No. 21-432

IN THE

Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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December 30, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTRODUCTION

Respondent does not dispute that the en banc Federal Circuit deadlocked 6-6 on the sole question before it: whether the one-year filing deadline of 35 U.S.C. § 5110(b)(1) is amenable to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). Respondent also does not dispute that this is an important issue for tens of thousands of current and future military veterans. *See* Pet. 9-14.

Respondent instead contends that the answer to this legal question is so clear as to make this case unworthy of Supreme Court review, even though the en banc Federal Circuit itself split evenly on the question. Opp. 9-22. It defies logic that an important question concerning the interpretation of a veterans' benefits statute would cause an irreconcilable split at the Federal Circuit if the answer were as clear as Respondent contends. This is especially true considering that the Federal Circuit has exclusive appellate jurisdiction over this subject matter and has more experience interpreting veterans' benefits statutes than any other federal circuit court in the country.

In the alternative, Respondent contends this case would be a poor vehicle to address the legal question presented because Mr. Arellano allegedly would have "no reasonable likelihood of obtaining any tangible relief" even if this Court ruled that § 5110(b)(1) is amenable to equitable tolling. Opp. 9. Respondent ignores, however, that the Federal Circuit *also* split on this issue, with five judges joining Judge Chen's concurring opinion that the merits of Mr. Arellano's equitable tolling argument cannot be decided on appeal because the Veterans Court and the Board declined to make any factual findings on the issue. *See* Pet. App. 68a-69a. Indeed, far from indicating that Mr. Arellano's

facts could never support a claim for equitable tolling as Respondent contends, the Veterans Court found his allegations would be "worth exploring" if equitable tolling were not categorically barred by *Andrews v. Principi,* 351 F.3d 1134 (Fed. Cir. 2003). Pet. App. 6a.

ARGUMENT IN REPLY

A. The *Irwin* Presumption Applies to the One-Year Deadline in 38 U.S.C. § 5110(b)(1)

In his concurring opinion, Judge Chen concluded that *Irwin*'s presumption of equitable tolling is categorically inapplicable to the one-year deadline in 38 U.S.C. § 5110(b)(1) because this provision does not meet the traditional definition of a statute of limitations. Pet. App. 27a-29a, 54a-55a. Respondent repeats this same argument in urging denial of the Petition. Opp. 10-13. In doing so, however, Respondent fails to address many of the countervailing points raised in Judge Dyk's concurrence and in the Petition, and thus presents only a one-sided view of the issue.

First, contrary to Respondent's foundational assumption (*see* Opp. 10), *Irwin* did not hold that the rebuttable presumption of equitable tolling applies only to traditional statutes of limitations. Instead, the Court held that "making the rule of equitable tolling applicable to suits against the Government, *in the same way that it is applicable to private suits*, amounts to little, if any, broadening of the congressional waiver [and] is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." 498 U.S. at 95 (emphasis added).

Irwin cites *Zipes* as an example of the traditional application of equitable tolling in a suit between private litigants. *See* 498 U.S. at 95 n.2 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

Zipes involved an administrative, pre-suit filing deadline—the 180-day deadline for lodging a charge of workplace discrimination under Title VII of the Civil Rights Act—which this Court described as "like" a statute of limitations while finding it amenable to equitable tolling. 455 U.S. at 393. Other courts have described this deadline as an "exhaustion of remedies" requirement rather than a traditional statute of limitations. *See, e.g.*, *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489-90 (2d Cir. 2018).

Similarly, in *Scarborough,* this Court considered whether *Irwin*'s presumption applies to the 30-day deadline for applying for fees under the Equal Access to Justice Act ("EAJA"). *Scarborough v. Principi*, 541 U.S. 401, 420-23 (2004). The Government argued that a presumption of equitable tolling should not apply to this deadline because it is part of a statute that "authorizes fee awards against the Government under rules that have no analogue in private litigation." *Id.* at 421-22. Although not expressly stated, this argument presumed that the 30-day deadline for filing an application for EAJA fees is not analogous to a traditional statute of limitations as would be found in private litigation. This Court rejected that argument:

> [I]t is hardly clear that *Irwin* demands a precise private analogue. Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government's engagements with private persons—*matters such as the administration of benefit programs*. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*'s reasoning would be

> diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.

Id. at 422 (emphasis added); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 162 (2013) (Sotomayor, J., concurring) ("[W]e have never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines.").

As made clear in *Zipes* and *Scarborough*, equitable tolling can apply to unique timing provisions found in statutory schemes such as government benefits programs, even if they do not have a precise private analogue and do not necessarily satisfy a traditional or strict definition of a statute of limitations.

The appropriate inquiry under *Irwin* is not, as Respondent implies, whether the one-year deadline of §5110(b)(1) meets a strict dictionary definition of a "statute of limitations." *Cf.* Opp. 10 (citing *Black's Law Dictionary* 1636 (10th ed. 2014)). Rather, the question is whether the provision is sufficiently similar to other timing provisions, such as statutes of limitations and administrative exhaustion requirements, that have traditionally been deemed amenable to equitable tolling in "private suits." *Irwin*, 498 U.S. at 95-97.

Respondent claims that the one-year filing deadline in § 5110(b)(1) shares "none" of the features of a statute of limitations because a veteran seeking disability compensation "faces no time limit for filing a claim." Opp. 11 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 431 (1985)). This ignores, however, that § 5110(b)(1) is concerned with *retroactive* disability benefits, which undisputedly cannot be recovered if the veteran misses the one-year filing deadline of § 5110(b)(1). *See* Pet. App. 77a (Judge Dyk explaining

that "§ 5110(b)(1) does impose what is clearly a one-year statute of limitations for retrospective claims—making retrospective benefits unavailable unless the claim is filed within one year after discharge.").

Respondent's observation that a veteran is not required to "file two separate applications for prospective and retrospective relief" (Opp. 21) is irrelevant because there is no dispute that a single claim for benefits can include a retroactive component, but only if the veteran satisfies § 5110(b)(1)'s one-year deadline for seeking such benefits. *See Wright v. Gober*, 10 Vet. App. 343, 348 (Vet. App. 1997) ("Under 38 U.S.C. § 5110(b)(1), Congress decided that veterans awarded disability compensation based on a claim filed within one year after separation should receive retroactive benefits.").

Respondent fails to distinguish *Young v. United States*, in which this Court held that the three-year "lookback" period in 11 U.S.C. § 507(a)(8)(A)(i) is "a limitations period subject to traditional principles of equitable tolling." 535 U.S. 43, 47 (2002). The Court reached this conclusion even though, "unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim (viz., priority and nondischargeability in bankruptcy)." *Id.* at 47-48 (footnote omitted). The Court reasoned that this "makes it a more limited statute of limitations, but a statute of limitations nonetheless." *Id.*

Respondent attempts to distinguish *Young* on the ground that "Section 5110(b)(1) does not prescribe a period within which certain rights must be enforced or else will be lost." Opp. 19. But that is incorrect. Section 5110(b)(1) clearly prescribes a one-year period within which a service-disabled veteran must enforce his or

her right to receive retroactive disability benefits, or else lose that right forever. That the veteran might still have *other* rights available after this period, e.g., a claim for prospective benefits, does not change the fact that "certain rights" (Opp. 19), i.e., the right to claim retroactive benefits, are lost forever if not exercised within one year. In this sense, § 5110(b)(1) is similar to the lookback provision in *Young*, i.e., it is "a more limited statute of limitations, but a statute of limitations nonetheless." 535 U.S. at 47-48.

B. Respondent's Equitable-Powers Argument Lacks Merit

As a fallback, Respondent argues that the *Irwin* presumption should not apply here because "Congress has not granted the VA a general power of equity akin to the power that the Judiciary Act confers on federal courts." Opp. 17. The issue in this appeal, however, is whether the *Veterans Court* erred in holding that § 5110(b)(1) is not amenable to equitable tolling under *Irwin*. There is no dispute that the Veterans Court has such equitable powers. *See Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc) (holding that the Veterans Court can equitably toll the 120-day period set forth in 38 U.S.C. § 7266(a)); *cf. Young*, 535 U.S. at 49-53 (recognizing a bankruptcy court's power to equitably toll deadlines); *Former Emps. of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1298 (Fed. Cir. 2004) (recognizing the Court of International Trade's power to equitably toll deadlines); *Myers v. Comm'r*, 928 F.3d 1025, 1036-37 (D.C. Cir. 2019) (recognizing the U.S. Tax Court's power to equitably toll deadlines).

Moreover, as Respondent concedes, Congress has granted the VA the power to "provide such relief . . . as the [VA] determines is equitable" in a range of circumstances. Opp. at 17 (quoting 38 U.S.C. § 503).

There is no reason to believe that this power cannot be used to equitably toll the deadline in § 5110(b)(1) to avoid manifest injustice in exceptional cases. *Cf. Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc) ("[T]he availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process.").

C. The Government Has Not Rebutted the *Irwin* Presumption

Respondent asserts that even if the *Irwin* presumption applies to § 5110(b)(1), it is rebutted by the overall format of § 5110, which Respondent characterizes as containing "thirteen specific exceptions under which an award of benefits would have an effective date earlier than the application date." Opp. 13 (citing *United States v. Brockamp*, 519 U.S. 347, 352 (1997) and *TRW Inc. v. Andrews*, 534 U.S. 18, 28 (2001)). But Respondent ignores the nexus requirement of *TRW*, i.e., that the enumerated exceptions must relate to the specific limitations period at issue.

In *TRW*, this Court held that an implied general discovery rule in the Fair Credit Reporting Act ("FCRA") was not applicable in calculating the FCRA's limitations period because the statute's text and structure established a two-year limitations period and *in the same sentence* provided a limited exception for cases of willful misrepresentation. *See TRW*, 534 U.S. at 28-31. This Court reasoned that a judicially recognized general discovery rule under the FCRA would render the narrower exception "insignificant, if not wholly superfluous." *Id*. at 31 (citation omitted).

Here, unlike in *TRW*, no explicit exception exists for § 5110(b)(1)'s one-year deadline for seeking retroactive

service-connected disability benefits. Instead, § 5110 generally lists additional limitations periods to receive retroactive coverage for *other types* of VA benefits such as disability pension or death compensation. *See* 38 U.S.C. § 5110(b)(3)-(n). These have no nexus with § 5110(b)(1) and can never stop or slow its one-year clock.

For example, Respondent relies heavily on Subsection (b)(4) (*see* Opp. 15-16), 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 disability pension" can be "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). According to Respondent, the fact that Congress considered this specific situation and applied a limited one-year grace period "only to a disability pension . . . not to the type of service-connected disability compensation that is at issue here" means that Congress did not intend for equitable tolling to apply to the one-year period of § 5110(b)(1). Opp. 15-16. This conclusion is not supported by *TRW*.

Respondent fails to explain how the one-year deadline in § 5110(b)(4) for a retroactive award of a disability pension would be rendered "insignificant" or "wholly superfluous" if equitable tolling were available for the one-year deadline for retroactive service-connected disability compensation under § 5110(b)(1). *TRW*, 534 U.S. at 31 (citation omitted). The fact is, these two provisions address entirely different types of awards and are not related to each other, as Respondent concedes. Opp. 15-16. This Court explained in *Young* that such a scheme "supplements rather

than displaces principles of equitable tolling." 535 U.S. at 52-53 (finding that an "express tolling provision" found for a first limitations period in a given subsection only "demonstrate[d] that the Bankruptcy code incorporates traditional equitable principles" and did not evince a congressional intent to bar tolling for a second limitations period).

D. This Case Is a Good Vehicle to Resolve the Federal Circuit's 6-6 Split on a Legal Question Important to Many Veterans

Respondent contends this case would be a "poor vehicle in which to address the question presented" because "[a]ll 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." Opp. 22. Respondent ignores, however, that the other six judges—despite opining that they would uphold *Andrews*—"would remand this case for further factual development" if § 5110(b)(1) were found amenable to equitable tolling. Pet. App. 68a-69a. In other words, even on this issue, the en banc Federal Circuit was deadlocked 6-6.

Respondent dives into the facts of Mr. Arellano's case, but neither side argued any of those facts before the Federal Circuit. *See* Pet. App. 68a ("The government, for its part, has never argued in this court that we can—or should—affirm the denial of equitable tolling on the facts of Mr. Arellano's case; it has only argued that equitable tolling is unavailable as a matter of law.").

Respondent is apparently trying to suggest—prematurely—that Mr. Arellano's prospects of ultimately winning on tolling are low. But far from indicating that Mr. Arellano's facts could never support a claim

for equitable tolling, the Veterans Court specifically stated that his allegations would be "worth exploring" in the absence of *Andrews*. Pet. App. 6a ("If we were writing on a blank slate, appellant's argument would be worth exploring."). Any suggestion that Mr. Arellano would not prevail under the doctrine is merely speculative, as the factual record is undeveloped.

Respondent dodges the *Chenery* doctrine altogether, despite it being discussed at length in the Petition. *See* Pet. at 15, 28, 29 (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Respondent also does not dispute any of the four salient points made in Judge Chen's concurrence, namely that the Veterans Court and the Board:

> (1) did not address any of [Mr. Arellano's] facts in denying equitable tolling; (2) made no factual findings on this issue; (3) did not consider whether further factual development may be warranted to adequately answer that question; and (4) did not consider Judge Dyk's rigid 'caregiver rule' that bars equitable tolling for totally and permanently disabled veterans who have a caregiver.

Pet. App. 68a.

Respondent also does not dispute that the legal question presented here is important to tens of thousands of disabled military veterans (*see* Pet. 9-14)—a fact that should not be overlooked in considering whether to grant the Petition. Respondent essentially asks the Court to postpone resolving this important legal question until a case with different facts arises. But, of course, Respondent could repeat this same argument for virtually *every* veteran who petitions this Court for review of *Andrews*, delaying resolution of this important issue indefinitely.

As this Court has explained, the bar for showing that a statute is amenable to equitable tolling is relatively low, since tolling is presumptively available under *Irwin*. *See* 498 U.S. at 95-96. On the other hand, the bar for showing that a veteran's particular circumstances *warrant* equitable tolling is quite high. *Id.* at 96 ("Federal courts have typically extended equitable relief only sparingly."). Given the disparity between these standards, the Government will always be able to argue that the particular facts presented by a veteran seeking to challenge *Andrews* constitute a "poor vehicle" for review. While the Government would presumably prefer delaying resolution of this important legal question indefinitely, that is not in the best interests of disabled veterans.

As it stands, *Andrews* creates a nonsensical scheme where the most disabled veterans—those suffering from severe mental and/or physical injuries—are also the ones most likely to suffer from the unforgiving enforcement of § 5110(b)(1)'s one-year deadline for seeking retroactive disability benefits. Half the Federal Circuit would overturn *Andrews*, and half would leave it in place. The nation's veterans deserve a firm and timely answer to this question, and this case—which Respondent concedes preserves every relevant issue—presents a good vehicle for providing that answer.

CONCLUSION

For the reasons explained above, the Court should grant the Petition.

Respectfully submitted,

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