No. 21-432

In the Supreme Court of the United States

ADOLFO R. ARELLANO, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Congress has directed that, "[u]nless specifically provided otherwise" in the relevant chapter of the United States Code, the "effective date of an award" on a claim for veterans benefits "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. 5110(a)(1). One of the statutory exceptions to that directive provides that the "effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." 38 U.S.C. 5110(b)(1). Petitioner was discharged from the military in 1981 and filed an application for disability compensation in 2011. He was awarded disability benefits effective as of June 3, 2011, the date the agency had received his benefits application. The question presented is as follows:

Whether petitioner is entitled to have the effective date of his benefits award changed to the day following his discharge, on the ground that the one-year grace period in 38 U.S.C. 5110(b)(1) is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-97a) is reported at 1 F.4th 1059. The decision of the Court of Appeals for Veterans Claims (Veterans Court) (Pet. App. 2a-7a) is unreported but is available at 2019 WL 3294899. The order of the Board of Veterans' Appeals (Board) (Pet. App. 112a-118a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021.

The petition for a writ of certiorari was filed on September 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2011, petitioner applied for service-connected disability compensation with the Department of Veterans Affairs (VA), which granted benefits with an effective date of June 3, 2011. The Board denied petitioner's claim for an earlier effective date. Pet. App. 112a-118a. The Veterans Court affirmed. *Id.* at 2a-7a. The court of appeals affirmed. *Id.* at 14a-97a.

1. Petitioner served in the Navy from 1977 to 1981. See Pet. App. 23a, 112a. Following his discharge from active service, petitioner suffered from "psychosis, delusions, schizoaffective disorders, paranoia and anxiety (including [posttraumatic stress disorder])." *Id.* at 113a. Congress has directed that, with limitations not relevant here, "the United States will pay [compensation] to any veteran" who is "disabled" as a result of "personal injury suffered or disease contracted in line of duty," or "aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. 1131; see 38 U.S.C. 1110 (same, for injuries suffered or aggravated during wartime service). Such disabilities entitling the veteran to benefits are called "service connected" because they are "causally related to an injury sustained in the service." *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985); see 38 U.S.C. 101(16).

In 2011, thirty years after his discharge, petitioner submitted an initial application for "service-connected disability benefits for his psychiatric disorders." Pet. App. 23a. The VA granted disability benefits, finding as relevant here that petitioner suffered from service-

connected "schizoaffective disorder bipolar type, with post traumatic stress disorder." *Id.* at 153a. The VA determined that the award of benefits would be "effective June 3, 2011," the date when the agency had received petitioner's benefits application. *Ibid.* Petitioner's monthly payments therefore began in July 2011. See 38 U.S.C. 5111(a)(1) (providing that as a general matter, "payment of monetary benefits based on an award or an increased award of compensation * * * may not be made to an individual for any period before the first day of the calendar month following the month in which the award or increased award became effective").

A statutory provision entitled "Effective dates of awards" states that, "[u]nless specifically provided otherwise in" the relevant chapter of the United States Code, "the effective date of an award based on an initial claim * * * of compensation * * * shall not be earlier than the date of receipt of application therefor." 38 U.S.C. 5110(a)(1). Section 5110 lists thirteen specific exceptions to that general rule, each of which allows for an effective date as much as one year earlier than the application date, depending on the circumstances. See 38 U.S.C. 5110(b)-(n). As relevant here, the exception set forth in Subsection (b)(1) provides that, in the case of "an award of disability compensation to a veteran," the "effective date * * * shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." 38 U.S.C. 5110(b)(1). Longstanding VA regulations state that, with respect to an award of disability compensation with a direct service connection (like petitioner's), the effective date generally is the "[d]ay following separation from active service * * * if

claim is received within 1 year of separation from service; otherwise, date of receipt of claim." 38 C.F.R. 3.400(b)(2)(i); see 26 Fed. Reg. 1561, 1593 (Feb. 24, 1961) (same).

The VA did not receive petitioner's initial application for disability compensation within one year of his discharge or separation from active service. See Pet. App. 23a. Accordingly, the agency explained that the effective date of petitioner's award could be "no ear[li]er" than June 3, 2011, because that was "the date [the agency] received [petitioner's] original claim for service connection" to "support [the] claim for mental disorder." *Id.* at 156a.

2. On appeal to the Board, petitioner sought to "change the effective date of June 3, 2011 to January 1, 1982," which was "the date by which [petitioner's] psychiatrist and his family member established that [petitioner] was 100% disabled." Pet. App. 147a. As the Board explained, petitioner "in essence contend[ed] that the effective date * * * should be based on the date his psychiatric disability was incurred, in other words, immediately after his discharge from service, or, at the latest, as of January 1, 1982." *Id.* at 114a.

The Board rejected that contention, explaining that "the law governing effective dates is clear: the effective date is the date of claim." Pet. App. 114a (citing 38 C.F.R. 3.400(b)(2)). The Board acknowledged that "[t]he effective date * * * for claims received within one year after separation from service shall be the day following separation from service." *Id.* at 113a. It observed, however, that "[petitioner's] original claim for benefits was received approximately 30 years after his discharge from service." *Id.* at 115a. The Board further observed that petitioner's brother and representative

had "candidly acknowledged that it was not until after their father, who was [petitioner's] principal source of support, died in December 2010 that [petitioner], having no income, was able to be convinced by his brother and his psychiatrists to file the June 3, 2011 application." *Id.* at 114a. The Board thus concluded that "under the law, there is no basis to assign an effective date * * * earlier than the date [petitioner's] original application was received." *Id.* at 115a.

3. The Veterans Court affirmed. Pet. App. 2a-7a. The court observed that petitioner "does not contest the Board's finding that he filed his claim for service connection for his mental disorder no earlier than June 3, 2011." *Id.* at 4a. Instead, the court observed, petitioner "claims that he is entitled to an earlier effective date because his mental disorder was so disabling from the moment he left service in 1981 that section 5110 should be tolled such that it would be possible for him to obtain an effective date as early as the date of his separation from service" pursuant to Section 5110(b)(1). *Ibid.*

The Veterans Court rejected that contention as "squarely foreclosed by binding precedent." Pet. App. 4a. The court explained that, in *Andrews* v. *Principi*, 351 F.3d 1134 (2003), the Federal Circuit had held that "[p]rinciples of equitable tolling are not applicable to the time period in § 5110(b)(1)." Pet. App. 5a (citation and ellipsis omitted). The *Andrews* court had acknowledged that "[e]quitable tolling may be applied to toll a statute of limitations" in certain circumstances, but had relied on the fact that "§ 5110 does not contain a statute of limitations, but merely indicates when benefits may begin and provides for an earlier date under certain limited circumstances." *Ibid.* (citation omitted).

4. The court of appeals, hearing the case initially en banc on its own accord, unanimously affirmed the Veterans Court's judgment but divided 6-6 on the rationale. Pet. App. 14a-97a.

a. The court of appeals issued a per curiam decision explaining that "a unanimous court holds that equitable tolling is not available to afford [petitioner] an effective date earlier than the date his application for benefits was received." Pet. App. 16a. The per curiam opinion further explained that the court was "equally divided as to the reasons for its decision," and that "[t]he effect of [its] decision is to leave in place [its] prior decision" in *Andrews*, *supra*, which the court described as having "held that principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5110(b)(1)." *Ibid.*

b. Judge Chen, joined by five other judges, concurred in the judgment. Pet. App. 17a-69a. In his view, *Andrews* was correctly decided and the one-year time period in Section 5110(b)(1) is not subject to equitable tolling. Judge Chen acknowledged (see *id.* at 18a-19a, 25a-26a) that in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court had stated that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" and had held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96 (citation omitted). Judge Chen further observed, however, that the *Irwin* Court had added "the caveat that 'Congress, of course, may provide otherwise if it wishes to do so.'" *Id.* at 26a (quoting *Irwin*, 498 U.S. at 96). Judge Chen explained that *Irwin* requires courts (1) to "determine whether the rebuttable presumption of equitable tolling applies to the

statutory provision at issue," and, if it does, (2) to "then determine whether that presumption has been rebutted—or in other words, whether there is 'good reason to believe that Congress did *not* want the equitable tolling doctrine to apply' to the statute." *Ibid.* (citation omitted).

Regarding the first step of that analytic framework, Judge Chen observed that this Court "has so far applied the presumption of equitable tolling *only* to statutory provisions that Congress clearly would have viewed as statutes of limitations," and, conversely, "has declined to presume that equitable tolling applies where the time limit at issue functions '*unlike* a statute of limitations.'" Pet. App. 28a (brackets and citation omitted). Judge Chen explained that, for this purpose, "whether § 5110(b)(1) is a statute of limitations" depends on whether it "satisfies the 'functional characteristics' of such statutes." *Id.* at 30a (citation omitted).

For two principal reasons, Judge Chen concluded that the one-year time period in Section 5110(b)(1) "does not have the functional characteristics of a statute of limitations." Pet. App. 30a. First, he observed that Subsection (b)(1) "does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed," but instead "determines one of many elements of a benefits claim that affects the amount of a veteran's award," without "eliminat[ing] a veteran's ability to collect benefits for that very disability." *Ibid.*; see *id.* at 32a-41a. Second, he observed that Subsection (b)(1) "lacks features standard" to statutes of limitations: "its one-year period is not triggered by harm from the breach of a legal duty owed by the opposing party, and it does not start the

clock on seeking a remedy for that breach from a separate remedial entity." *Id.* at 30a-31a; see *id.* at 41a-48a.

As to the second step, Judge Chen explained that, "even if *Irwin*'s presumption were to apply" to the one-year time period specified in Subsection (b)(1), "equitable tolling would nonetheless be unavailable because it is 'inconsistent with the text of the relevant statute.'" Pet. App. 55a (citation omitted). He observed that Section 5110 "begins with the default rule" in Subsection (a)(1), under which the effective date of a disability-benefits award ordinarily is the date the VA received the veteran's application, and "then proceeds to list more than a dozen detailed exceptions to the default rule." *Id.* at 57a. Judge Chen viewed those express exceptions as indicating "that Congress implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date and specifying the temporal extent of the exceptions for those circumstances." *Id.* at 58a.

c. Judge Dyk, joined by five other judges, concurred in the judgment. Pet. App. 70a-97a. In his view, *Andrews* was wrongly decided and the one-year time period in Subsection (b)(1) operates as a statute of limitations subject to *Irwin*'s presumption of equitable tolling. *Id.* at 73a-91a. Judge Dyk would have held, however, that petitioner had not demonstrated an entitlement to equitable tolling in the circumstances of this case. *Id.* at 96a-97a. Judge Dyk observed that "[t]here is no allegation that [petitioner's guardian] was somehow prevented from filing, or faced obstacles in his attempt to file, [petitioner's] request for benefits sooner." *Id.* at 96a. He further observed that "there is no claim

that [petitioner] was estranged from [his guardian] or refused to interact with him." *Id.* at 96a-97a. Judge Dyk found "nothing in the record that justifies the inordinate thirty-year delay in filing the application at issue." *Id.* at 97a.

ARGUMENT

Petitioner contends (Pet. i, 16-29) that the effective date of his award should be earlier than June 3, 2011, because the one-year grace period in 38 U.S.C. 5110(b)(1) is subject to equitable tolling. The court of appeals correctly rejected that contention, and neither the decision below nor the court's earlier decision in *Andrews* v. *Principi*, 351 F.3d 1134 (Fed. Cir. 2003), conflicts with any decision of this Court or another court of appeals. Nor does the decision below create any intracircuit conflict warranting this Court's intervention. Moreover, this case would be a poor vehicle in which to address the question presented because the six Federal Circuit judges who believed that Section 5110(b)(1)'s grace period is subject to equitable tolling further concluded that petitioner would not be entitled to an earlier effective date even if equitable tolling were available. Petitioner therefore would have no reasonable likelihood of obtaining any tangible relief even if this Court granted review and ruled in petitioner's favor on the first question presented in the certiorari petition. Further review is not warranted.

1. Petitioner contends that the one-year grace period in Section 5110(b)(1) is subject to equitable tolling. That argument is mistaken. Subsection (b)(1) does not function as a statute of limitations to which a presumption of equitable tolling would apply, and Section 5110's text and structure would rebut any such presumption even if it did apply.

a. Whether equitable tolling applies to a statutory time limit "is fundamentally a question of statutory intent." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014). In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court held that a "rebuttable presumption of equitable tolling" generally applies to statutes of limitations because "[s]uch a principle is likely to be a realistic assessment of legislative intent." *Id.* at 95-96. That approach reflects the fact that equitable tolling of statutes of limitations is a sufficiently "long-established feature of American jurisprudence," *Lozano*, 572 U.S. at 10, that Congress may be presumed to have incorporated it into any new federal limitations period even in the absence of express language to that effect, see *id.* at 10-11. But because the effect of that approach is to engraft an implied exception onto facially unqualified statutory text, it is particularly important to confine the presumption to the sorts of time limits for which equitable tolling is indeed an entrenched practice. This Court accordingly has "only applied that presumption to statutes of limitations." *Id.* at 13-14.

"[T]he determination whether [a particular time] period is a statute of limitations depends on its functional characteristics." *Lozano*, 572 U.S. at 15 n.6; see Pet. 18. A statute of limitations is a "law that bars claims after a specified period." *Black's Law Dictionary* 1636 (10th ed. 2014). Statutes of limitations "'establish the period of time within which a claimant must bring an action'"; "characteristically embody a 'policy of repose, designed to protect defendants'"; and "foster the 'elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Lozano*, 572 U.S. at 14 (citations omitted).

The one-year grace period in Subsection (b)(1) shares none of those features or functions. Most importantly, Subsection (b)(1) does not establish a time within which a veteran must bring a claim, and it does not bar claims after the one-year period expires. To the contrary, a veteran seeking disability compensation "faces no time limit for filing a claim." *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011); see *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 311 (1985) ("There is no statute of limitations."). A veteran who files an application for disability benefits years or even (like petitioner) decades after discharge is entitled to benefits if his disability is shown to be service-connected. At no point would the claim for compensation expire or become time-barred.

For the same reason, the statute here does not embody a policy of repose, eliminate stale claims, or provide certainty about the plaintiff's recovery or the defendant's liability. Cf. *Lozano*, 572 U.S. at 14. If a qualifying veteran can establish a service connection for a qualifying disability, "the United States will pay * * * compensation," no matter how long a period has elapsed since the veteran's discharge and/or the onset of the disability. 38 U.S.C. 1131; see 38 U.S.C. 1110 (same). Indeed, even a veteran whose claim for benefits has been denied is free to bring the same claim again at any time if it is supported by new and material evidence. 38 U.S.C. 5108; see *Walters*, 473 U.S. at 311 (explaining that "a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts").

Petitioner's case illustrates these aspects of the statutory scheme. Since 2011, petitioner has received monthly disability benefits for mental illness found to

have been contracted or aggravated by military service that ended in 1981, based in part on evidence (including treatment records) that was decades old. See Pet. App. 141a, 150a. Petitioner's claim was subject to Subsection (a)(1)'s general default rule that, for purposes of determining when compensation payments may begin, the effective date of a claim is the date (here, June 3, 2011) when the VA received the benefits application. 38 U.S.C. 5110(a)(1); see 38 U.S.C. 5111(a)(1). But at no point in the thirty years between petitioner's discharge and the filing of his application for disability benefits did petitioner's claim expire or otherwise become time-barred. As Judge Chen recognized (Pet. App. 30a), the date on which a benefits application is filed simply "determines one of many elements of a benefits claim that affects the amount of a veteran's award but, unlike a statute of limitations, does not eliminate a veteran's ability to collect benefits for that very disability."

That Section 5110(b)(1) contains a one-year time limit does not convert it into a statute of limitations. Subsection (b)(1) is an exception that permits a veteran to obtain an effective date up to (but not more than) a year earlier than the application date, if the application is filed within a year after the applicant's discharge from active service and seeks compensation for a service-connected disability. 38 U.S.C. 5110(b)(1). A veteran who applies for disability compensation outside the one-year window does not lose his right to benefits; the effective date of his application is simply determined in accordance with the default rule in Subsection (a)(1). Whether an application is filed within Subsection (b)(1)'s grace period thus also "determines one of many elements of a benefits claim" but does not "eliminate a

veteran's ability to collect benefits for that very disability." Pet. App. 30a.

b. Even if *Irwin*'s presumption of equitable tolling applied to the one-year grace period in Subsection (b)(1), the text and structure of Section 5110 would rebut that presumption. See *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019) ("Whether a rule precludes equitable tolling turns * * * on whether the text of the rule leaves room for such flexibility."); *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."); *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (asking whether "there [was] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply").

As Judge Chen recognized (Pet. App. 55a), Section 5110's text and structure implement a "highly detailed statutory scheme dictating specific legislative choices for when a veteran's claim may enjoy an effective date earlier than the date it was received by the VA." Section 5110 begins with Subsection (a)(1), which sets forth the default rule that the effective date of an award is the date the VA receives the veteran's application, and which states that the default rule applies "[u]nless specifically provided otherwise in" the relevant chapter of the United States Code. 38 U.S.C. 5110(a)(1). Section 5110 then lists thirteen specific exceptions under which an award of benefits would have an effective date earlier than the application date, with precise and detailed descriptions of the circumstances in which each exception would apply. See 38 U.S.C. 5110(b)-(n).

Allowing a claimant to obtain an effective date earlier than the application date in additional circumstances would contravene the text and structure of Sec-

tion 5110 by effectively adding a fourteenth exception to the list. See *Brockamp*, 519 U.S. at 352 (explaining that a statute's "detail," "technical language," and "explicit listing of exceptions" supported the conclusion that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote"); cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted). Congress's intent that the thirteen enumerated exceptions would be exclusive is readily inferable from the number and specificity of the exceptions themselves. And the statutory directive that the default rule applies "unless specifically provided otherwise in" the relevant United States Code chapter, 38 U.S.C. 5110(a)(1), confirms that Congress did not anticipate or intend that further exceptions would be created. To adopt the "tolling" rule that petitioner advocates in this case would be particularly anomalous given that each of the thirteen exceptions in Section 5110—including the exception in Subsection (b)(1) itself—allows an effective date no earlier than one year before the application date. See 38 U.S.C. 5110(b)-(n); cf. *Brockamp*, 519 U.S. at 351 (finding a statute incompatible with equitable tolling in part because that statute "reiterates its limitations several times in several different ways"). Petitioner, by contrast, seeks an effective date that is more than 29 years earlier than his application date.

Several of the enumerated statutory exceptions, moreover, are triggered by circumstances—namely, disruptive life events that might reasonably cause a veteran to delay submission of an application for benefits—

resembling those that might support equitable tolling in other contexts. Those circumstances include discharge from the military, 38 U.S.C. 5510(b)(1); an increase in the severity of a disability, 38 U.S.C. 5110(b)(3); the progression of a disability to the point that a veteran has become "permanently and totally disabled," 38 U.S.C. 5110(b)(4); the death of a spouse, 38 U.S.C. 5110(d); and the need to obtain a correction of military records in order to qualify for VA benefits, 38 U.S.C. 5110(*i*). Those exceptions reinforce the inference that Congress has identified the "equitable" concerns that it believes warrant a deviation from the default effective-date rule. See *Brockamp*, 519 U.S. at 351-352; cf. *Elgin* v. *Department of Treasury*, 567 U.S. 1, 13 (2012) (holding that the existence of a specific statutory exception to the otherwise exclusive Federal Circuit review of certain Merit Systems Protection Board decisions "indicates that Congress intended no [other] exception").

Particularly relevant in that regard is Subsection (b)(4), which provides that the "effective date of an award of disability pension" for a "veteran who is permanently and totally disabled and who is prevented by a disability from applying for a disability pension" generally "shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date." 38 U.S.C. 5110(b)(4). Congress thus specifically addressed the precise circumstance that petitioner alleges applies to him—namely, a permanent and total disability that prevented the earlier filing of an application. But rather than directing that all statutory time limits should be tolled throughout the period of permanent and total disability, Congress (a) limited the grace period to one year and

(b) made the provision applicable only to a disability pension, see 38 U.S.C. 1521, not to the type of service-connected disability compensation that is at issue here, see 38 U.S.C. 1131. The judge-made tolling rule that petitioner advocates thus "would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the" default rule. *United States* v. *Dalm*, 494 U.S. 596, 610 (1990).

c. Additional considerations confirm that equitable tolling does not apply to the one-year grace period in Section 5110(b)(1).

i. Section 5110(b)(1) does not define the period for seeking relief in court. Filing a benefits application within one year after discharge likewise is not a prerequisite to obtaining judicial review of whatever benefits determination the VA ultimately makes. Rather, Section 5110(b)(1) specifies one of several criteria that are used to determine the appropriate effective date of any benefits award the veteran receives—a determination that is entrusted to the agency in the first instance.

If the one-year grace period in Subsection (b)(1) were subject to equitable tolling, the VA would be required to exercise broad-ranging equitable powers to determine whether tolling was warranted in particular instances. In the veterans'-benefits context as elsewhere, a court reviewing agency action asks whether the agency whose decision is under review permissibly exercised its own responsibilities. It therefore would make no sense for a reviewing court to invoke equitable tolling as a ground for mandating an effective date earlier than the one the VA had chosen unless Congress intended the agency itself to apply the same tolling principle. Consistent with that understanding, petitioner has argued not simply that the Veterans Court or the

Federal Circuit should have tolled Section 5110(b)(1)'s grace period, but that *the Board* erred in declining to do so. See Pet. 14-15 (citing Pet. App. 3a).

Federal courts may apply equitable tolling because the "Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits in equity,'" which means the authority to administer "'traditional principles of equity jurisdiction.'" *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999) (citations and ellipsis omitted). Equitable tolling is a "classic example" of such a "traditional" principle. *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 137 S. Ct. 2042, 2050 (2017). But for agencies like the VA, "[b]oth their power to act and how they are to act are authoritatively prescribed by Congress." *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013).

Congress has not granted the VA a general power of equity akin to the power that the Judiciary Act confers on federal courts. Instead, Congress has granted only a narrow equitable power, codified in 38 U.S.C. 503, that authorizes the VA to "provide such relief * * * as the [VA] determines is equitable" if an individual has been deprived of benefits because of an "administrative error," 38 U.S.C. 503(a), or has "suffered loss" in reliance upon an "erroneously made" eligibility or entitlement determination by the agency, 38 U.S.C. 503(b). That narrow grant of equitable authority does not encompass the power to toll the effective-date provisions in Section 5110.

ii. The VA has long construed Section 5110 to preclude equitable tolling. Its longstanding regulations provide that the effective date for an award of compensation for a service-connected disability generally is the

"[d]ay following separation from active service * * * if claim is received within 1 year of separation from service; otherwise, date of receipt of claim." 38 C.F.R. 3.400(b)(2)(i). And since its 2003 decision in *Andrews*, *supra*, the Federal Circuit has repeatedly reaffirmed its holding that Section 5110 is not subject to equitable tolling. *E.g.*, *Titone* v. *McDonald*, 637 Fed. Appx. 592, 593 (2016) (per curiam); *Butler* v. *Shinseki*, 603 F.3d 922, 926 (2010) (per curiam). As Judge Chen observed, "Congress has amended § 5110 four times since *Andrews*, and at no point has it expressed disapproval of *Andrews* and its progeny or otherwise indicated that equitable tolling is available under this statute." Pet. App. 62a-63a. The longstanding regulatory practice, court of appeals holdings, and apparent congressional acquiescence all reinforce the most natural reading of Section 5110's text. See *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 159 (2013) (rejecting equitable tolling in light of a longstanding administrative practice prohibiting any deadline extensions, especially given that "Congress amended [the statute] six times" without "express[ing] disapproval" of the agency's practice).

c. Petitioner's contrary arguments lack merit.

Petitioner relies heavily (Pet. 18-21) on this Court's decision in *Young* v. *United States*, 535 U.S. 43 (2002), which held that the "'three-year lookback period'" in the Bankruptcy Code "is tolled during the pendency of a prior bankruptcy petition." *Id.* at 44. Under the relevant Code provisions, certain tax liabilities "for which the return was due within three years before the bankruptcy petition was filed" are nondischargeable. *Id.* at 46. But when a debtor files back-to-back petitions (by voluntarily dismissing the first immediately before fil-

ing the second), a tax debt that was within the three-year lookback period of the first petition (and thus non-dischargeable) may be outside the lookback period of the second petition (and thus dischargeable)—even though the automatic stay would have "prevent[ed] the IRS from taking steps to collect the unpaid taxes" during the pendency of the first petition. *Ibid.* To close that apparent "loophole," *ibid.*, the Court treated the three-year lookback period as a limitations period that may be equitably tolled during the pendency of the first petition, *id.* at 47. The Court explained that the lookback period "prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced," and "serves the same 'basic policies furthered by all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Ibid.* (brackets and citation omitted).

Petitioner's reliance on *Young* is misplaced. Section 5110(b)(1) does not prescribe a period within which certain rights must be enforced or else will be lost. Rather, as explained above, a veteran can still claim entitlement to compensation for a service-connected disability even if his application is filed more than one year after his military discharge. Instead, the application itself is an element of the claim, see 38 U.S.C. 5101(a)(1)(A), and its filing date determines only the effective date of any benefits award, and thus the *amount* of aggregate compensation. Cf. *Brockamp*, 519 U.S. at 352 (rejecting a proposed form of equitable tolling that would evade "limitations on the amount of recovery—a kind of tolling for which [this Court] ha[s] found no direct precedent"). And as explained above, the time limits in Section 5110

do not further the policies of repose, eliminating stale claims, and certainty about legal liability.

Furthermore, although it is colloquially referred to as a "lookback," the three-year period at issue in *Young* actually "commences on the date the return for the tax debt 'is last due.'" 535 U.S. at 48 (citation omitted). It thus operates like a classic statute of limitations, being "triggered by the violation giving rise to the action," *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989)—namely, the nonpayment of the tax when due. The one-year grace period in Section 5110(b)(1), by contrast, commences upon the veteran's discharge, which is not a "violation" of any law and does not otherwise give rise to liability.

Moreover, the lookback period at issue in *Young* applies on a tax-by-tax basis; the lookback period for each return would be computed separately to determine the dischargeability of any tax owed on that return. Cf. *Young*, 535 U.S. at 49 (explaining that the lookback period "define[s] a subset of claims eligible for certain remedies") (emphasis omitted). That is also true of the three-year lookback period for copyright damages claims, see *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014), and the six-year lookback period for patent damages claims, see *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954, 961 (2017); cf. Pet. 21. Both of those statutes treat each infringing act as giving rise to a separate claim, damages for which are available only if a civil action "is commenced within three years after the claim accrued" in the case of copyright, 17 U.S.C. 507(b), or six years in the case of patent, 35 U.S.C. 286; see *SCA Hygiene*, 137 S. Ct. at 961-962.

A claim for disability compensation, by contrast, is unitary and indivisible, and a qualifying veteran "faces no time limit for filing a claim." *Henderson*, 562 U.S. at 431; see *Walters*, 473 U.S. at 311. Petitioner suggests that a claim for disability compensation is really two claims—"a retrospective claim for benefits for past disability" and "a prospective claim for future benefits"—and that Section 5110(b)(1) imposes "a one-year statute of limitations for [the] retrospective claim[]." Pet. 20-21 (citation omitted). That is incorrect. A veteran who applies for benefits within one year of discharge under Section 5110(b)(1) is not required to file two separate applications for prospective and retrospective relief. Instead, a veteran may invoke the one-year grace period in Section 5110(b)(1) by filing a single application, which will result in a single award with a single effective date. Cf. 38 U.S.C. 5110(b)(1) (referring to "[t]he effective date of an award" (singular)).

Petitioner also contends (Pet. 23-24) that equitable tolling applies to the one-year grace period in Section 5110(b)(1) because that time limit is not jurisdictional. But as Judge Chen observed (Pet. App. 56a), "[n]either party here argues that § 5110(b)(1)'s effective-date provision is jurisdictional." "[S]how[ing] that Congress made the time bar at issue jurisdictional" is "[o]ne way to" rebut *Irwin*'s presumption that equitable tolling is available, *United States* v. *Wong*, 575 U.S. 402, 408 (2015), but it is not the only way, see *id.* at 408 n.2 ("Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations."). "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." *Nutraceutical*, 139 S. Ct. at 714. As explained above, the text and structure

of the VA disability-benefits scheme leaves no room for equitable tolling.

2. Petitioner does not contend that the Federal Circuit's decision in this case, or its earlier decision in *Andrews*, *supra*, conflicts with any decision of another court of appeals. Instead, he contends that, because the en banc court below was evenly divided on the availability of equitable tolling for the time limit in Section 5110(b)(1), and because the Federal Circuit is the only court of appeals that adjudicates cases involving veterans'-benefits claims, the even division within that court creates an intracircuit conflict warranting this Court's intervention. That contention is incorrect.

As the court of appeals explained in its per curiam opinion, "[t]he effect of [its] decision is to leave in place [its] prior decision" in *Andrews*, *supra*. Pet. App. 16a. And as Judge Chen made clear, the court of appeals has consistently adhered to *Andrews* since that case was decided. See *id.* at 62a-63a. Thus, even if an intracircuit conflict could warrant this Court's intervention, but cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."), no such conflict exists here.

3. In any event, this case would be a poor vehicle in which to address the question presented. All six Federal Circuit judges who believed that the effective date for a VA disability-benefits award could be tolled in some circumstances agreed that tolling is unavailable here. See pp. 8-9, *supra*. There is consequently no reasonable likelihood that petitioner could ultimately obtain an earlier effective date if this Court granted review and held that Section 5110(b)(1)'s one-year grace period can be equitably tolled.

Even where it is available with respect to a particular timing provision, equitable tolling should be applied "only sparingly." *Irwin*, 498 U.S. at 96. In *Irwin*, this Court explained that it had "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Ibid.* (footnotes omitted). On the other hand, the Court "ha[s] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

Petitioner does not allege that he actively pursued any remedies under Subsection (b)(1) (for example, by filing a defective application for benefits) during the one-year period after his discharge. Nor does he allege that he was tricked into not filing an application until 2011. To the contrary, as the Board observed, petitioner's representative "candidly acknowledged that it was not until after their father, who was [petitioner's] principal source of support, died in December 2010 that [petitioner], having no income, was able to be convinced by his brother and his psychiatrists to file the June 3, 2011 application." Pet. App. 114a.

As Judge Dyk explained for six members of the en banc Federal Circuit, "[t]here is no allegation that [petitioner's guardian] was somehow prevented from filing, or faced obstacles in his attempt to file, [petitioner's] request for benefits sooner." Pet. App. 96a. Judge Dyk further observed that "there is no claim that [petitioner] was estranged from [his guardian] or refused to interact with him," as had been the case in other situations in which the court of appeals had equitably tolled

certain deadlines. *Id.* at 96a-97a. Judge Dyk concluded that "[t]here is nothing in the record that justifies the inordinate thirty-year delay in filing the application at issue." *Id.* at 97a. Given that view of the case expressed by the six Federal Circuit judges who believed that the one-year grace period is subject to equitable tolling, petitioner would have no reasonable likelihood of ultimately obtaining tangible relief even if the first question presented in the certiorari petition were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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