No. 13-1075

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, JEWISH WAR VETERANS OF THE UNITED STATES, INC., NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL DEFENSE COMMITTEE, NATIONAL COALITION FOR HOMELESS VETERANS IN SUPPORT OF RESPONDENT

Rani Habash
DECHERT LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3430

Joshua D. N. Hess
Counsel of Record
Mark DiPerna
Carl Gismervig
Jonathan Massey
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104
(415) 262-4500
joshua.hess@dechert.com

Counsel for Amici Curiae

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are all service and advocacy organizations whose missions are to assist and further the interests of the over 25 million living veterans and active service members of the United States armed forces. They all share a strong interest in ensuring that these veterans and service members receive the benefits to which they are entitled by virtue of their service and sacrifice to the Nation. Moreover, they share an interest in ensuring that the Government is held accountable when it fails to provide these benefits or causes injury to veterans, whether in the provision of these benefits or through other misconduct.

Paralyzed Veterans of America ("PVA"), a congressionally chartered veterans service organization founded in 1946, has developed a unique expertise on a wide variety of issues involving the special needs of veterans of the armed forces who have experienced spinal cord injury or dysfunction. PVA uses that expertise to be the leading advocate for quality health care for veterans, research and education addressing spinal cord injury and dysfunction, benefits available as a result of its members' military service, and civil rights and opportunities that maximize the independence of its members.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief.

The Military Order of the Purple Heart ("MOPH"), chartered by Congress in 1958, is a non-profit organization comprised of military men and women who received the Purple Heart for wounds received in combat. It is the only veterans' service organization comprised exclusively of combat veterans. Through its National Service Program, MOPH operates a nationwide network of 77 service offices that have assisted over 91,000 veterans and their families obtain well-deserved benefits. MOPH provides service to veterans through volunteers at over 100 Veterans Health Administration Medical Centers and clinics across the country. MOPH also promotes Americanism through its myriad educational and scholarship programs.

The Jewish War Veterans of the United States, Inc. ("JWV"), organized in 1896 by Jewish Veterans of the Civil War, is the oldest active national veterans' service association in America. JWV is a federally chartered patriotic organization that has among its purposes a continuing commitment to maintain true allegiance to the United States of America; to foster and perpetuate trust in Americanism; to uphold the fair name of Jews and fight their battles wherever unjustly assailed; to encourage the doctrine of universal liberty, equal rights, and full justice to all men and women; to combat the powers of bigotry and darkness wherever originating and whatever the target; and to preserve the memories and records of patriotic service performed by the men and women of the Jewish faith and honor their memory. In furtherance of its organizational purposes, JWV engages in extensive advocacy in support of veterans.

The National Veterans Legal Services Program ("NVLSP") is a federally chartered, nonprofit organization that has worked since 1980 to ensure that the Government delivers to our Nation's 25 million veterans and active duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country. NVLSP provides pro bono legal assistance (through its own lawyers as well as a network of outside volunteer counsel) to veterans with disability issues in connection with claims for benefits to which they are entitled.

The National Defense Committee is a War Veterans organization that focuses on matters that impact upon the individual civil rights of military personnel and veterans and benefits programs for individual military personnel and veterans, as they relate to veterans' care, national defense, homeland security, and national security.

The National Coalition for Homeless Veterans ("NCHV") is a nonprofit organization that serves as the resource and technical assistance center for a national network of community-based service providers and local, state and federal agencies that provide emergency and supportive housing, food, health services, job training and placement assistance, legal aid and case management support for hundreds of thousands of homeless veterans each year. NCHV also serves as the primary liaison between the Nation's care providers, Congress, and the Executive Branch agencies charged with helping them succeed in their work. NCHV's advocacy has strengthened and increased funding for virtually every federal

homeless veteran assistance program in existence today.

Amici assert that the position presented by the Government in this case – as well as in *United States v. Wong*, No. 13-1074 – would have a profoundly prejudicial impact on America's veterans and is contrary to the longstanding national policy that veterans are to be provided every benefit of the doubt and assistance in their interactions with the Government.

SUMMARY OF ARGUMENT

I. Congress has a long and ever-expanding record of supporting policies that promote the fair and equitable – even preferential – treatment of this Nation's veterans with respect to their interactions with the federal government. This solicitude is especially pronounced in connection with veterans' efforts to assert claims for benefits and compensation from the Department of Veterans Affairs ("VA"). Indeed, Congress has long imposed on the VA a "duty to assist" veterans in obtaining such benefits and compensation. Moreover, in creating the process by which veterans obtain benefits and compensation from the federal government, Congress has been adamant that the Government "should not create technicalities and bureaucratic hoops for them to jump through." 146 Cong. Rec. S9212-13 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller).

II. One of the ways in which Congress's solicitude toward veterans has manifest itself is through a complex system of benefits that, while valuable, also renders veterans far more susceptible to governmental negligence than average citizens. Most notably,

millions of veterans receive their health care through the Veterans Health Administration ("VHA"). Each year, veterans submit thousands of claims for medical malpractice against the VHA.

The complexity of the VA system, combined with the VA's statutory notice and assistance obligations, has created a confusing process that often results in veterans unwittingly failing to submit Federal Tort Claims Act ("FTCA") claims properly. Victims of medical malpractice by the VHA have two avenues of recourse: the FTCA and an administrative claim under 38 U.S.C. § 1151. Section 1151 compensation is awarded exclusively through a VA administrative process and provides limited compensation on a monthly basis that "dies with the veteran." The FTCA, on the other hand, provides a lump-sum payment that takes into account, for example, pain and suffering and lost wages, and is also transferrable to a veteran's spouse or family members upon the veteran's death. Because of this dual-track process, the VA – who possesses a "duty to assist" veterans with benefits claims and upon whom veterans rely for such assistance – frequently instructs claimants about the Section 1151 claims process, but not the separate FTCA claims process. Consequently, veterans who believe they are diligently pursuing the administrative process to assert all of their malpractice claims against the VA are often surprised to find they are pursuing only the limited Section 1151 claim and not the more valuable FTCA claim. Courts have applied equitable tolling in such cases to alleviate the resulting injustice, but a ruling in favor of the Government here would remove this vital check on this administrative legerdemain.

III. Equitable tolling is particularly merited with respect to claims brought by veterans for other reasons as well. Recent scandals at the VA have uncovered a "systemic, totally unacceptable lack of integrity within" the VHA. Remarks by Secretary Eric K. Shinseki, U.S. Dep't of Veterans Affairs, *2014 National Coalition for Homeless Veterans Annual Meeting* (Washington D.C. May 30, 2014), *available at http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014). Specifically, investigations have revealed widespread efforts to conceal and misrepresent failures in care provided to veterans at VHA health facilities, including falsifying records regarding patient waiting times and covering-up patients' exposure to Legionnaires' disease. Such actions to conceal evidence undercuts the ability of a veteran to exercise legal recourse against the Government and to attain a remedy allowed under the law.

In addition to these recent scandals, certain characteristics of the veterans community makes it particularly in need of equitable treatment. Millions of veterans suffer from some sort of mental health disorder or cognitive impairment as a result of their service. Such conditions often render veterans unable to follow procedural formalities scrupulously. Additionally, veterans comprise a disproportionate percentage of America's homeless population relative to their representation in the general populace. The lack of a mailing address alone means that these veterans have no reliable means of receiving notice under the FTCA regarding their claims. Moreover, the lives of the homeless are defined by extraordinary circumstances on a daily basis. The withdrawal of equitable treatment under these circumstances

would be particularly antithetical to Congress's policy toward veterans.

IV. Finally, a holding that upholds the application of equitable tolling to FTCA claims is consistent with this Court's application of the "discovery rule" in determining the accrual of medical malpractice claims under the FTCA. In *United States v. Kubrick*, 444 U.S. 111, 113 (1979), in connection with a medical malpractice claim brought by a veteran under the FTCA, the Court rejected the general rule of accrual and instead adopted the more equitable "discovery rule," which provides that the statute of limitations begins to run only when the plaintiff knows of *both* the existence of his injury and its cause. The "discovery rule" is a common-law doctrine of equity that this Court found was consistent with the Government's waiver of sovereign immunity under the FTCA. The application of equitable tolling would not extend the United States' waiver of sovereign immunity any more than the application of the common-law "discovery rule."

Furthermore, a holding that prohibits the application of equitable tolling would force lower courts to make arbitrary distinctions between, for example, whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury, or did expire because the existence of the claim was fraudulently concealed after the fact. The survival of veterans' medical malpractice claims should not hang on such an illusory distinction.

ARGUMENT

I. Congress Has a Long and Ever-Expanding Record of Supporting Fair and Equitable Treatment for Veterans by the Federal Government.

"The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). This statement by the Court, in the context of the ever-increasing scale of pensions, homes, hospitals and other facilities provided for veterans, represents the lens through which the Court should interpret Congress's general intent that veterans receive fair and equitable treatment, and even preferential treatment where reasonable, from the federal government.

One of the earliest known examples of the codification of our cultural belief that veterans should be afforded generous treatment in exchange for their service dates to 1636, when the Plymouth Colony passed a law to support disabled soldiers from conflicts with the Pequot Indians. *See History – Department of Veterans Affairs (VA), U.S. Dep't of Veterans Affairs, available at http://www.va.gov/about_va/vahistory.asp (last visited Nov. 7, 2014).* Examples of the same principle continued through the Revolutionary War and beyond, including supporting soldiers from both sides of the Civil War, and every other major conflict involving United States service men and women since. *Id.*

As the number of veterans increased in the 20th Century, Congress adapted to increase not only the amount and scope of benefits for veterans, but also included improving and expanding the process for

veterans to receive benefits under notions of equity. For example, in 1956, the United States created the Commission on Veterans' Pensions (commonly known as the Bradley Commission) with the goal of analyzing the way veterans receive benefits and to provide guidance and a framework for providing federal benefits to veterans going forward. The Bradley Commission established certain principles, including:

- "The Government should do everything within its power to distribute the burdens of war service as equitably as possible" and that "[t]imely and adequate assistance must be provided to alleviate the war-incurred handicaps of servicemen"; and
- "Fair and equal treatment of all veterans, disabled and nondisabled, according to their service-connected needs, should be the guiding principle in all our programs."

President's Commission on Veterans' Pensions, *Veterans' Benefits in the United States, Findings and Recommendations*, at 10-12 (Apr. 1956).

The guiding principles set forth by the Bradley Commission can be readily traced forward to subsequent statutory regimes enacted in the second half of the 20th Century. For example, in 1972, Congress added a new clause to the Veteran's Compensation and Relief Act to allow the Secretary of Veterans Affairs to provide for equitable relief in situations where the letter of the law otherwise would not. *See* 38 U.S.C. § 503. In this Act, Congress codified the concept that a veteran should not be barred from applicable benefits due to administrative error, delay,

or any other cause beyond the actual nature of the claim.

In another context, Congress reaffirmed and clarified that support and assistance should be provided to veterans to ensure their claims are properly heard. In the Veterans Claims Assistance Act of 2000, Congress re-codified the long-recognized "duty to assist claimants" in making claims to the VA. *See* 38 U.S.C. § 5103A. This duty, in addition to underscoring the non-adversarial relationship between veterans and the VA, requires the VA to assist veterans in obtaining evidence required to properly adjudicate veteran claims submitted to the VA.

In its debates prior to passing the Act, Congress voiced particular displeasure with certain narrow judicial constructions that it felt necessitated passage of the legislation. During the House's deliberations on the bill, Representative Evans stated, "[v]eterans … have earned, as a result of their service to our country, [the right] to have their claims [to the VA] decided fairly and fully." 146 Cong. Rec. H6786 (daily ed. July 25, 2000) (statement of Rep. Evans). In the Senate, Senator Rockefeller echoed this sentiment:

> The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate. . . . It is critical that we honor our commitment to veterans and their families. ***We should not create technicalities and bureaucratic hoops for them to jump through***.

146 Cong. Rec. S9211 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller) (emphasis added).

In addition to direct legal obligations to veterans, equitable treatment of our service members and veterans is necessary to secure our significant and immediate military and national security needs. In order to maintain the vitality of our all-volunteer military force, it is necessary for the Government to keep faith with servicemen and veterans concerning their treatment and care. Administrative failings measureable in the loss of lives and health of our servicemen or veterans such as the events at Walter Reed, uncovered in 2007, and the conduct of the Phoenix Veteran Health Administration system, uncovered just this year, undermine this national policy.

In the aftermath of the Walter Reed Scandal, the then-ranking member of the House Committee on Veterans Affairs noted, "[w]e are involved in a long war against terrorism. For this, the Nation's mothers, fathers and spouses trust their sons and daughters and spouses to the Nation's armed forces. They must be confident that they will be cared for should harm come their way." *Findings Of The President's Commission On Care For America's Returning Wounded Warriors*, H. Comm. on Veteran's Affairs, 110th Cong. (Sept. 19, 2007) (statement of Rep. Steve Buyer, Ranking Member, H. Comm. on Veteran's Affairs), *available at https://veterans.house.gov/hearing-transcript/findings-of-the-presidents-commission-on-care-for-americas-returning-wounded* (last visited Nov. 7, 2014). These remarks make clear that the federal government's duties to care for veterans, whether express or implied, are different from and greater than duties arising from other governmental activities. Harms to veterans that are not redressed negatively impact individual veterans and,

in the aggregate, can potentially undermine the viability of military recruitment and retention, which are vital components to the preservation of our national security.

Given the necessary relationship between effective care of veterans and the ongoing efficacy of our active military, it is clear why Congress loudly objects when events threaten the integrity of the Nation's express and implied promises to effectively care for veterans. For example, following the recent scandal related to the Phoenix Veteran Health Administration system, the ranking member of the House Committee on Veteran's Affairs stated, "[m]y heart goes out to the families of the veterans who did not receive the health care they deserved in Phoenix and around the country. Rest assured, we will understand what went wrong, fix it, and hold those responsible for these failures accountable." *Scheduling Manipulation and Veteran Deaths in Phoenix: Examination of the OIG's Final Report*, H. Comm. on Veteran's Affairs, 113th Cong. (Sept. 17, 2014) (statement of Rep. Michael Michaud, Ranking Member, H. Comm. on Veteran's Affairs), *available at http://veterans.house.gov/opening-statement / honorable-michael-michaud (last visited Nov. 7, 2014).*

Consistent with these statements, this Court has recognized, in a variety of contexts, Congress's intent that laws that benefit veterans should be equitably interpreted in favor of them. For example, in 1943, the Court construed a veterans' benefits statute "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Court's decision in *Fishgold v. Sullivan Drydock &*

Repair Corp., decided the same year the FTCA was enacted, also echoed this sentiment by construing a statute in favor of veterans to benefit "those who left private life to serve their country in its hour of great need." 328 U.S. 275, 285 (1946). A further example of the same principle is provided in *King v. St. Vincent's Hosp.,* where the Court embraced "the canon [of statutory construction] that provisions for benefits to members of the [a]rmed [s]ervices are to be construed in the beneficiaries' favor." 502 U.S. 215, n.9 (1991). In each of these rulings, the Court embraced the idea that laws that provide relief for veterans should be interpreted in a manner so as to best provide veterans with the care they need.

These examples throughout the Nation's history provide both a reflection of Congress's intent of solicitude toward veterans and a policy framework within which any legal matter impacting the rights or benefits of veterans in connection with their pursuit of claims against the Government should be equitably interpreted in favor of veterans' interests.

II. Due To Circumstances Unique To The Relationship Between Veterans And The VA System, Elimination Of Equitable Tolling For FTCA Claims Would Contravene Congress's Policy Goals.

Consistent with this longstanding policy favoring America's veterans, Congress has created a system of support and assistance to veterans in recognition of their service to the Nation.[2] These programs were

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[2] *See, e.g.*, *Federal Benefits for Veterans, Dependents and Survivors* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at*

intended to guide veterans through a "non-adversarial system of awarding benefits to veterans," often giving veterans the benefit of any reasonable doubt. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (noting Congress both recognized and wished to preserve the non-adversarial nature of awarding benefits to veterans).

The VA identifies "provid[ing] … high quality medical care and benefits" as its most important mission. *VA Access Audit & Wait Times Fact Sheet, U.S. Dep't of Veterans Affairs (June 9, 2014), available at http://www.va.gov/health/docs/ vaaccessauditsystemwidefactsheet060914.pdf (last visited Nov. 7, 2014).* This mission is implemented through the Veterans Health Administration ("VHA"), which is the largest integrated health care system in the United States, with over 1,700 healthcare sites serving 8.76 million veterans each year. *See Veterans Health Administration* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/health* (last visited Nov. 7, 2014). Although the VHA system provides many valuable benefits, it is also is liable for many injuries to veterans and their families. Between January 2003 and the middle of 2013, the VA paid approximately $845 million in judgments and settlements to resolve 4,426 of more than 16,000 medical malpractice claims brought by veterans and their families. J. Sweigart and A. Diamant, *VA's Malpractice Tab: $845M in 10*

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http://www.va.gov/opa/publications/benefits_book/2014_Federal_Benefits_for_Veterans_English.pdf (*"Federal Benefits for Veterans, Dependents and Survivors"*) (last visited Nov. 7, 2014).

Years, Cox Media Group, Nov. 12, 2013*, available at http://www.daytondailynews.com/news/news/vas-malpractice-tab-845m-in-10-years/nbpj4* (last visited Nov. 7, 2014). As these figures attest, medical malpractice claims against the VA represent a significant category of tort claims brought by veterans.

In cases of medical malpractice by the VA, veterans or their survivors may choose to pursue both a negligence claim under the FTCA as well as a disability compensation claim under 38 U.S.C. § 1151 ("Section 1151"), but the two claims are very different both in terms of the compensation they afford and the procedural requirements they impose.

Section 1151 provides veterans subject to VA negligence with monthly compensation benefits that often does not provide complete relief. *See Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability). Under Section 1151, the VA makes monthly payments to an injured veteran based on the veteran's rate schedule disability-classification, and other predefined factors. *See* 38 U.S.C. § 1151(a)(1) (establishing the conditions under which a veteran can recover for VA-caused disabilities).[3] Because Section 1151 payments "die with the veteran," the veteran's survivors receive no con-

[3] *See also Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability).

tinuing benefit.[4] Furthermore, Section 1151 claims only compensate for the additional disability caused by the medical negligence. *See* 38 U.S.C. § 1311; 38 C.F.R. § 3.361(b). Accordingly, when a veteran is already significantly disabled, the added disability may result in limited additional compensation.

In contrast, the VA pays a lump sum under the FTCA, taking into consideration the veteran's individual pain, suffering, and economic loss.[5] Unlike the monthly benefits afforded under Section 1151, FTCA awards pass to survivors by will or intestacy. Because FTCA awards are individualized and devisable, veterans who recover under the FTCA, rather than or in conjunction with Section 1151, are better able to care for themselves and their families.

Because both Section 1151 and the FTCA compensate for VHA medical malpractice and involve VA administrative processes, veterans and the VA often

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[4] Under a claim for Dependency and Indemnity Compensation, however, a surviving spouse can seek relief if the VA medical malpractice causes the veteran's death. 38 U.S.C. § 1151(a)(1). Even then, a surviving spouse is eligible to receive only a small monthly sum (approximately $1,233.23 per month for most surviving spouses in 2014). 38 U.S.C. § 1311; *Federal Benefits for Veterans, Dependents and Survivors*, at 116.

[5] *See, e.g., Davis v. United States*, 375 F.3d 590, 591 (7th Cir. 2004) (affirming an award for economic loss and pain and suffering for a veteran's claim against the North Chicago VA hospital that performed the wrong medical procedure and had failed to inform the veteran that medication, instead of invasive surgery, could also treat his condition); *Deasy v. United States*, 99 F.3d 354, 360 (10th Cir. 1996) (upholding an award for pain and suffering relating to the VA's negligent psychiatric treatment).

confuse the two claims. *See, e.g.*, *Bartus v. United States*, 930 F. Supp. 679, 682-83 (D. Mass. 1996) (noting that neither the VA nor the veteran understood the difference between Section 1151 and FTCA claims). Although veterans have the burden of providing the essential information necessary to make their claims, the VA has an affirmative duty to assist veterans in substantiating their claims. *See* 38 U.S.C. § 5103A. Although Section 1151 disability claims and FTCA negligence claims appear similar, veterans must initiate them in different ways. *See Glarner v. United States*, 30 F.3d 697, 700 (6th Cir. 1994) (noting that filing a FTCA claim involves filling out a SF-95 form, separate from the § 1151 claim for disability benefits). When veterans do not understand the different filing requirements (frequently due to the VA's erroneous guidance or negligence), they sometimes fail to file FTCA claims within the limitations period. *See, e.g.*, *Bartus*, 930 F. Supp. at 682-83.

Given the VA's statutory notice and assistance obligations, veterans should not be penalized for mistakes or misdirection by the VA when veterans submit a claim only for the limited Section 1151 remedies, but not a claim under the FTCA, even though they believe they are pursuing both. Justice requires equitable tolling when veterans reasonably rely on the VA's guidance and, as a result, fail to file an administrative FTCA claim within the limitations period. When veterans approach the VA to file a negligence claim, the VA has a duty to provide the appro-

priate form for filing.[6] But because even the VA finds the distinction between § 1151 disability claims and FTCA negligence claims confusing, the VA does not always discharge its duty. When VA institutional incompetence (or worse) causes veterans to file more limited Section 1151 disability claims, but not FTCA negligence claims, courts rely on equitable tolling to remedy the resulting unfairness.

For example, in *Bartus*, the veteran-plaintiff experienced permanent asthma problems after a VA surgery. 930 F. Supp. at 680. The veteran approached a VA benefits counselor to discuss filing a negligence claim and the benefits counselor offered to file the claim on his behalf, consistent with the VA's duty to assist veterans. *Id.* The veteran, however, did not realize that the benefits counselor incorrectly filed the Section 1151 form instead of the FTCA form until almost two years later when the VA denied the veteran's "disability benefits" claim. *Id.* By then, the statute of limitations had run on his FTCA claim. *Id.* The court noted that, "[a]pparently, neither [the veteran] nor the benefits counselor understood the difference between a negligence claim for damages and a negligence claim for disability benefits; the

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[6] *See* 38 C.F.R. § 14.604(a) ("Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death."); 38 C.F.R. § 3.150(a) ("Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished.").

counselor asked [the veteran] to complete a § 1151 form, the wrong form." *Id.* at 682. Because "[i]t would be distinctly unfair to allow this bureaucratic snafu to foreclose plaintiff's [FTCA] claim[,]" the court equitably tolled the statute of limitations for the veteran's FTCA claim. *Id* at 682-83. [7]

Without equitable tolling, the VA has limited incentives to educate its employees on the availability of FTCA claims and the differences between an FTCA claim and a Section 1151 claim. The VA has a duty to serve and care for veterans. When the VA provides negligent medical care, it should not be incentivized to compound the harm by further providing wrong or misleading advice, thus escaping liability for pain and harm it inflicted upon the veteran in the first place. The more extensive remedies available under the FTCA are therefore required to protect veterans and their families from the "systemic, totally unacceptable lack of integrity within" the VHA. *Remarks by Secretary Eric K. Shinseki*, U.S. Dep't of Veterans Affairs, (May 30, 2014), at *http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014).

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[7] *See also Glarner*, 30 F.3d at 699 (equitably tolling FTCA statute of limitations where veteran-plaintiff told office of Disabled American Veterans in a VA Medical Center that he wanted to file a negligence claim and the officer breached his duty by filing a § 1151 form, rather than an FTCA Standard Form 95).

III. Equitable Tolling Is Particularly Justified With Respect To FTCA Claims Brought By Veterans And Its Elimination Would Have A Devastating Impact.

The equitable tolling doctrine is crucial to veterans and their families due to improprieties surrounding the health care system administered by the VA and the prevalence of mental health issues in the veteran population. These threats are not merely hypothetical. Recent investigations have revealed that the VA has allegedly concealed and falsified records to prevent the disclosure of failures in care. Veterans have a legal right to seek recourse for injuries they sustain while under the VA's care and active concealment of evidence wrongfully prevents that right from being exercised. Additionally, veterans disproportionately suffer from cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. Without equitable tolling, these factors would result in substantial injustices against veterans.

A. Recent VA Scandals Demonstrate Systematic Efforts To Conceal Tortious Conduct Towards Veterans That May Go Unchecked Absent Tolling.

The VA system is currently under intense scrutiny due to recent discoveries that VA personnel have "systemically covered up delays and deaths they have caused" to protect the bonuses of VA managers. *See, e.g.*, *Friendly Fire: Death, Delay & Dismay at the VA*, Senate Oversight Report of the U.S. Dep't of Veterans Affairs, Sen. Tom Coburn, at 4, June 24, 2014, *available at http://www.coburn.senate.gov*

/public/index.cfm?a=Files.Serve&File_id=577d9e90-ee2a-4eee-a52d-2cf394420761 ("Senate Oversight Report") (last visited Nov. 7, 2014). The extent of the alleged malfeasance is appalling and wide-ranging. Over the past decade, it is estimated that "more than 1,000 veterans may have died as a result of VA malfeasance." *Id.*

In Phoenix, for example, a whistleblower recently revealed that over the past few years, more than 1,400 veterans in need of health care were placed on a "secret list" and that documents were shredded to conceal long wait times from the public – and veterans in particular. *Phoenix VA Officials Put on Leave After Denial of Secret Wait List*, CNN, May 1, 2014, *available at http://www.cnn.com/2014/05/01/health/veterans-dying-health-care-delays/index.html* (last visited Nov. 7, 2014). The August 26, 2014 VA Office of Inspector General report, *Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practice as the Phoenix VA Health Care System* (the "Inspector General Report"), found that over 3,500 veterans, many of whom were included on "unofficial wait lists," were waiting to be scheduled for appointments, but were not included on the Phoenix VA official wait list. *See* Inspector General Report at 34. The Inspector General Report also documented "scheduling schemes" used by the Phoenix VA to meet wait time goals imposed by leadership. *Id.* at 49-53. Whistleblowers at VA hospitals in Texas, Wyoming, and New Mexico, among other VA facilities, have admitted to similar concealment practices taking place over the past several years. *See, e.g.*, *Texas VA Run Like a 'Crime Syndicate,' Whistleblower Says,* The Daily Beast, May 27, 2014, *available at*

http://www.thedailybeast.com/articles/2014/05/27/exclusive-texas-va-run-like-a-crime-syndicate-whistleblower-says.html (last visited Nov. 7, 2014). The Inspector General Report confirmed that "[i]nappropriate scheduling practices are a systemic problem nationwide." Inspector General Report, at 65.

Recent VA cover-ups have not been limited to hospital wait times. In Pittsburgh, Pennsylvania, for example, six veterans died and 22 others became ill following an outbreak of Legionnaires' disease. *See* Senate Oversight Report at 30. VA officials allegedly knew of the outbreak for more than a year, yet failed to notify patients or take other precautions to stop the disease from spreading. *VA Hospital Knew Human Error Caused Legionnaires' Outbreak*, CBS News, March 13, 2014, *available at http://www.cbsnews.com/news/va-hospital-knew-human-error-caused-legionnaires-outbreak* (last visited Nov. 7, 2014).

These examples are just a few of the recent scandals that are currently known, though there may be countless other cover-ups being carried out by the VA that may not be revealed until farther in the future. If VA employees are able to conceal or falsify evidence for more than two years, veterans and their families could be left without a remedy under the FTCA in the absence of equitable tolling.

While congressional efforts to hold those responsible for the failures within the VHA system accountable are laudable, it should not be undercut by strained interpretations of existing laws and rules that can provide appropriate redress to veterans.

B. The Disproportionate Impact Of Cognitive Impairments On Veterans Render The Veteran Community Particularly Vulnerable To Abuse Of Process.

Veterans disproportionately suffer health complications involving cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. For example, nearly 700,000 veterans are compensated for post-traumatic stress disorder ("PTSD") alone. *VA Benefits & Health Care Utilization*, U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/vetdata/docs/pocketcards/fy2014q4.pdf* (last updated July 11, 2014). In addition, more than 300,000 veterans and active military personnel have been diagnosed with traumatic brain injury ("TBI") since 2002. *See DoD Worldwide Numbers for TBI*, Defense and Veterans Brain Injury Center, *available at http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi* (last visited Nov. 7, 2014). Veterans inflicted with these conditions frequently suffer from memory loss, confusion, concentration problems, and dementia.

As a result of these mental conditions, as well as other factors such as poverty, the lack of support networks, substance abuse issues, and often a lack of transferable skills for employment in the civilian workforce, veterans disproportionately represent a large percentage of the homeless population in the United States. Veterans make up approximately 12 percent of the homeless adult population, and approximately 150,000 homeless veterans receive specialized health care treatment from the VA each

year. *See Homeless Veterans Background & Statistics, Nat'l Coalition for Homeless Veterans, available at http://nchv.org/index.php/news/media/background_and_statistics (last visited Nov. 7, 2014).* Roughly 50 percent of homeless veterans suffer from a serious mental illness and about 70 percent have substance abuse problems. Moreover, homeless veterans often lack a mailing address, transportation, telecommunications, internet access, and other key resources, making it even more difficult for them to be aware of and fulfill statutory deadlines.

These mental health issues and other life challenges that plague the veteran community, along with the VA's demonstrated penchant for obfuscating the deficiencies in the care it provides, combine to create a frightening mosaic that begs for the applicability of equitable doctrines that prevent injustice to the veteran community. Equitable tolling is such a doctrine, and its applicability to the FTCA should be affirmed.

IV. This Court's Application Of The Common-Law "Discovery Rule" To The FTCA's Statute Of Limitations Requires Upholding "Equitable Tolling" As Well.

Finally, the position advanced by the Government here is antithetical to this Court's embrace of equitable, common-law doctrines when applying the FTCA's statute of limitations in medical malpractice cases brought by veterans against the United States. In *United States v. Kubrick*, 444 U.S. at 113, this Court held that, in medical malpractice cases, the FTCA's two-year statute of limitations begins to run only when the plaintiff knows of both the existence of

his injury and its cause. The Court reasoned that a plaintiff ignorant of his legal rights did not stand on the same footing as a plaintiff ignorant of the fact of his injury or its cause, because the injury in fact "may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122. In contrast, the plaintiff who is aware of both his injury and who inflicted it is "no longer at the mercy of the latter" and may in the exercise of reasonable diligence discover the necessary facts to bring his claim. *Id.*

Importantly, the Court's adoption of the common-law "discovery rule" of accrual in *Kubrick* was a departure from the "general rule" that a tort claim accrues at the time of plaintiff's injury. *Id.* at 121 n.7. The Court's departure from the "general rule" of accrual in favor of the "discovery rule" in this context is particularly notable given the Court's reticence to "graft a discovery rule" onto statutes of limitations absent "textual, historical, or equitable reasons." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013).

The "discovery rule" established by this Court in *Kubrick* has since been applied to FTCA claims countless times by the Courts of Appeal and other courts. *See*, *e.g.*, *Miller v. Phila. Geriatric Ctr.*, 463 F.3d 266, 271 (3d Cir. 2006) (FTCA claims involving medical malpractice "accrue not at the time of injury, but rather when a plaintiff knows of both the existence and the cause of his injury."); *Nemmers v. United States*, 795 F.2d 628, 629 (7th Cir. 1986) ("The time starts to run in a medical malpractice case when the plaintiff has the information necessary to

discover 'both his injury and its cause.'"); *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) ("The diligence-discovery rule sets the accrual date at the time when, with reasonable diligence, the plaintiff has or . . . should have discovered the critical facts of both his injury and its cause.") (citations omitted).

This Court's adoption of the common-law discovery rule to medical malpractice claims under the FTCA supports the application of equitable tolling to such claims. For example, in *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013), the Seventh Circuit correctly held that the FTCA's statute of limitations could be equitably tolled in certain circumstances. Judge Posner wrote that the discovery rule as applied to the FTCA by this Court in *Kubrick* "bolstered" the Seventh Circuit's decision: "as a practical matter the discovery rule extends the statute of limitations by delaying the date on which it begins to run. Yet despite the rule's being a common law rule rather than part of the Federal Tort Claims Act, it has long been accepted as fully applicable to suits under the Act." *Id.*[8]

In light of the above, the Government's reliance on *Kubrick* is sorely misplaced. *See* Brief of Petitioner at 29-30. The Government cited *Kubrick* for the

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[8] Similarly, the Ninth Circuit in *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013) likewise relied on this Court's application of the discovery rule to hold that equitable tolling applied to claims under the FTCA: the "[a]pplication of a common law discovery rule not enunciated in the statute to aspects of § 2401(b) reinforces the notion that the FTCA's statutes of limitations admit of common law exceptions." *Id.*

proposition that when the United States waives its sovereign immunity, the statute of limitations acts as a condition on that waiver, and the Court "'should not take it upon [itself] to extend the waiver beyond that which Congress intended.'" *Id.* (quoting *Kubrick*, 444 U.S. at 117-18). Yet, mindful of that principle, this Court nevertheless grafted a *common-law* doctrine onto Section 2401(b), found nowhere in the text of the FTCA, which requires federal courts to engage in a fact-intensive inquiry to determine when a plaintiff knew or should have known of both his injury *and its cause*. The Government provides no argument as to how "equitable tolling" extends the United States' waiver of sovereign immunity any further than the discovery rule. The Government's inability to do so confirms that this Court should affirm the applicability of equitable tolling to the FTCA.

On the other hand, a holding in favor of the Government that equitable tolling does not apply would require this Court to reconsider *Kubrick* or find some defensible and administrable basis of distinguishing the application of an equitable common-law doctrine to the FTCA's statute of limitations in the case of accrual, but not doing so in the case of tolling. The Court should not, and cannot, do so.

As an initial matter, beyond the prudential considerations of *stare decisis*, this Court should not overturn *Kubrick*'s holding that the "discovery rule" applies in determining the accrual of medical malpractice claims under the FTCA. As discussed above, the Courts of Appeals have consistently applied – and America's veterans have relied upon – *Kubrick*'s holding for 35 years. Additionally, as described in Parts II & III, *supra*, veterans overwhelmingly rely

on the VA for medical care, and already face numerous obstacles to vindicating their rights when injured by the VA. Injuries from medical malpractice are frequently latent and present themselves years after the "injury" is inflicted. Recent events also show that the VA has a proclivity for concealing evidence from veterans as to the cause of their injuries. Thus, any ruling that did not preserve the discovery rule would be extremely prejudicial to veterans as a group, and *amici curiae* urge the Court to consider carefully how a ruling in favor of the Government would affect the applicability of the discovery rule to Section 2401(b), and at the very least to preserve the status quo applicability of the discovery rule.[9]

Additionally, any attempt to draw a meaningful distinction between the application of the "discovery rule" and the application of "equitable tolling" would be difficult to administer by lower courts. Courts should not be forced to make gossamer distinctions between whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury or did expire because the existence of the claim was fraudulently concealed after the fact.

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[9] Although the Government has only challenged the application of "equitable tolling" to the FTCA, courts have noted the confusion between the "fraudulent concealment" doctrine of equitable tolling and the discovery rule. *See, e.g.*, *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011) (noting "the all-too-common mistake by which the discovery rule is sometimes confused with the concept of fraudulent concealment of a cause of action" (citations and quotations omitted)). Should the Court decide in favor of the Government here, *amici* encourage the Court to expressly exclude the "discovery rule" from its decision.

The facts of the *June* case present a ready-made illustration. When Anthony Booth was killed in the fateful automobile accident, his estate argued that his claim had not accrued because through "reasonable diligence" his estate could not have known that the defective guard rail was the cause of his death. *See June v. United States,* No. 11-901-PHX-SRB, Order Granting Mot. to Dismiss at 3-4, (D. Ariz. Nov. 1, 2011) ECF No. 19. This was because the Federal Highway Administration allegedly concealed information about the fitness of those guard rails. *Id.* Assuming the "discovery rule" applied, but equitable tolling did not, would the claim be saved because plaintiff could not have known of "the cause" of Booth's death, or barred because the claim was merely fraudulently concealed? This example suggests two things: First, the distinctions between accrual and tolling are often arbitrary and amorphous and the survival of a claim should not depend upon the outcome. Second, making such distinctions would do nothing to encourage transparency by federal agencies, especially when litigation is pending or threatened. Given the existing lack of transparency of the VA described in detail above, such an outcome is not only unsound policy, but it is inconsistent with Congress's intent in passing the FTCA.

CONCLUSION

For the foregoing reasons, as well as those offered by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

Rani Habash
DECHERT LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3430

Joshua D. N. Hess
Counsel of Record
Mark DiPerna
Carl Gismervig
Jonathan Massey
DECHERT LLP
One Bush Street,
Suite 1600
San Francisco, CA
94104
(415) 262-4500

Counsel for Amici Curiae

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