It is reasonable to

conclude that if Veterans have concerns about accessing VA mental health care, they also have these concerns about accessing VA disability compensation for mental health conditions. Both health care services and the disability compensation claims process require the Veteran to disclose personal mental health concerns, instead of “sucking it up.”

c. Veterans with PTSD Are Prevented From Applying For VA Disability Compensation Within One Year After Discharge Due to Symptoms Related to PTSD.

A symptom of PTSD itself—avoidance—likely prevents Veterans from applying for VA disability compensation within one year after discharge. According to VA’s National Center for PTSD, avoidance is a common reaction to trauma. U.S. DEPT. OF VETERANS AFFAIRS, WHAT IS PTSD, AVOIDANCE, <https://www.ptsd.va.gov/understand/what/avoidance.asp> (last visited Oct. 11, 2020). Avoidance occurs “when a person avoids thoughts or feelings about a traumatic event.” *Id.* Avoidance causes the person to shun reminders of the trauma. *Id.*

The VA Office of Inspector General (OIG) has found that Veterans who have PTSD and other mental health conditions as a result of military sexual trauma (MST) generally are reluctant to report the trauma. They are reluctant to file for VA disability compensation. This reluctance is

due to avoidance, stigma, or concerns that VA will erroneously deny their claims. See DEPT. OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL, 17-05248-241, DENIED POSTTRAUMATIC STRESS DISORDER CLAIMS RELATED TO MILITARY SEXUAL TRAUMA i-ii, 1-4, 8-9 (Aug. 21, 2018), <https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>. Indeed, in August 2018, VA's OIG reported that nearly half of denied claims related to MST were not properly processed following VA's own policies and procedures. *Id.* at 1-8. Notably, VA's OIG acknowledged that the process of applying for VA disability compensation itself can be re-traumatizing for MST victims. *Id.* at 8-9. For example, one Veteran reported "nausea and vomiting for several days surrounding any time they had to discuss the MST event with mental health providers or examiners." *Id.* at 9. VA's OIG report noted that "the trauma of restating or reliving stressful events could cause psychological harm to MST victims and prevent them from pursuing their claims." *Id.*

Pursuing a VA disability claim often re-victimizes the Veteran. In order to apply for and establish entitlement to VA disability compensation for PTSD, a Veteran must collect information concerning the event(s) and talk about the traumatic event(s) in order to provide

evidence to support their claim. *See* 38 C.F.R. § 3.304(f). In fact, Veterans must fill out the VA stressor form, VA Form 21-0781, which requires extraordinary detail of the “stressful incidents” including the location, unit assignment, and description of the event. Thereafter, Veterans must go through a Compensation and Pension exam with a VA psychologist for hours, reliving the original trauma and describing it in detail. This all presupposes that the Veteran’s claim is granted during the first claim cycle—appeals may require additional evidence or recounting of the traumatic stressor event. The common PTSD symptom of avoidance, therefore, may actually prevent Veterans from applying for VA disability compensation for PTSD.

Many of the law school clinics of the NLSVCC represent MST survivors in their claims for VA disability compensation. The Clinics report that many of their clients with MST-related claims do not pursue their claims until many years after discharge largely because they correctly anticipate that the VA claims process will be re-traumatizing, especially after erroneous adjudication leading to long appeals and recounting the trauma over and over. Given these circumstances,

equitable tolling is necessary to afford these Veterans the benefits they deserve.

d. Veterans' Actual Experiences Show That Equitable Tolling May Be Justified Where the Veteran Has Service-Connected PTSD.

As mentioned above, NLSVCC members are law school clinics who help Veterans seeking VA disability compensation for a myriad of conditions, including PTSD. Some Veterans do not apply for VA disability compensation for PTSD until years after their discharge due to unique circumstances, including military socialization and stigma, the symptoms of PTSD itself, or the urge to avoid a re-traumatizing claims process, as described above. Below, we describe accounts from member clinics that illustrate the difficulties facing Veterans who are service connected for PTSD in terms of completing timely applications for VA benefits. Importantly, these difficulties impact both Veterans and their family members.

1. "C.A."

The Veterans Clinic at the University of Missouri School of Law represents "C.A.," a dependent of a Veteran who served honorably in the

Vietnam War.¹ C.A.'s father received a Combat Action Ribbon for his service, including fighting on Hill 55 and 91 and combat in the mountains of On Wa. C.A.'s father was severely disabled as a result of his service.

In November 2004, VA determined that C.A.'s father should receive the highest possible rating for PTSD, which is 100 percent. This rating was based on the Veteran's extreme symptoms, including suicidal ideation, mild auditory hallucinations, nightmares, and flashbacks. The VA examiner specifically noted that the Veteran had major impairment of family relations. Because the Veteran's disability was total and permanent in nature, VA granted Dependents Education Assistance (DEA), which is an educational benefit provided to the child of a severely disabled Veteran. *See* 38 U.S.C. § 3512. Since service in the Vietnam War rendered C.A.'s father completely disabled, the government was obliged to pay the Veteran monthly disability compensation *and* to take care of his children by paying for C.A.'s higher education.

C.A. became estranged from her father at the age of 12 following physical, emotional, and verbal abuse. VA was aware that C.A. was being raised by her mother, the custodial parent, and communicated with

¹ C.A.'s case is pending at the U.S. Court of Appeals for Veterans Claims (CAVC) and is under seal. These are the initials used in that proceeding.

C.A.'s mother. However, VA failed to provide notice to C.A.'s mother that C.A. was entitled to receive the DEA benefit as a result of her father's disability, even though the statute requires that notice be given to the "parent or guardian." 38 U.S.C. § 3563. Consequently, C.A. did not learn about the DEA benefit until three years after her graduation from college. C.A. applied for the benefit at that time.

VA denied C.A.'s claim and refused to apply a regulation allowing for good cause extensions. VA relied on, *inter alia*, 38 U.S.C. § 5113, which provides that effective dates relating to DEA awards "shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation."

C.A.'s case is currently on appeal to CAVC. VA's steadfast position is that notice was provided to the disabled Veteran, and the Veteran should have notified his dependents. This position is absurd in light of the facts: a Veteran with a 100% disability rating for PTSD due to suicidal ideation, auditory hallucination, and difficulty communicating with family was expected to notify his estranged and traumatized daughter of her entitlement to education benefits. Equitable relief is

justified in this case, given the extraordinary circumstances arising from the Veteran's severe PTSD.

2. "Nash"

Nash always wanted to serve in the Navy and enlisted immediately after graduating high school in the early 1980s.² While completing a tour off the coast of Japan on an aircraft carrier, he suffered endless harassment and sleep deprivation from his peers. He sought help from the ship's counselor with no success. He soon felt that he had no way out and jumped off the aircraft carrier, hoping that the propellers would kill him. After nearly eight minutes in frigid water, Navy sailors pulled him aboard. The Navy's response was to discharge him with an other than honorable discharge status in 1984. Since his discharge, Nash has suffered from Bipolar Disorder and PTSD. He has been homeless for nearly thirty-six (36) years.

In 2019, several years after the Hagel³ and Kurta Memoranda⁴ provided instruction on how to decide discharge upgrade applications

² In an effort to keep the Veteran's name confidential, the veteran will be referred to as "Nash," his nickname.

³ Office of the Secretary of Defense, *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder* (2014).

⁴ Office of the Secretary of Defense, *Clarifying Guidance to Military Discharge*

from veterans suffering from mental health conditions, Nash, with assistance of counsel, submitted his application for a discharge upgrade to the Board of Corrections for Naval Records (BCNR). In the psychological assessment supporting Nash's BCNR application, the psychologist opined that the hazing and harassment Nash suffered in service triggered his Bipolar Disorder, which affected his mental state, initialized his impulsivity, exaggerated his sense of hopelessness, and ultimately culminated in his suicide attempt. The BCNR, in determining Nash's application, requested review from the BCNR's Physician Advisor. The Physician Advisor concurred, opining that it is not unusual for stress to bring on the initial presentations of Bipolar Disorder, which typically manifests in early adulthood. Therefore, the Physician Advisor ultimately concluded that it was "more likely than not" that Nash's Bipolar Disorder and PTSD resulted in his misconduct during military service and that his suicide attempt was attributable to his mental health conditions.

Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of Their Discharge Due to Mental Health Conditions, Sexual Assault, and Sexual Harassment (2017).

Based on the Physician Advisor's opinion, the BCNR concluded that Nash's suicide attempt that resulted in his other than honorable discharge was the result of his Bipolar Disorder and PTSD. The BCNR upgraded Nash's discharge status to honorable. However, Nash was barred from seeking VA medical care, disability benefits, and assistance programs for homeless Veterans. Although the application of equitable tolling is extremely rare, equitable tolling should apply when a Veteran, like Nash, has been prevented from making any claim for benefits due to the military's error in discharge.

II. The Equitable Tolling Standard in Veterans' Benefits Cases is Sufficiently Stringent to Ensure the Doctrine is Allowed Only in Extraordinary Circumstances, Addressing Any Concerns about Opening the Floodgates.

In veterans' benefits cases, courts have imposed a stringent standard for equitable tolling. The claimant must demonstrate: (1) "that [the claimant] has been pursuing his rights diligently" and (2) "that some extraordinary circumstance stood in his way." *Palomer v. McDonald*, 27 Vet. App. 245, 252-53 (2015). Moreover, claimants must demonstrate that the extraordinary circumstance directly caused the claimant's mishap. *Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015) (citing *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014)); *see also*

Claiborne v. Nicholson, 19 Vet. App. 181, 185-86 (2005). “Extraordinary” “refers not to the uniqueness of [the claimant’s] circumstances, but rather to the severity of the obstacle impeding compliance.” *Palomer*, 27 Vet. App. at 253 (citing *Harper v. Ercole*, 648 F.3d 132, 137 (2nd Cir. 2011)) (internal quotations omitted). When a claimant’s health is the alleged “extraordinary circumstance,” the claimant must demonstrate that “mental or physical illness renders him incapable of handling his own affairs or functioning in society;” severe impairment is not enough. *Palomer*, 27 Vet. App. at 253; *Claiborne*, 19 Vet. App. at 187. When lack of capacity due to severe mental illness is the reason for the claimant’s mishap, the severe mental illness may, in itself, show that the claimant “was incapable of a diligent response.” *Claiborne*, 19 Vet. App. at 188. The standard for equitable tolling in veterans’ benefits cases is even more stringent if the claimant is represented by counsel; in such cases, when mental illness is the alleged justification for equitable tolling, “the veteran must make an additional showing that the mental illness impaired the attorney-client relationship.” *Barrett v. Principi*, 363 F. 3d 1316, 1321 (Fed. Cir. 2004).

The stringency of the equitable tolling standard is easily illustrated in reviewing the facts of those cases in which courts *denied* equitable tolling:

- 1) Elderly veteran suffering from poor eyesight and poor hearing, rendering him dependent on others for communication, living in a foreign country with delayed mail service, and confused by VA forms concerning timing requirements missed notice of appeal deadline. *Palomer*, 27 Vet. App. 245.
- 2) Elderly veteran suffering from Alzheimer's disease or dementia, the diagnosis of which was acknowledged by several doctors' written opinions (which were submitted as evidence, and in which doctors stated the veteran's condition severely impaired his ability to remember dates and times, function in society, and handle his own affairs), where veteran was under stress because he was assisting two severely ill daughters and a severely injured wife who injured herself after the date of the Board decision, but before the date the veteran filed his Notice of Appeal outside of the 120-day timeframe. *Claiborne*, 19 Vet. App. 181.
- 3) Veteran who was unable to obtain information about his representation from Disabled American Veterans while incarcerated and missed filing deadline. *Smith v. Wilkie*, 30 Vet. App. 205, 208 (2018).
- 4) Veteran misunderstood filing deadline because he failed to receive the first copy of the Board decision, contacted VA to obtain another copy, and then, confused by VA communications about when the 120-day deadline would elapse, properly filed his Notice of Appeal within 120 days of the second copy of the Board decision, but failed to file within 120 days of the first copy of the Board decision. *Toomer*, 783 F.3d at 1238.
- 5) Veteran contacted an attorney representing him on several occasions inquiring about filing deadline, and despite the

Veteran's diligent efforts, the attorney missed the filing deadline. *Nelson v. Nicholson*, 19 Vet. App. 548, 554 (2006).

The stringent standard required for equitable tolling in veterans' benefits cases assuages any floodgate concerns. For example, in *Barrett*, in determining whether equitable tolling applied to a veteran suffering from mental illness who missed a filing deadline, the Federal Circuit held that the veteran "must show that the failure to file was the direct result of a mental illness that rendered him incapable of 'rational thought or deliberate decision making,' ... or 'incapable of handling [his] own affairs or unable to function [in] society.'" 363 F.3d at 1321 (citing *Melendez-Arroyo v. Cutler-Hammer de PR, Co.*, 273 F.3d 30, 37 (1st Cir. 2001)). The stringent standard only allowed for equitable tolling in extreme cases of impairment. *Barrett*, 363 F.3d at 1321. "A medical diagnosis alone or vague assertions of mental problems will not suffice." *Id.* In *Barrett*, the veteran claimed he was prevented from timely filing his appeal to CAVC because he was incapacitated by PTSD and panic disorder. *Id.* at 1318. CAVC determined that equitable tolling was reserved for cases where the veteran's failure to timely file was the *direct* result of mental illness,

rendering the veteran incapable of rational thought or deliberate decision-making. *Id.* at 1321.

Veterans shoulder a heavy burden when seeking equitable tolling; courts have denied requests for equitable tolling, even when veterans faced multiple, significant obstacles. For example, in *Palomer*, CAVC held that an elderly Veteran did not meet the burden to justify equitable tolling, even when he alleged that: (1) delays in receiving and sending mail between the U.S. and the Philippines constituted extraordinary circumstances; (2) his poor health rendered him incapable of handling his affairs; and (3) VA provided confusing notice concerning deadlines for asserting appellate rights. 27 Vet. App. at 249. CAVC reasoned that equitable tolling should be decided on a case-by-case basis, with the claimant shouldering the burden of proof, which could require production of evidence. *Id.* at 251. In Mr. Palomer's specific case, CAVC determined that the Veteran failed to show that he had insufficient time to consider his options and timely file the motion. *Id.* at 252-53. CAVC also rejected the Veteran's argument that his advanced age, poor eyesight, and poor hearing rendered him incapable of handling his affairs. *Id.* at 253-54.

Claims for equitable tolling based on mental incapacity face a “high” hurdle in proving entitlement to tolling. *Claiborne*, 19 Vet. App. at 187. Even Veterans with severely impaired ability to handle their own affairs do not meet the standard. *Id.* Equitable tolling was not granted for a Veteran who was able to produce multiple medical opinions illustrating he suffered from dementia, severely impacting his ability to meet deadlines and remember dates. *Id.* at 187-88. The Veteran showed that he suffered from dementia or Alzheimer’s disease, his two daughters were seriously ill, and his wife suffered a serious injury, occurring after the Board decision. *Id.* at 182. Despite significant medical evidence, CAVC reasoned that the Veteran failed to adequately provide “evidence that the symptoms of his dementia [had] manifested in such a manner and to such an extent that his failure to file ... in a timely fashion was “a direct result” of his medical condition.” *Id.* at 183, 186. CAVC reasoned that the medical opinions were overly conclusory and did not provide sufficient rationale. *Id.* at 186-87. Importantly, CAVC held that, even assuming the medical opinions had set forth adequate rationale, to the extent the opinions stated merely that the Veteran was “severely impaired” in his ability for rational thought, deliberate decision-making,

and handling his own affairs, they did not justify equitable tolling; “severe impairment” due to mental condition was insufficient; the Veteran had to be “incapable” of ‘rational thought or deliberate decision-making,’ or ‘incapable of handling his own affairs or unable to function [in] society.’” *Id.* at 187 (quoting *Barrett*, 363 F.3d at 1321).

Even a Veteran’s incarceration may not meet the strict criteria to warrant equitable tolling. *Smith*, 30 Vet. App. at 208. In *Smith*, CAVC held that “[i]ncarceration alone, without more, does not satisfy the requirements for an extraordinary circumstance to warrant equitable tolling.” *Id.* at 208. The Veteran requested equitable tolling after missing the filing deadline for an appeal to CAVC and advised CAVC that he had requested that the representative from Disabled American Veterans that had represented him before the Board represent him in his appeal prior to the filing deadline. *Id.* However, he received no response or information from the representatives or attorneys from Disabled American Veterans. *Id.* CAVC ultimately determined that (1) the Veteran did not exercise due diligence in trying to timely file his appeal and that (2) incarceration, in and of itself, did not rise to an extraordinary circumstance warranting equitable tolling. *Id.* at 210.

Courts will not allow equitable tolling unless the claimant meets the heavy burden of demonstrating diligent pursuit of rights, extraordinary circumstances, *and* causation; proving only one will not suffice. *Toomer*, 783 F.3d 1229. In *Toomer*, the Veteran erroneously filed his appeal paperwork using the wrong date of the Board decision from which he was seeking review by CAVC. *Id.* at 1231. The veteran was confused because the Board mailed two copies of its decision after he failed to receive the first copy, then requested another copy that the Board later sent. *Id.* at 1231, 1232. The Veteran filed his appeal within 120 days of the mailing of the *second* copy of the Board decision, but failed to file his appeal within 120 days of the first copy of the Board decision. *Id.* at 1231, 1232. This Court affirmed CAVC's decision to deny equitable tolling, emphasizing that both due diligence and extraordinary circumstances were required and finding that the lower court did not err "by focusing too narrowly" on whether the Veteran's case conformed to a particular factual pattern. *Id.* at 1239. Rather, CAVC properly considered whether the veteran's claim that he was misled by VA documents constituted extraordinary circumstances. *Id.* at 1239.

Even attorney neglect, such as missing a filing deadline, is not an extraordinary circumstance warranting equitable tolling. *Nelson*, 19 Vet. App. at 554. In *Nelson*, the Veteran, cognizant of the filing deadline, attempted to contact his attorney on several occasions. *Id.* at 549-50. On at least one occasion after the Veteran specifically asked his attorney about the filing deadline, the attorney responded “‘deadlines are for veterans, not lawyers, or words similar to that effect,’ meaning that the ‘lawyers can get around deadlines by time extensions or some techniques based on their knowledge as lawyers.’” *Id.* Not surprisingly, the Veteran’s attorney missed the filing deadline. *Id.* Ultimately, CAVC determined that (1) the attorney’s negligence in missing the filing deadline did not rise to an extraordinary circumstance warranting equitable tolling and that (2) the Veteran did not exercise due diligence in filing the notice of appeal because, instead of remaining a bystander watching the deadline pass, he should have retained new counsel or filed the notice of appeal himself. *Id.* at 553-55.

Therefore, in veterans’ benefits cases, the stringent standard for allowing equitable tolling, reserving the doctrine for truly extraordinary circumstances, when the Veteran has exercised due diligence, but

extraordinary circumstances caused the Veteran's mishap, assuages any concerns that theoretically authorizing equitable tolling of 38 U.S.C. § 5110 will open the floodgates to claimants.

CONCLUSION

For the reasons stated above, the equitable tolling standard in veterans' benefits cases is sufficiently stringent so as to apply only in extraordinary circumstances. These extraordinary circumstances should include when Veterans are unable to apply for VA benefits within one year after discharge due to issues relating to PTSD and/or MST, as in Mr. Arellano's case.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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I, Jillian Berner, counsel for amici curiae and a member of the Bar of this Court, certify that, on October 14, 2020, 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 14, 2020

/s/ Jillian Berner

JILLIAN BERNER