No. 22-259

In the Supreme Court of the United States

LEWIS B. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that petitioner's claim for military medical retirement pay under 10 U.S.C. 1201 dating back to his separation from service was time-barred under the applicable six-year statute of limitations, see 28 U.S.C. 2501, where petitioner was separated from service without retirement pay in 1988 and filed suit in 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31), is reported at 30 F.4th 1094. The opinion of the Court of Federal Claims (Pet. App. 53-68) is reported at 149 Fed. Cl. 703.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2022. A petition for rehearing was denied on June 17, 2022 (Pet. App. 71-72). The petition for a writ of certiorari was filed on September 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In several provisions of Title 10 of the U.S. Code, Congress addressed payments to a member of the armed services who is determined to be unfit for duty.

Section 1201, the provision at issue here, states that certain members of the armed services may be separated from service with military retirement pay.

If a servicemember becomes unfit for duty due to a physical disability incurred during service, the Secretary of the relevant military department "may retire" that individual "with retired pay" if the Secretary makes certain determinations about the nature and source of the disability and the length of the member's service. 10 U.S.C. 1201 (1988); see 10 U.S.C. 101(8) (1988) ("Secretary concerned" means the Secretary of the armed service affected). For a servicemember who has less than 20 years of service, the Secretary must determine, *inter alia*, that the disability "is at least 30 percent under the standard schedule of rating disabilities in use by the Veteran's Administration"—which has since been renamed the Department of Veterans Affairs (VA), see 10 U.S.C. 1201(b)(3)(B); Pet. App. 9 n.3—"at the time of the determination." 10 U.S.C. 1201(3)(B) (1988). The VA rates disabilities based on the extent to which they impair a veteran's earning capacity in the civilian world. 38 U.S.C. 355 (1988); see 38 U.S.C. 1155.

As an alternative to disability retirement pay, a servicemember is entitled to "severance pay" if she is unable to perform her duties due to a qualifying disability, "is *less than* 30 percent [disabled] under the standard schedule of rating disabilities in use by [the VA] at the time of the determination," and satisfies various other requirements. 10 U.S.C. 1203(4)(A) and (B) (1988) (emphasis added). Other statutory provisions address payments to servicemembers in other circumstances, including where a servicemember's disability is temporary or is not connected to her service. See 10 U.S.C. 1201-1207.

Challenges to military-pay determinations under Section 1201 are subject to the statute of limitations in 28 U.S.C. 2501, which bars any claim that is not filed "within six years after such claim first accrues." *Ibid.*; see 28 U.S.C. 1491(a)(1); *Fisher* v. *United States*, 402 F.3d 1167, 1174-1175 (Fed. Cir. 2005) (explaining that Section 1201 is a money-mandating statute that establishes Tucker Act jurisdiction in the Court of Federal Claims). Congress established an exception to the six-year time limit if the plaintiff is "under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2501. The limitations period established by Section 2501 is "jurisdictional." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 136 (2008) (brackets and citation omitted).

The military-pay scheme at issue here is distinct from the provisions for disability benefits administered by the VA. Under the VA disability-benefit system, a veteran suffering a disability because of an injury or disease incurred "in [the] line of duty" during military service is generally entitled to monthly monetary "compensation." 38 U.S.C. 1110, 1131. The amount of that monthly compensation depends on the nature and severity of the disability at the time of each payment. See 38 U.S.C. 1114, 1134. A veteran's disability rating and consequent monthly VA benefits therefore can increase over time if her medical condition worsens.

2. From 1981 to 1988, petitioner served in the U.S. Air Force. Pet. App. 3, 6. In 1982, while on active duty in Germany, petitioner was struck in the eye by the door of an armored personnel carrier. *Id.* at 3. The injury caused various physical and psychological effects and made it increasingly difficult for petitioner to perform his duties. *Ibid.*

In 1988, petitioner was referred to a Medical Evaluation Board (MEB), which documented petitioner's severe headaches resulting from the eye injury. Pet. App. 4. The MEB report explained that the headaches had been increasing in frequency and duration, becoming nearly constant in the days leading up to the evaluation. *Ibid.* The report also observed that petitioner suffered from "psychological factors effecting a physical illness" and recommended "psychometric testing." *Ibid.* (citation omitted). The MEB referred petitioner's case to the Physical Evaluation Board (PEB) to consider whether petitioner's condition rendered him unfit to serve. *Ibid.*

Petitioner told the PEB that his condition had worsened since the MEB evaluation, and that he was in constant physical pain and suffering "psychologically." Pet. App. 5 (brackets and citation omitted). The PEB determined that petitioner was 10% disabled. *Ibid.* It concluded, based on the nature and extent of his disability, that petitioner was entitled to severance pay. *Ibid.* Petitioner "agreed with the PEB's recommendation," and he did not appeal the 10% disability rating. *Id.* at 6; see *id.* at 11 n.4. He was honorably discharged in 1988 with severance pay rather than retirement pay. *Id.* at 6.

Petitioner subsequently sought and was awarded disability-benefit payments from the VA under Title 38. Pet. App. 6. In computing those payments, the VA calculated petitioner's disability rating at various points in time. *Ibid.* In 2005, the VA increased petitioner's disability rating to 50%. *Id.* at 56. In 2012, the VA further increased petitioner's disability rating based on a combination of conditions including headaches, post-traumatic stress disorder (PTSD), and traumatic brain

injury. *Ibid.* In 2017, the VA increased petitioner's disability rating to 100%. *Ibid.*

In 2018, petitioner petitioned the Air Force Board for Correction of Military Records (AFBCMR or Board) for changes to his record that he asserted would entitle him to disability retirement pay dating back to 1988. Pet. App. 56-57. In 2020, the AFBCMR denied the request. See *id.* at 57. The Board explained that, although post-discharge changes in a veteran's medical condition may be taken into account in adjusting benefit levels under the VA's disability-compensation scheme, such changes cannot entitle the servicemember to disability retirement pay under Title 10. See *id.* at 25-26 (Newman, J., dissenting) (describing and quoting Board's decision).

3. a. On April 23, 2020, petitioner filed suit in the Court of Federal Claims (CFC) seeking review of the Board's denial of his request for disability retirement pay dating back to his separation from service. Pet. App. 57.

b. The CFC dismissed petitioner's complaint for lack of jurisdiction, holding that his suit was time-barred under the six-year limitations period in 28 U.S.C. 2501. See Pet. App. 53-68.

The CFC explained that, under longstanding Federal Circuit precedent, a claim for disability retirement pay first accrues when all events have occurred to fix the alleged liability and the appropriate military board "either finally denies such a claim or refuses to hear it." Pet. App. 60 (quoting *Real* v. *United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990)). The court accordingly determined that petitioner's claim had accrued in 1988, when petitioner was discharged after the PEB determined that he "should be separated, and not retired,"

due to his disability. *Id.* at 61. The court concluded that petitioner's 2018 application to the AFBCMR, filed shortly after the VA had awarded him a 100% disability rating, did not affect the accrual date for his current claim for disability retirement pay. *Id.* at 62.

The CFC then considered petitioner's argument that the accrual-suspension rule tolled the accrual of his claim. See Pet. App. 63-64 (citing *Japanese War Notes Claimants Ass'n of Philippines, Inc.* v. *United States*, 373 F.2d 356, 359 (Ct. Cl. 1967)). The CFC determined that the rule did not delay the accrual of petitioner's claim because "[t]he facts of this case do not show that [petitioner's] disabling health problems were inherently unknowable in 1988." *Id.* at 64. To the contrary, petitioner had "recognized the disabling nature of his health problems in 1988." *Id.* at 66. The court also explained that petitioner was not entitled to tolling under the statutory exception for "legal disability," 28 U.S.C. 2501, because the record did not establish that petitioner's disability had impaired his capacity to transact business "to the extent and for the number of years" required. Pet. App. 62 n.3. The court also rejected petitioner's other arguments. See *id.* at 66-68.

c. The court of appeals affirmed. Pet. App. 36-52. It agreed with the CFC that petitioner's medical impairment was not inherently unknowable in 1988. *Id.* at 43-44. Judge Newman dissented. She would have held that petitioner's claim did not accrue until the VA assigned at least a 30% disability rating to petitioner. *Id.* at 46-52.

Petitioner filed a petition for panel rehearing and rehearing en banc, relying on the dissent's reasoning to argue that his claim for disability retirement pay had not accrued until 2020.

d. The court of appeals granted the petition for panel rehearing and issued a modified opinion addressing petitioner's arguments. See Pet. App. 1-31.

The court of appeals explained that the CFC lacks jurisdiction over a suit filed more than six years after the relevant claim first accrues. Pet. App. 9 (citing *John R. Sand & Gravel Co.*, 552 U.S. at 132-135). The court found that petitioner's claim had accrued in 1988 when the PEB issued its informal report determining that petitioner was 10% disabled and recommending severance pay but not retirement pay. Petitioner had waived his appeal at that time and was honorably discharged. *Id.* at 11-12 & n.4; see *id.* at 9-12. In reaching that conclusion, the court emphasized that the PEB "had before it evidence pertaining to [petitioner's] injuries from being struck in the head, including his headaches and his potential psychological claims," so that by the time the PEB issued its decision "all events necessary to fix the government's alleged liability occurred." *Id.* at 15.

Petitioner argued that a claim for retirement pay does not accrue until a servicemember is assigned a 30% disability rating. The court of appeals rejected that argument, emphasizing that the CFC often hears claims where a servicemember challenges a rating of less than 30%. Pet. App. 15-16. The court noted that the PEB had been apprised of "the severity and frequency of [petitioner's] headaches, as well as his other physical and psychological injuries." *Id.* at 16. The court further explained that, to the extent petitioner's disability had worsened after the PEB determination, that circumstance would not be relevant to petitioner's claim for retirement pay under the statute, which requires that eligibility for disability retirement be assessed based on the disability rating "at the time of the determination."

Ibid. (quoting 10 U.S.C. 1201). Accordingly, the court concluded that "[t]he VA's later assignment of a higher disability rating, combined with [petitioner's] proceedings before the [AFBCMR], did not provide him with a new claim." *Ibid.*

The court of appeals also rejected petitioner's argument that the accrual-suspension rule delayed the accrual of his claim. The court explained that petitioner "has the burden of proving that the facts underlying [his] claim were inherently unknowable," and it "agree[d]" with the CFC that petitioner "did not make such a showing." Pet. App. 17. The court reiterated that a disability that "progressively worsens over time" "is not a basis for suspending the accrual of a claim for disability retirement," which the statute fixes at the time of the determination regarding the separation from service. *Id.* at 20. The court further observed that petitioner's approach could "undermin[e] the careful balance that Congress struck between the disability retirement systems of the several armed services and the veterans benefit system administered by the VA." *Id.* at 22.

e. Judge Newman dissented. Pet. App. 23-31. She took the view that, because entitlement to disability retirement for a servicemember with less than 20 years of service "requires at least 30% disability" and "such events had not occurred in 1988," petitioner's claim "cannot have accrued in 1988." *Id.* at 28. She appeared to accept that petitioner was only 10% disabled at the time of his separation from service. See *id.* at 24 (stating that petitioner "could not have established entitlement to disability retirement at discharge in 1988 with 10% disability"). She stated, however, that "as the years passed his disability increased." *Id.* at 25; see *id.*

at 29 (noting that "[t]he age-related progression of service-connected disability is not unusual"). Judge Newman viewed petitioner's arguments "based on 100% disability" to constitute a new claim, premised on "changing circumstances," that had not been previously decided and had been timely filed. *Id.* at 30.

Petitioner filed a second petition for rehearing and rehearing en banc. The court of appeals denied the petition, with no judge in regular active service calling for a vote on the petition. Pet. App. 71-72.

ARGUMENT

The courts below correctly rejected, as time-barred, petitioner's claim that he should have received retirement pay upon his 1988 separation from military service. That holding does not conflict with any decision of this Court or of another court of appeals. In any event, this case would not be a suitable vehicle for further review because of petitioner's long delay in seeking relief from the Board after the VA increased his disability rating to 50% in 2005.

1. This case does not satisfy the Court's usual criteria for review. Petitioner does not assert a circuit conflict or any conflict with a specific decision of this Court. The Federal Circuit declined to consider the decision below en banc, with no judge in active service dissenting from that denial or calling for a vote.

2. The decision below was correct. In 1988, petitioner was honorably discharged after the PEB, the relevant board of the U.S. Air Force, determined that petitioner was unfit for service. The PEB further found that, because petitioner's otherwise qualifying disability rendered him less than 30% disabled, he was entitled to severance rather than retirement pay. Pet. App. 15, 61-62; see 10 U.S.C. 1201, 1203.

As the courts below correctly held, petitioner's challenge to those PEB determinations accrued at that time. Starting in 1988, petitioner could have brought suit to argue that the 10% disability rating was incorrect, and to challenge the denial of retirement pay on that basis. At that point, "all events ha[d] occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue." Pet. App. 9-10 (quoting *Martinez* v. *United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003), cert. denied, 540 U.S. 1177 (2004)). In addition, as required by Federal Circuit precedent, "final action [had been] taken by the first board competent to decide the matter of entitlement." *Id.* at 10.

In contesting that conclusion, petitioner and the dissenting judge below have offered three distinct rationales for finding petitioner's suit to be timely. Each of those arguments lacks merit.

a. Petitioner states that 10 U.S.C. 1201 "unambiguously provides that a disabled service member is not entitled to retirement pay unless the Secretary has determined that the service member's disability is at least 30 percent." Pet. 5. Petitioner argues that, regardless of the *actual* extent of a servicemember's disability at the time of her discharge, "a cause of action for retirement pay under 10 U.S.C. § 1201 can[not] accrue in the absence of a determination by the Secretary that the service member is at least 30 percent disabled." Pet. 7; see Pet. 5 (stating that petitioner's claim "could not have accrued until * * * [he] obtained a disability rating of at least 30 percent"); Pet. App. 12-13 (noting petitioner's argument below that "his claim for disability retirement pay could not accrue until * * * the Air Force determined that he was entitled to a 30% disability rating"). Petitioner contends that he could not have sued in 1988

because at that time his disability rating, *as determined by the Secretary*, "was only 10 percent." Pet. 6.

Petitioner is correct that, under Section 1201, a service Secretary may award retirement pay only if he determines, *inter alia*, that the veteran is at least 30% disabled. It does not follow, however, that a servicemember is foreclosed from seeking relief in court if she is denied retirement pay based on a Secretarial disability rating lower than 30%. Rather, as the court of appeals explained, the CFC regularly "hears cases where a service member challenges a board's rating with respect to disability retirement." Pet. App. 15 (citing cases). Thus, if petitioner had believed in 1988 that he was at least 30% disabled, the Secretary's contrary determination would not have foreclosed petitioner from filing suit to challenge the denial of retirement pay.

In resisting that conclusion, petitioner invokes (Pet. 10-11) the pro-veteran canon. Under that interpretive principle, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." See *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (citation omitted). But that principle applies only to resolve interpretive doubt created by ambiguous statutory text, see *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and so has no application in this case, see Pet. App. 16 (explaining that the statutory language "forecloses [petitioner's] argument"). Petitioner's reliance on the canon is particularly misplaced in this context because the position he advocates—*i.e.*, that a veteran cannot seek judicial review of a denial of retirement pay until the Secretary involved has given him a disability rating of at least 30%—would *disserve* the interests of veterans generally by foreclosing prompt judicial review of a lower disability rating.

b. In dissenting below, Judge Newman appeared to accept that petitioner was less than 30% disabled at the time of his separation from service. See pp. 8-9, *supra*. She viewed petitioner's current claim as premised on "changing circumstances," Pet. App. 30, *i.e.*, an increase in the extent of his disability during the decades after his discharge, see *id.* at 25, 29. In her view, that claim could not have accrued in 1988 because the factual predicate for the claim did not exist at that time.

That analysis reflects a misunderstanding of the statutory scheme. Section 1201 does not authorize retroactive retirement pay to a servicemember who is less than 30% disabled at the time of discharge but subsequently becomes at least 30% disabled. Rather, it provides retirement pay to those servicemembers who are at least 30% disabled *at the time of their separation*.

Section 1201 authorizes the Secretary of the Air Force to award retirement pay to certain active-duty servicemembers. That authorization applies if specified conditions are satisfied. First, the Secretary must determine that the servicemember "is unfit to perform" her assigned duties "because of physical disability" and therefore should be separated from service. 10 U.S.C. 1201(a). Second, the Secretary must "also make[]" certain "determinations with respect to the member and that disability," *ibid.*, including that the disability requiring separation from service "is at least 30 percent under the standard schedule of rating disabilities in use by the [VA] at the time of the determination," 10 U.S.C. 1201(b)(3)(B); accord 10 U.S.C. 1201 (1988). The statute therefore ties eligibility for disability retirement pay to the servicemember's disability level "at the time of the determination," 10 U.S.C. 1201(b)(3)(B); 10 U.S.C. 1201(3)(B) (1988), rather than delaying resolution until

such time as the veteran meets the statutory requirements. For that reason, "a disability that progressively worsens over time is not a basis for suspending the accrual of a claim for disability retirement" because "[t]he only relevant point in time for a disability retirement determination is 'the time of the determination.'" Pet. App. 20 (quoting 10 U.S.C. 1201(b)(3)(B)).

The dissenting judge's approach is inconsistent not only with the text of Section 1201, but with the overall statutory scheme. A servicemember who has less than 20 years of service, and who is separated due to a disability that "is *less than* 30 percent under the standard schedule of rating disabilities in use by the [VA] at the time of the determination," is (if other requirements are satisfied) entitled to "*severance pay*," which petitioner received. 10 U.S.C. 1203(a) and (b)(4)(A) (emphases added); accord 10 U.S.C. 1203 and (4)(A) (1988). Taken together, Sections 1201 and 1203 direct the Secretary of the relevant military department to determine at the time of separation whether an otherwise qualifying servicemember is at least 30% disabled. If the answer is yes, the servicemember receives retirement pay; if it is no, the servicemember receives severance pay. Thus, while the VA can consider post-separation changes to a veteran's physical condition in calculating disability benefits under Title 38, see p. 3, *supra*, disability retirement pay determinations under Title 10 depend on a servicemember's physical condition when the separation decision is made.

c. Petitioner contends (Pet. 11-18) that the courts below erred in denying him the benefit of the accrual-suspension rule. Petitioner suggests that he may in fact have been at least 30% disabled in 1988, but that his claim for retirement pay did not accrue at that time

because petitioner became aware only later of the extent of his disability. See, *e.g.*, Pet. 12 (identifying "veterans who have major-but-hidden or undiagnosable injuries" as intended beneficiaries of the accrual-suspension rule).

The Federal Circuit has held that the accrual of certain claims against the United States can be suspended for purposes of 28 U.S.C. 2501 when the claims are "inherently unknowable" on the accrual date. See Pet. App. 17 (quoting *Martinez*, 333 F.3d at 1319). In this case, however, the court of appeals agreed with the CFC that the factual record did not support the application of the accrual-suspension rule because petitioner "had an understanding of the seriousness of his condition"—including both "his physical and psychological injuries"—at the time of the 1988 PEB evaluation. *Id.* at 20-21. In arguing that the extent of his disability was inherently unknowable, petitioner points (Pet. 15-16) to his subsequent diagnosis of PTSD and traumatic brain injury. But neither diagnosis was necessary to determine the extent of petitioner's impairment at the time of discharge, which the courts below found was both knowable and known. Pet. App. 20-21, 64-66; see 38 U.S.C. 355 (1988); 38 U.S.C. 1155. Petitioner has not identified any error in the lower courts' determinations on this point, and this Court's review of petitioner's factbound argument is not warranted.

In addition, although the court of appeals did not rule on this basis, application of the accrual-suspension rule would not be compatible with the statute, at least in the circumstances presented here. The practical effect of deeming petitioner's claim not to have accrued until petitioner was diagnosed with PTSD and traumatic brain disorder would be to toll the Section 2501 limitations

period based on equitable considerations. See Pet. 11-12. But the time limit in 2501 is jurisdictional, see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 136 (2008), and "a court must [enforce a jurisdictional time bar] even if equitable considerations would support extending the prescribed time period," *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409 (2015). Moreover, Section 2501 specifically tolls the time for filing suit for a person who is "under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2501. Congress's inclusion of express exceptions to the statutory time limit weighs strongly against adopting additional, atextual exceptions. See *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360-361 (2019); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

3. Even if events that postdated the Secretary's 1988 10% disability rating could be relevant in determining when petitioner's claim accrued, this case would not be a suitable vehicle for considering the question presented because petitioner did not act diligently in response to the intervening events that he contends delayed the accrual of his claim. The VA determined in 2005 that petitioner was 50% disabled, see Pet. App. 56, but petitioner did not file suit until 2020.

In 2018, petitioner asked the AFBCMR to find him entitled to disability retirement pay. Pet. App. 6. That request appears to have been precipitated by petitioner's receipt of the VA's 100% disability rating in 2017, see *ibid.*; but a 100% rating is not a prerequisite to qualification for retirement pay. See 10 U.S.C. 1201. The Board denied petitioner's request in January 2020, and petitioner filed suit in April of that year. See Pet. App. 6.

The dissenting judge below appears to have concluded that petitioner's suit was timely because it was filed within six years after that AFBCMR decision. See Pet. App. 29-30. That conclusion is erroneous for the reasons set forth above. But in any event, petitioner's long delay in seeking relief from the Board makes this case an unsuitable vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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