

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ADOLFO R. ARELLANO,)
)
 Petitioner,)
)
 v.) No. 21-432
)
 DENIS R. McDONOUGH,)
)
 SECRETARY OF VETERANS AFFAIRS,)
)
 Respondent.)

Pages: 1 through 50
Place: Washington, D.C.
Date: October 4, 2022

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ADOLFO R. ARELLANO,)

Petitioner,)

v.) No. 21-432

DENIS R. McDONOUGH,)

SECRETARY OF VETERANS AFFAIRS,)

Respondent.)

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Washington, D.C.

Tuesday, October 4, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:00 p.m.

APPEARANCES:

JAMES R. BARNEY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

SOPAN JOSHI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(12:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-432, Arellano versus McDonough.

Mr. Barney.

ORAL ARGUMENT OF JAMES R. BARNEY

ON BEHALF OF THE PETITIONER

MR. BARNEY: Thank you, Mr. Chief Justice, and may it please the Court:

When service-disabled veterans are discharged from the military, they have one year under 5110(b)(1) to file a claim for retroactive disability compensation. This deadline operates like a statute of limitations by encouraging service-disabled veterans to promptly apply for -- for retroactive benefits or else lose that right forever.

The Irwin presumption in favor of -- of equitable tolling applies to this one-year deadline because it's a non-jurisdictional claims-processing rule set forth in a statute for which Congress has waived sovereign immunity.

Now the Secretary attempts to rebut

1 the Irwin presumption by characterizing Section
2 5110 as a general rule subject to multiple
3 exceptions, but that does not rebut the
4 presumption.

5 First, none of the other subsections
6 the Secretary points to relate to
7 service-connected disability compensation, which
8 is the sole focus of 5110(b)(1). For example,
9 the Secretary relies heavily on subsection
10 (b)(4), but that sets a deadline for disability
11 pensions, a different type of benefit passed by
12 a different Congress at a different time.

13 Other subsections set forth deadlines
14 for dependency benefits, death benefits, and
15 death pensions, none of which have any nexus to
16 5110(b)(1). Not one of those other deadlines
17 would be rendered superfluous by the application
18 of equitable tolling to 5110(b)(1). So this is
19 not a situation where the deadline in question
20 already includes an exception, an express
21 exception, that would be swallowed by the
22 application of equitable tolling. Here, there
23 are zero express exceptions to the one-year
24 deadline of 5110(b)(1).

25 Finally, even if we accept the

1 Secretary's argument that Congress provided
2 equitable exceptions elsewhere in 5110, that
3 only strengthens the Irwin presumption for
4 5110(b)(1) because, unlike in those other
5 subsections, Congress chose to remain silent for
6 5110(b)(1), which is exactly what we would
7 expect Congress to do if they -- if it wanted
8 the general rule of equitable tolling to apply.

9 And with that, I welcome the Court's
10 questions.

11 CHIEF JUSTICE ROBERTS: Counsel, I
12 think it was wise of you to mention (b)(4) in
13 your opening because I think that's the biggest
14 hurdle you've got to get over, and it's a
15 situation where Congress specifically addressed
16 tolling in a case of disability preventing a
17 timely filing.

18 Now you say, well, that was only for
19 disability pensions. It had nothing to do and
20 your case is, of course, service-connected.
21 But, you know, at least they were addressing
22 that particular issue, and it seems odd to me to
23 have express -- I don't know whether it's
24 tolling, right, in -- in -- in the one
25 provision, but another one which is the same

1 sort of thing, the same question, does
2 disability prevent you from filing, not have --
3 not have that there.

4 I just -- I guess I'd like you to
5 expand a little further on the answer you gave
6 just a moment ago.

7 MR. BARNEY: Thank you, Mr. Chief
8 Justice.

9 As you noted, (b)(4) does not apply to
10 the same type of benefit that's at issue here.
11 It's important to understand that 5110 includes
12 what I would call a grab bag of different types
13 of benefits that have been codified over the
14 years into 5110. They were passed by different
15 Congresses at different times.

16 And (b)(4) is a perfect example. That
17 particular benefit comes from -- from the 1970s
18 and doesn't have any nexus to the benefit that
19 appears in subsection (b)(1), which dates back
20 to at least 1958. So, first of all, they're
21 different -- they're different benefits.

22 With respect to what presumption or
23 what inference should we draw from the fact that
24 Congress saw fit to include some sort of
25 equitable exception in (b)(4), the inference

1 really should be the opposite of what -- of what
2 you just suggested. If Congress saw fit to --
3 in 1973, to include this equitable exception for
4 disability pensions, which, again, are an
5 entirely different type of benefit, but was
6 silent, remained silent for Section (b)(1), then
7 the inference we should draw is that Congress
8 intended to have the full general rule of
9 equitable tolling apply to Section (b)(1).

10 JUSTICE JACKSON: Counsel, I have a
11 question because you have set this up as whether
12 or not we have a statute of limitations here,
13 because you're trying to take advantage of Irwin
14 and equal -- equitable tolling.

15 But I typically conceive of statutes
16 -- statutes of limitations as having a funneling
17 effect, so we have to sort of start at what is
18 the background rule or principle. And in the
19 ordinary course of affairs, the default rule is
20 that a plaintiff can pursue their remedies at
21 any time, their claims at any time, and a
22 statute of limitations limits, for all the
23 reasons that you point out, limits their ability
24 to pursue their remedies because we're trying to
25 get them to do it quickly, because we're trying

1 to preserve evidence. Whatever the reason
2 Congress gives, it's sort of a funnel.

3 Whereas, when I read this statute, you
4 start at (b), but 510 has an (a), which I think
5 is actually setting the default rule in this
6 circumstance, that the (a) is telling us that at
7 the beginning we have a very limited set of
8 circumstances in which veterans can claim, you
9 know, these kind -- this kind of compensation,
10 right? (a) says, unless specifically provided,
11 the effective date, right, shall be fixed in
12 accordance with the facts found but not earlier
13 than. It sets the effective date as essentially
14 the application date.

15 And so, if you look at it that way,
16 we're not -- we don't have a funnel in the
17 structure of this statute. We actually have
18 more like a pyramid because the background rule
19 is the effective date is the date of
20 application, and what (b) is doing is giving
21 some veterans under some circumstances more
22 rights than they otherwise had.

23 So maybe you can speak to whether I'm
24 wrong about thinking -- thinking that, and that,
25 of course, sort of undermines your view that (b)

1 relates to a right of retroactive compensation
2 as the sort of background principle.

3 MR. BARNEY: Thank you, Justice
4 Jackson.

5 I don't disagree with you that
6 subsection (a)(1) sets forth a default rule.
7 The default rule that it sets out is that
8 veterans are only -- for the -- for the types of
9 benefits that are set forth in the preamble of
10 subsection (a)(1), the benefits -- those
11 benefits are only going to be prospective in
12 nature. That's the default rule because they're
13 only going to be measured from the date of the
14 filing of the application.

15 And then there are a series -- but it
16 says "except as otherwise provided." Then there
17 are a series of exceptions to that, and those
18 exceptions, Congress, for different types of
19 benefits -- and, of course, the one we're
20 dealing with here is 5110(b)(1), which is a
21 specific type of benefit for -- for
22 service-connected disability compensation.

23 Congress has said we're -- we're going
24 to allow retroactive benefits. That's different
25 than (a)(1). So it's a different type of --

1 it's a -- it's an expansion, if you will, of --
2 of what's allowed under (a)(1). But, to do so,
3 you have to file by a certain deadline.

4 JUSTICE JACKSON: But why -- why is
5 that a statute of limitation? If they are -- if
6 they are expanding the default and they're doing
7 so conditionally, we're expanding the default if
8 you file in a certain way, I don't understand
9 why that operates like a statute of limitation.

10 MR. BARNEY: Your Honor, many statutes
11 of limitations are in the form of exceptions to
12 a general rule, and I can point to, for example,
13 the -- the statute of limitations that was at
14 issue in Young. You find that statute of
15 limitations in the bankruptcy statute. And what
16 it is is actually an exception to the general
17 rule in the bankruptcy statute that the debts of
18 the bankrupt party are -- are -- are discharged.

19 JUSTICE JACKSON: But doesn't --
20 doesn't Young really involve the same kind of
21 funneling if you go back to the sort of original
22 -- I -- I thought it kind of had the same
23 structure if you went back far enough.

24 MR. BARNEY: It's similar. But my
25 point being that in Young, you had a general

1 rule, which was -- which is the debts of the
2 bank -- bankrupt party should be discharged --

3 JUSTICE JACKSON: Right.

4 MR. BARNEY: -- except as set forth
5 otherwise. And one of those exceptions was the
6 three-year look-back period for the IRS to -- to
7 recover past due taxes if it was -- if -- if the
8 IRS filed that claim within three years of
9 the -- of the bankruptcy petition.

10 So that was an exception to a general
11 rule. And yet this Court found it to be a
12 statute of limitations, a limited statute of
13 limitations albeit, but a statute of limitations
14 nonetheless.

15 JUSTICE JACKSON: And was that because
16 Young was actually involving Congress trying to
17 incentivize the government to act properly?
18 Wasn't the reasons for -- the reasons for a
19 statute of limitations operating here --

20 MR. BARNEY: Your Honor --

21 JUSTICE JACKSON: -- in a way that
22 they're not really in this case?

23 MR. BARNEY: I apologize. Your Honor,
24 I think you're correct that the rationale or at
25 least part of the rationale the Court used in

1 Young in determining that that particular
2 provision of the bankruptcy code operated like
3 or -- or was a limited statute of limitations,
4 one aspect the -- the Court looked at was the
5 fact that it did incentivize the IRS to file its
6 claims in a timely manner in order to -- in
7 order to make sure that they come in within that
8 three-year window.

9 And so that is one of the hallmarks of
10 the statute of limitations, but that applies
11 equally here. 5110(b)(1) encourages
12 service-disabled veterans, once they're
13 discharged from service, if they feel like they
14 have a claim that's compensable, to file that
15 claim promptly within one year. So that serves
16 the same sort of benefit as this Court pointed
17 out in Young.

18 JUSTICE ALITO: Doesn't the failure to
19 -- doesn't the failure to satisfy a statute of
20 limitations typically result in the loss of the
21 ability to prevail on a claim and not simply the
22 loss of the ability to obtain a certain kind of
23 relief?

24 MR. BARNEY: Sometimes, Your Honor,
25 but not always. And so I go back to Young as an

1 example. In Young, there was a statute of
2 limitations that did not preclude the
3 government, did not preclude the IRS from
4 maintaining a claim against a taxpayer, even
5 outside the three-year window.

6 What it did was it eliminated certain
7 advantages the government otherwise would have
8 had, which is nondischargeability and priority.

9 But there was nothing about that
10 particular statute of limitations that required
11 the government to drop its claims, even if they
12 were outside the three-year window.

13 As an example, the government could --
14 the IRS could maintain a four-year-old or a
15 five-year-old claim against a bankrupt --
16 against a bankrupt petitioner, and if the Court
17 ends up not ordering discharge for whatever
18 reason, perhaps there was evidence of fraud,
19 well, those claims, those older claims of the
20 IRS can be maintained and the IRS might even be
21 able to recover on them depending on the size of
22 the estate.

23 That's just one example of a statute
24 of limitations that did not completely cut off
25 the ability of the petitioner or the claimant to

1 maintain and even recover on a claim.

2 JUSTICE KAGAN: But even -- even
3 assuming that this is a statute of limitations,
4 the second step, which is -- or the second
5 question presented is has Congress indicated
6 that it doesn't want an equitable tolling rule
7 to apply.

8 I mean, when you have a statute that
9 says, unless specifically provided otherwise in
10 this chapter, one rule will apply, and then you
11 have 16, I think, exceptions, specific
12 exceptions, provided in this chapter, and this
13 isn't one of them, and so the thing that you
14 want is a 17th thing, which is not specifically
15 provided in this chapter, I mean, doesn't that
16 just -- doesn't that language indicate that
17 Congress didn't want a 17th thing?

18 MR. BARNEY: Your Honor, I would
19 respectfully disagree that that is the correct
20 characterization of 5110. It is true there are
21 exceptions. As I mentioned, there's exceptions
22 rolled in throughout different Congresses and
23 they -- they get codified in Section 5110.

24 The -- the fact that it says
25 specifically, that's a word of emphasis, as this

1 Court has held. Most statutes of limitations
2 are written with words of emphasis, things like
3 shall be forever barred, and as this Court found
4 in Kwai Fun Wong, that's of no moment to whether
5 or not equitable tolling can apply to that
6 statute of limitations.

7 I think the key here is that each one
8 of these benefits is discrete. A -- a
9 disability -- a service-connected disability
10 compensation is a very different type of benefit
11 than a -- than a disability pension. They're
12 awarded at different times in the veteran's life
13 and one of them is means tested, the pension is
14 means tested, whereas a disability compensation
15 claim is not means tested.

16 A disability pension doesn't even
17 require a showing of service connection. So
18 they're very different types of benefits. And
19 so, for each one of these unique types of
20 benefits, Congress has established a -- a
21 pathway for retroactive claiming that wouldn't
22 otherwise exist under -- under the general rule,
23 (a)(1), and has set forth basically a statute of
24 limitations saying, if you -- if you want to
25 benefit from this retroactive pathway, you have

1 to file your claim within a certain period of
2 time.

3 So it very much operates like a
4 statute of limitations.

5 JUSTICE JACKSON: Counsel, can you
6 speak --

7 MR. BARNEY: I'm not sure if I
8 answered your question. I hope I did.

9 JUSTICE JACKSON: -- can you speak to
10 how your contention about equitable tolling
11 works as a practical matter? Who -- who is
12 making the decision? The agency? I mean,
13 equitable tolling is ordinarily a judicial
14 doctrine, kind of what Justice Alito was
15 suggesting. So how is this working if we adopt
16 your proposal?

17 MR. BARNEY: Thank you, Justice
18 Jackson.

19 As a practical matter, it would be
20 decided in the first instance by the agency.
21 Now, of course, this Court doesn't necessarily
22 need to reach that question to decide this case
23 because we also have the Veterans Court, and the
24 Veterans Court is an Article I court, and I
25 believe this Court has already held on multiple

1 occasions that Article I courts can have the
2 power to equitably toll -- equitably toll
3 deadlines.

4 JUSTICE JACKSON: But is that what
5 you're asking for? So is it your view of this
6 that the ordinary administrator inside the
7 agency would apply the statute as written and
8 say the effective date, you're outside of it,
9 you don't meet any of the 16 categories, and
10 then it would go to court, the Veterans Court,
11 Article I, and that's where the equitable
12 tolling would come in or no?

13 MR. BARNEY: No, Your Honor, I
14 apologize. I didn't mean to suggest that. I
15 think the most practical way for this to be
16 administered is for the agency itself to make
17 that determination in the first instance.

18 And I will point out that this is not
19 new territory for the agency. In our -- in our
20 reply brief on page 18, we cited to the
21 regulation that's already on the books at the VA
22 that allows the agency to extend -- excuse me,
23 to -- to extend deadlines for good cause shown.

24 JUSTICE JACKSON: Yes, but that's the
25 agency has its own regulation. You'd be asking

1 us to order the agency to make a regulation
2 about this? Because, surely, the individual
3 claims administrator, you know, at her desk is
4 not the one who's going to be deciding whether
5 or not to depart from the rules, whether or not
6 the circumstances are sufficient for equitable
7 tolling.

8 So this would -- I kind of hear you
9 saying that this would have to be an agency
10 determination, what are the circumstances in
11 which we're going to depart.

12 And so are you asking us to order the
13 agency to promulgate a rule that would cover the
14 equitable tolling circumstance?

15 MR. BARNEY: No, Your Honor, not --
16 not asking you to -- to -- to order the agency
17 to do that. I believe the agency already has
18 the power to do that. I think that's the point
19 of Irwin, is that when Congress passes
20 non-jurisdictional claims-processing deadlines
21 of the sort we have here, that those deadlines
22 by -- merely by the silence of Congress, by
23 saying nothing, that those deadlines are
24 presumed to come prepackaged with equitable
25 power to toll the deadline for good cause.

1 I pointed to the regulation to
2 illustrate the fact that the VA apparently has
3 already assumed that it has such power because
4 extending deadlines for good cause is equitable.
5 You're extending a statutory deadline for good
6 cause, which means you're looking at things that
7 are out -- that are extenuating circumstances.
8 And the VA actually has a body of law that it's
9 already developed to make that determination at
10 the agency level.

11 So I guess my point was the VA
12 apparently has already assumed it has this
13 power. It already exercises this power in
14 certain circumstances. However, it has ceased
15 operating or using that power with respect to
16 deadlines under 5110 because of the Andrews
17 decision from the Federal Circuit.

18 JUSTICE SOTOMAYOR: What other
19 deadlines are at issue that they think they have
20 the power of?

21 MR. BARNEY: The most often that that
22 particular regulation comes into play are
23 filings of notices -- notices of disagreement.
24 So, when a veteran misses the deadline for a
25 notice of -- a disagreement from the RO stage to

1 the Board of Veterans Appeals, they can ask the
2 -- the Board, and -- and if that's denied, they
3 can ask the Veterans Court to extend that
4 deadline retroactively, using that -- that
5 particular regulation.

6 JUSTICE SOTOMAYOR: Okay.

7 JUSTICE KAVANAUGH: The solicitor
8 general adds two other buckets of arguments,
9 among others, in addition to the text. One is
10 the immense practical problems, to use their
11 phrase, that would be caused by ruling in your
12 favor, and they say that makes it especially
13 implausible to allow equitable tolling or that
14 Congress intended to allow it here. So that's
15 one.

16 The second is that the VA's
17 longstanding regulatory practice has been in
18 this direction and that Congress has not
19 disturbed that. So I want to just make sure you
20 get a chance to respond to both of those.

21 MR. BARNEY: Thank you, Your Honor.

22 With respect to the practical problem,
23 we're certainly not -- we're certainly not
24 dismissive of that argument. We understand that
25 there's realities to -- to every -- to every new

1 change in the law or a recognition of new -- new
2 opportunities for people to seek certain claims.

3 But I think that, in reality, the
4 Secretary's assertion that this would cause a --
5 a floodgate problem is -- is overstated, and I
6 can point to a few data points to -- to sort of
7 back that up.

8 The first is prior to the Andrews
9 decision, which dates back to, I believe, 1990
10 or so, veterans were able to ask for equitable
11 tolling, and -- and some did, but it wasn't a
12 floodgate. So, prior to the Andrews decision,
13 there didn't seem to be a floodgate problem.

14 I've already mentioned that the VA has
15 some equitable power to extend deadlines under
16 the regulation that I -- that I noted, which is
17 38 C.F.R. 3.109(b), and we're not aware of any
18 floodgate problem that that has caused with
19 veterans, you know, run -- breaking down the
20 gates to request extensions of deadlines. There
21 are some, but it's -- it's more described as a
22 trickle, as veterans who truly do have
23 extenuating circumstances.

24 And the last thing that I would point
25 to on that particular point, Your Honor, is, of

1 course, Article III courts and -- and some
2 Article I courts have the power to -- to
3 equitably toll deadlines. In fact, that's the
4 general rule. Most deadlines in civil
5 litigation are tollable. And I'm not aware that
6 there has been a floodgate problem in the -- in
7 the -- in the nation's courts with people
8 breaking down the doors seeking equitable
9 tolling.

10 This Court has a well-developed body
11 of law that the Veterans Court and the VA can
12 draw upon to determine when, given a certain set
13 of circumstances, should equitable tolling
14 apply. And this Court has said that it should
15 be applied sparingly. And we have no reason to
16 believe that the Veterans Court won't follow
17 that guidance.

18 And so we expect this to be something
19 that's applied sparingly, but in the cases where
20 it's truly deserving and for veterans who truly
21 do deserve consideration of an equitable tolling
22 claim, it ought to be available.

23 Your -- your second question had to do
24 with the longstanding -- the fact that this
25 regulation has been on the books and there's

1 been a longstanding recognition of it. I'm
2 assuming you're talking about the Andrews
3 decision, Your Honor, am I correct?

4 So our response there is, as we
5 explained in our brief, there actually was some
6 disagreement or there was not exactly a meeting
7 of the minds even among the judges who authored
8 the Andrews decision as to whether it actually
9 served as a categorical bar to equitable
10 tolling. Justice -- excuse me -- Judge Newman,
11 in a -- in a later -- in a later dissent or a
12 concurring opinion in another case, Butler, made
13 that point, that that's not what we meant in
14 that decision.

15 I think, given that uncertainty, I
16 think it would be not exactly correct to say
17 that there was a settled understanding of both
18 the Federal Circuit and Congress for that matter
19 that equitable tolling can't apply to this
20 particular deadline.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito, anything further? No?

25 Justice -- no? No?

1 Thank you, counsel.

2 MR. BARNEY: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Mr. Joshi?

4 ORAL ARGUMENT OF SOPAN JOSHI

5 ON BEHALF OF THE RESPONDENT

6 MR. JOSHI: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 The Irwin presumption doesn't apply,
9 and even if it does, it's been amply rebutted.
10 As to applicability, I think, as some of the
11 questions have recognized, the -- the question
12 isn't whether, you know, clever lawyers can
13 reconceptualize this provision as effectuating a
14 partial limitations period with respect to a
15 retroactive piece of the claim. The question
16 is, did Congress view it that way?

17 The premise of Irwin is that tolling
18 is justified when Congress speaks in the
19 language of limitations periods because, when it
20 does that, it's invoking this deep common law
21 tradition and pedigree. And I think, if you
22 look at 5110, it just doesn't look like that's
23 the language Congress is speaking.

24 But, if you have doubts about that,
25 you should have no doubts whatsoever that the

1 presumption has been rebutted here for a number
2 of reasons, and I guess I would put them in
3 three main buckets.

4 One is the text and structure of 5110
5 itself. It's sort of hard to imagine how
6 Congress would have written it differently if it
7 wanted to foreclose any exceptions except for
8 the ones specifically written in the text and
9 what it wrote here.

10 The second bucket would be --

11 JUSTICE KAVANAUGH: Well, it could
12 have -- I'm sorry.

13 MR. JOSHI: I'm happy to take
14 questions.

15 JUSTICE KAVANAUGH: They could have
16 said equitable tolling doesn't apply, so
17 Congress could have been clearer. That's my
18 only point.

19 MR. JOSHI: A fair point, Justice
20 Kavanaugh. But I think equitable tolling, as
21 even Irwin recognized, is an exception to the
22 ordinary rule usually dictated by the separation
23 of powers that courts apply the text that
24 Congress wrote. It is framed as an exception to
25 that rule, and it's framed as an exception

1 precisely because, as Irwin said, it's likely to
2 reflect congressional intent. And I think
3 Lozano later said statutory intent.

4 But -- but the point is equitable
5 tolling is authorized only because we read text
6 that looks like a limitations period as an
7 implicit grant of authority to the judiciary to
8 toll that particular deadline. But, if Congress
9 doesn't speak in that language, then there's no
10 basis for that -- for that inference from
11 congressional silence, and I think that's all
12 Congress really needs to do.

13 But, as I said, I think there are many
14 other indicia in the statute. You know, as I
15 said, the text and structure of 5110. The
16 second bucket would be the text and structure of
17 other statutes in the veterans benefits area,
18 both past and present. And then the third would
19 be some just practical realities, all of which
20 suggest that Congress could not have intended
21 equitable tolling here.

22 JUSTICE JACKSON: So can you speak to
23 my -- just how would this work in terms of your
24 understanding of the -- of the Petitioner's
25 contention? Because you've said several times

1 that we read the text of a statute that reads
2 like a limitations period as an implicit
3 authorization to courts that the idea of
4 equitable tolling is permitted.

5 But he appears to be suggesting that
6 equitable tolling would operate in this context
7 at the agency level. So can you just help me to
8 sort that out?

9 MR. JOSHI: Certainly, Justice
10 Jackson. I don't actually know if Petitioner
11 agreed with that. I'm not sure what his
12 position is. But -- but that is a point of
13 confusion for me as well, because I think the
14 Irwin presumption and every case in which this
15 Court has found the presumption applicable and
16 -- and not rebutted has involved a court of some
17 sort applying equitable tolling to a deadline
18 that was missed for court.

19 Now it's not always -- as this Court
20 recognized in -- in Boechler in a footnote last
21 year, it's not always an Article III court. It
22 can be a bank -- you know, a bankruptcy court or
23 a tax court, but it's a court of some kind.

24 But, here, the court would be
25 reviewing agency action usually to say is it

1 supported by substantial evidence, is it
2 arbitrary and capricious? And so I think the
3 only sensible way to interpret tolling here
4 would be that the agency, meaning the regional
5 office and the board, would have to apply it in
6 the first instance.

7 That's a kind of tolling that's sort
8 of unheard of. This Court has never applied the
9 Irwin presumption or equitable tolling in that
10 agency context like that. The few times it's
11 come up, this Court has rejected it, as in
12 Auburn Regional Medical Center. And so I think
13 that's yet another reason to suggest that maybe
14 Congress did not envision tolling as being
15 applicable in -- in this particular
16 circumstance.

17 JUSTICE BARRETT: Mister --

18 JUSTICE ALITO: What do you make of
19 the Edgewood veterans' brief and the prospect of
20 some veterans being forbidden from disclosing
21 information that's necessary to substantiate
22 their claims? Would -- would that be a
23 circumstance in which there would be equitable
24 tolling until the -- the disclosure is made?

25 MR. JOSHI: So, Justice Alito, no, but

1 I do think there are other ways to handle cases
2 like that. And -- and I -- I suppose it's --
3 I've got two answers there, and maybe neither is
4 going to be entirely satisfactory to you.

5 But one answer is that the agency
6 itself has taken a couple of steps to handle
7 cases like that. One is that its internal
8 processing manual, M 21-1, does say that for at
9 least the cases of special operations, if a
10 veteran files a claim that requires classified
11 information to support the claim, either the
12 existence of the injury or the service
13 connection for that injury, the regional office
14 can submit what's called a classified research
15 request to the -- to -- to the central military
16 records organization, which will then run that
17 research request and then send back to the
18 regional office, okay, there is credible
19 evidence supporting the claim or not. And so
20 that's one way to proceed.

21 The other is, by regulation, the VA --
22 and this was made explicit in -- in a 2006
23 amendment to the regulation, but this is at
24 3.156 sub (c) of -- of Title 38 of the Code of
25 Federal Regulations. That says that if a claim

1 is denied for lack of evidence and then
2 classified records are later declassified, that
3 would count as new and material evidence that a
4 veteran could come in and seek reconsideration
5 of the claim. And if, indeed, the -- the agency
6 then determines that the claim is supported in
7 light of these declassified records, the
8 benefits would be granted with an effective date
9 of the original claim to begin with.

10 Now, again, that's not maybe entirely
11 satisfactory, but I think it's an attempt to
12 address the problem.

13 And then I guess my second answer
14 would be, to the extent that doesn't completely
15 solve the problem of these very sympathetic
16 cases of the Edgewood veterans, I think,
17 unfortunately, the -- the answer is that that
18 should be in Congress's hands to solve. These
19 are special cases. I don't think it's provided
20 for by the statute under the normal rules of
21 Irwin and Brockamp, and because of that, I
22 think, fundamentally, it's -- it's going to be a
23 question for -- for Congress.

24 JUSTICE SOTOMAYOR: Counsel, you're
25 not suggesting that no filing with an agency can

1 be -- can't be equitably tolled. We've already
2 done it in Wong with filing a claim with an
3 agency with the Federal Torts Claims Act,
4 correct?

5 MR. JOSHI: I disagree with that
6 characterization of Wong, Justice Sotomayor.

7 JUSTICE SOTOMAYOR: Okay.

8 MR. JOSHI: I -- I under -- I
9 recognize your concurrence in Auburn Regional
10 pointed out that you've never said you couldn't
11 do that.

12 JUSTICE SOTOMAYOR: Right.

13 MR. JOSHI: I think the majority
14 pointed out that you've never actually said
15 that. But, in Wong, remember, it was a -- it
16 was a claim filed with the agency and it was
17 untimely, but the question in Wong was
18 whether -- not whether that filing with the
19 agency could be equitably tolled. It was
20 instead whether the failure to timely file it
21 with the agency was a jurisdictional
22 prerequisite for the case filed in court.

23 JUSTICE SOTOMAYOR: So let -- let's
24 talk about why agency deadlines shouldn't be
25 equitably tolled.

1 First, assuming it's not this one,
2 assuming it's Subdivision L here, which entitles
3 surviving spouses to benefits based on death or
4 divorce if the application is filed within one
5 year. Okay, so that sounds to me like a typical
6 statute of limitations drop-dead date. If you
7 don't file within a year, you get no survivors'
8 benefit.

9 MR. JOSHI: I disagree. You do get
10 the survivor benefit when you file. It's just
11 this is a kind of tolling rule itself in which,
12 if you file within a year -- it's a grace
13 period. If you file within a year of the
14 triggering event, the agency by statute treats
15 you as if you had filed on the date of the
16 event.

17 But, if it takes you longer than a
18 year and you file, you get benefits starting --

19 JUSTICE SOTOMAYOR: Oh, how
20 interesting. So I thought, and I'll have to go
21 back, that there are some cases below in which
22 benefits haven't been given to spouses who pass
23 -- who filed late, that some courts have said
24 this operates as a drop-dead date.

25 MR. JOSHI: That -- that --

1 JUSTICE SOTOMAYOR: Pardon the
2 expression, okay? But you're -- you're
3 conceding on behalf of the government that those
4 decisions, if I'm right about them, if they
5 exist, that they were wrong?

6 MR. JOSHI: So, with respect, I'm not
7 sure I'm aware of those decisions, so I don't
8 want to comment on them.

9 JUSTICE SOTOMAYOR: Yeah. I'll have
10 to look at them, okay.

11 So you see all of those like L and the
12 one with dependent children that have to file
13 within a year of turning 18, that all of those
14 would still entitle both the spouse and the
15 child to get benefits after the year?

16 MR. JOSHI: My understanding is that
17 these exceptions to the default effective date
18 rule in 5110 simply operate as grace periods,
19 but they don't determine whether you're entitled
20 to benefits at all. They determine only
21 whether, if you file within a year of a
22 triggering event, as a grace period, we treat
23 you as if you filed on the triggering event.

24 There may be --

25 JUSTICE SOTOMAYOR: So that's how --

1 MR. JOSHI: -- there may be -- I -- I
2 fully concede there may be other limitations to
3 getting benefits that may or may not be
4 fulfilled by a certain claimant, and those might
5 involve time limits. I -- I don't know. Some
6 of them very well might.

7 I do know, as Mr. Barney said, that --
8 that the disability compensation and pension in
9 -- in (b)(4) do not have a time limit of that
10 sort.

11 JUSTICE SOTOMAYOR: So, basically, you
12 would accept Justice Kagan's point, which is we
13 don't have to reach the first issue writ large
14 of whether equitable tolling applies to agency
15 deadlines in all or no situations.

16 On the second prong of the question,
17 you're arguing that Congress has spoken to that?

18 MR. JOSHI: That's exactly right.
19 And, indeed, in Brockamp, that's exactly the
20 approach this Court took. The Court said, we
21 assume for argument's sake that this is tollable
22 and that the Irwin presumption applies, but in
23 this case, all the statutory indicia have
24 rebutted that presumption, and we think that
25 would actually be a perfectly sound way to

1 proceed in this case because, however strong our
2 arguments are on the inapplicability of the
3 presumption, I think they're even stronger and
4 more clear that any such presumption would have
5 been rebutted in -- in this case.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 JUSTICE GORSUCH: Just to put Justice
9 Sotomayor's point, as I understand it, in --
10 in -- in slightly different terms, that there is
11 plenty of indication in the statute arguably to
12 support your -- your -- your contention that
13 Congress specifically made clear no equitable
14 tolling. Okay, I got that.

15 But there's less evidence, I think
16 Justice Sotomayor is saying, and this is my
17 instinct too, that Congress meant to distinguish
18 between courts and agencies because some of
19 those 16 things you point to could be described
20 as equitably tolling the period for -- for
21 benefits for certain -- in certain circumstances
22 at the agency level, not just at the court
23 level.

24 Is -- is that a fair summary?

25 MR. JOSHI: Yes, but I think that's a

1 point in our favor, that there --

2 JUSTICE GORSUCH: I -- I -- I
3 understand. I got that. But -- but that -- is
4 that -- is that a fair summary, that some of
5 those exceptions treat -- deal specifically with
6 agency and agency time limits and toll, for a
7 better word, benefits determinations for them?

8 MR. JOSHI: Yes, I think that's fair.
9 And I think the point here is that Congress has
10 provided for that.

11 JUSTICE GORSUCH: Right.

12 MR. JOSHI: And so judicial tolling
13 would be tolling on tolling.

14 JUSTICE GORSUCH: I got that. I got
15 that. Thank you.

16 CHIEF JUSTICE ROBERTS: Counsel, I am
17 not sure which way your emphasis on the 16
18 exceptions really cuts. I mean, if there are 16
19 exceptions to the rule, that kind of suggests to
20 me that the insistence upon strict enforcement
21 is really not that important.

22 I mean, your -- your friend points out
23 that these things came in at different times and
24 different considerations. To me, the sort of
25 strict notion of -- of sovereign immunity, I

1 mean, you've already compromised it quite --
2 quite a bit, and yet you're going to insist on
3 it when it comes to service-connected
4 disability.

5 That seems -- in other words, the
6 plethora of exceptions seems to me to make it
7 more likely that you ought to stick with the
8 normal rule in the private sector and allow
9 equitable tolling.

10 MR. JOSHI: So I -- I disagree, Mr.
11 Chief Justice. That's certainly not how this
12 Court has framed it in cases like Brockamp and
13 --

14 CHIEF JUSTICE ROBERTS: Well,
15 Brockamp, I mean, that's the Internal Revenue
16 Code, right? I mean, you've -- you've got to
17 turn square corners or whatever it is, whenever
18 the -- you know, on your taxes, that's a whole
19 different arena.

20 MR. JOSHI: Fair enough. But in --
21 but in all of the case --

22 CHIEF JUSTICE ROBERTS: You don't want
23 the equitable principles that govern the
24 government's collection of taxes to apply across
25 the board, do you?

1 MR. JOSHI: Perhaps not. But --

2 (Laughter.)

3 MR. JOSHI: -- I -- I think this
4 Court -- this Court has generally, not just in
5 this area in each of its cases but just as a
6 general matter, I think, the notion that if
7 Congress gives an inch, we should just assume it
8 gave a mile doesn't really apply as a sound
9 principle of statutory interpretation here.

10 CHIEF JUSTICE ROBERTS: But that is --
11 that is -- with respect, that is exactly the
12 principle that applies.

13 Now your client may not have had a
14 very good lawyer in Irwin, but this is --

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: -- this is
17 what -- this is what the Court said on precisely
18 that point. "Once Congress has made such a
19 waiver of sovereign immunity, we think that
20 making the rule of equitable tolling applicable
21 to suits against the government in the same way"
22 -- let me see if I can get it -- "in the same
23 way that it's applicable to private suits
24 amounts to little, if any, broadening of the
25 congressional waiver."

1 It's sort of, once you're -- you know,
2 once you've waived, you know, the situation is
3 entirely different. At least that's what the
4 Court, you know, said in -- in Irwin.

5 MR. JOSHI: I understand, Mr. Chief
6 Justice. But, in Irwin, I think the deputy
7 solicitor general in that case agreed that the
8 language of Irwin was that of a statute of
9 limitations. It was -- it was, you know, the
10 time to file.

11 CHIEF JUSTICE ROBERTS: Well, he may
12 have given up a lot.

13 (Laughter.)

14 MR. JOSHI: I thought he did an
15 excellent job, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 thank you.

18 But, no, I mean, the basic
19 proposition, and -- and the -- I guess this is
20 really a repetition of the 16 exceptions point,
21 sort of once you've waived sovereign immunity,
22 then you're in the normal arena and all the
23 principles that would apply to regular
24 litigation ought to apply to you.

25 MR. JOSHI: Well, I think the "unless

1 specifically provided otherwise in this chapter"
2 is exactly the kind of emphatic language
3 Congress would put in to say, although we have
4 waived sovereign immunity with respect to these
5 kinds of claims, when it comes to this effective
6 date provision, this is the effective date and
7 no others unless we write them in this chapter
8 and you have to apply them as we specifically
9 provide in this chapter.

10 I think those are the indications
11 Congress is saying, look, we're waiving
12 sovereign immunity, but we are building a wall
13 here, so, courts, don't go beyond what -- what
14 this wall is. And I think that really
15 distinguishes this case from Irwin.

16 And it does make it --

17 CHIEF JUSTICE ROBERTS: I -- I -- I'm
18 not sort of, you know, sliding into the
19 pro-veteran canons, but does it make any sense
20 as an abstract matter to say the one area where
21 we're not going to waive it, where we're going
22 to insist on strict adherence, is
23 service-connected disabilities?

24 MR. JOSHI: I -- I -- I actually think
25 it does, Mr. Chief Justice, and only because

1 that's how I read these statutes. So I -- I --
2 I fully accept that these are intended to be
3 very solicitous of the veteran and -- and the
4 claims.

5 And if you look at the structure of
6 this statute, there is no statute of
7 limitations. For many years, beginning with the
8 earliest veterans benefits statutes in 1873,
9 moving on until the '40s, there was a five-year
10 statute of limitations for filing these kinds of
11 claims. Congress got rid of that. So there's
12 no more statute of limitations, as this Court
13 has recognized.

14 There is no res judicata. So the
15 claimant can continue to bring the claims as
16 long as he has new and material evidence, and
17 the agency will reconsider it and, in some
18 cases, assign an effective date back to the
19 original application date.

20 But the one thing Congress has said
21 is, as solicitous as that -- as this program is,
22 in 5101(a)(1)(A), Congress made clear that it is
23 the filing of an application in the form
24 specified by the Secretary, it must be filed in
25 order for benefits to be paid.

1 So I think what Congress is doing is
2 being very solicitous on the one end but then
3 also saying the application for benefits is not
4 the same as like filing a lawsuit. It is an
5 element of your entitlement to benefits. And --

6 CHIEF JUSTICE ROBERTS: Did it say it
7 must be filed?

8 MR. JOSHI: 38 U.S.C. 5101(a)(1)(A),
9 it is the provision that says that an
10 application -- an application must be filed for
11 benefits to be paid. I'm afraid it's not in our
12 statutory appendix in the brief. We cite only
13 5110. But we do cite 5101(a)(1)(A) in our -- in
14 our brief.

15 But I -- I -- I think the whole
16 structure of the statute is set up to say it's
17 the application that sort of triggers the
18 entitlement to benefits in a way. That's when
19 the agency's duty to help the claimants and
20 provide information and help the claimant get
21 the medical exams necessary to support the
22 claim, that's when all of those duties kick in.
23 That's where the agency's duty to -- you know,
24 under 5102, for example, says that if a
25 defective application is filed, then the

1 claimant has a year to -- to correct any -- any
2 deficiencies, and the agency has some duties to
3 -- to help them to do that.

4 I think that's -- you know, everything
5 is triggered by the application. And so, unless
6 the application is filed, I think it makes
7 perfect sense that Congress would look at it and
8 say the effective date should not be earlier
9 than the application date unless we say
10 otherwise. And then 16 times in emphatic and
11 repeated ways, it says, at most, you can get one
12 year beforehand, which kind of makes sense if
13 you're looking at trying to just sort of get
14 some certainty about the -- the potential burden
15 on the public fisc and not have, like, an
16 unbounded liability out there that you don't
17 know about.

18 The application is what triggers the
19 agency's knowledge of these claims, and that all
20 sort of makes sense. Indeed, if you look at
21 5102, addressing deficient applications, Irwin
22 itself identified one reason where equitable
23 tolling might be justified is if a claimant
24 diligently pursues his claim, such as by filing
25 a defective claim within the limitations period.

1 That's a reason for equitable tolling.

2 Well, I think 5102 suggests that
3 Congress has thought about that problem and
4 addressed it in the statute, which I think is
5 just further evidence that equitable tolling is
6 really not appropriate in -- in this particular
7 context.

8 JUSTICE KAGAN: On -- on your first
9 point, Mr. Joshi, and, really, the first thing
10 you got up there and said was, look, the Irwin
11 presumption doesn't apply at all. You know,
12 even if some clever lawyer can reconceptualize
13 this in statute of limitations type terms, we
14 all know it's not really that.

15 And I guess I had a -- I -- you know,
16 I didn't quite agree with that. You know, it
17 seems like Lozano says very clearly that we're
18 supposed to consider this question of what a
19 statute of limitations is in a functional way,
20 not in a formal way.

21 And you were suggesting, well, there
22 has to be some kind of formal characteristic
23 that Congress has -- that there are -- there are
24 formal characteristics of statute of limitations
25 that Congress has to incorporate when it writes

1 a provision, and if Congress doesn't do it in
2 that way, the presumption doesn't kick in.

3 MR. JOSHI: So I think it's actually a
4 bit of both. I think the functional
5 characteristics are certainly a necessary
6 feature to trigger the -- the Irwin presumption,
7 as Lozano makes clear, but I also think there's
8 a secondary feature which -- which was
9 essentially or in part at least the motivation
10 of Lozano's alternative holding, which was that,
11 look, this is a treaty and, of course,
12 treaty-makers don't draft against the back --
13 backdrop of this common law rule. And Irwin
14 heavily relied on the common law rule in order
15 to conclude that it was a -- likely to be
16 reflective of congressional intent.

17 And so I do think there is this notion
18 that if Congress writes something that doesn't,
19 you know, walk and quack like a statute of
20 limitations, then Congress is saying we are not
21 implicitly authorizing the judiciary --

22 JUSTICE KAGAN: I don't know what that
23 means --

24 MR. JOSHI: -- to toll the statute --

25 JUSTICE KAGAN: -- it doesn't walk and

1 quack like a statute of limitations. If it, in
2 fact, functions like a statute of limitations,
3 then whatever words Congress has used should be,
4 you know -- you know, sometimes Congress writes
5 some sets of words and sometimes some others,
6 and there shouldn't be some magic set if it, in
7 fact, functions like a statute of limitations,
8 which is, I think, the point here.

9 MR. JOSHI: And, look, at -- at -- at
10 the end, I might -- I might concede that, but I
11 -- I do think it does matter how Congress
12 structures these things in terms of, like, how
13 carefully are you going to slice and dice what's
14 actually going on in order to tease out some
15 portion of it that sort of looks like a
16 limitations period.

17 And, in fact, here, I don't even
18 think -- even accepting everything you said, I
19 don't even think this looks like a limitations
20 period. Even with respect to a myopic focus on
21 just (b)(1), I don't think it works like a
22 limitations period because, if it were a
23 limitations period, essentially, the way it
24 would operate, if -- if -- if you accept that
25 framing, is the first month's worth of

1 retroactive benefits has an 11-month statute of
2 limitations. The second month has a 10-month
3 statute of limitations. The third month and so
4 on and so forth. And then it falls off a cliff
5 at 13 months.

6 That's not how statutes of limitations
7 function in the ordinary sense. And, you know,
8 I'll note that Petitioner is not asking for the
9 benefits he accrued between 1981 and 1982, nor
10 is he asking for the benefits he accrued between
11 2010 to 2011. He's asking for 1981 to 2011; in
12 other words, every month delayed filing
13 increased the amount of the benefits by a month.

14 I know of no statute of limitations
15 that works in that fashion. So even if we want
16 to look only at (b)(1) and then treat it as a
17 retroactive claim, I still don't think this
18 functions as a statute of limitations.

19 Unless the Court has further
20 questions.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 Justice Alito?

24 Justice Jackson?

25 Okay. Thank you, counsel.

1 A rebuttal, Mr. Barney?

2 REBUTTAL ARGUMENT OF JAMES R. BARNEY
3 ON BEHALF OF THE PETITIONER

4 MR. BARNEY: Yes, Your Honor. I'll be
5 very brief.

6 On that very last point, in the
7 briefing, we pointed out that the patent damages
8 statute is one example of a statute of
9 limitations that does, in fact, operate in that
10 manner. It is true that statute -- that patent
11 infringement is considered a separate -- a
12 separately accruing tort, but so too, by
13 analogy, is a veteran's disability --
14 service-connected disability. Every month that
15 goes by that that veteran is service-disabled,
16 he or she is entitled to monthly compensation
17 under -- under the statute. So every month that
18 goes by can be analogized to a separate --
19 separately accruing claim.

20 I want to just circle back to one of
21 the questions that Justice Sotomayor asked, and
22 that had to do with whether statutes of
23 limitations that exist at the agency level can
24 be tolled. And you are absolutely correct, Your
25 Honor. This Court has already ruled that such

1 statutes -- such statutes of limitations can be
2 tolled. Zipes is an example of that, and also
3 the companion case to Kwai Fun Wong, which was
4 in June, had to do with the -- with the filing
5 deadline at the agency level.

6 I believe what my colleague on the
7 other side was getting at in his response to
8 your question was this Court has not yet
9 addressed the question of whether the agency
10 itself can toll one of those deadlines, as
11 opposed to a court reviewing the agency's
12 action. And I believe that goes to your
13 concurrence in the -- in the Auburn case, where
14 you made the point that the Court has not yet
15 said one way or the other whether that's --
16 whether that's the case.

17 And I would just like to address that
18 at a very high level. As Justice Gorsuch
19 pointed out in his questioning, Congress clearly
20 has the power to extend equitable powers to an
21 agency. There's no question about that. And,
22 normally, we would expect Congress to do so
23 explicitly.

24 But, in Irwin, there's one exception
25 to that. In Irwin, the exception is, for

1 non-jurisdictional claims-processing deadlines,
2 Congress need not be explicit about the grant of
3 equitable power. It may do so implicitly. In
4 other words, silence itself, it will be
5 construed, absent evidence to the contrary, that
6 Congress intended that particular deadline to
7 become -- to come prepackaged with the equitable
8 powers to toll it for good cause. And if that
9 deadline is being directed to an agency, there's
10 no reason to believe that that power doesn't
11 extend to the agency.

12 With that, unless Your Honors have any
13 other questions, I don't have anything else.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel -- counsel. The case is submitted.

16 (Whereupon, at 12:48 p.m., the case
17 was submitted.)

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