No. 21-432

IN THE

Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF AMICI CURIAE DISABLED AMERICAN VETERANS AND LEE KIRBY SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

DAV is a federally chartered veterans service organization, founded to serve the interests of the nation's disabled veterans. 36 U.S.C. § 50301 *et seq*. DAV has more than a million members, all of whom are service-connected disabled veterans. Although DAV operates a number of charitable programs that serve the interests of its constituency, its marquee program, and the one for which it is best known, is the National Service Program. Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV service officers provide free assistance to veterans and their families with their claims for benefits from the United States Department of Veterans Affairs. In 2021, DAV assisted veterans and their families in filing over 151,000 claims for benefits, and DAV-represented veterans received more than $25 billion in earned benefits.

In 2012, DAV's service officers assisted Lee Kirby in obtaining VA death and indemnity compensation. Mrs. Kirby's husband, a decorated veteran of the Vietnam conflict, suffered a fatal heart attack in 1994. *See Title Redacted by Agency*, BVA Docket No. 16-06 368, 2021 WL 3282761, *1 (June 9, 2021). VA admits that within a year of her husband's death, Mrs. Kirby

[1] The parties have consented to the filing of this amici brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

contacted the agency about her eligibility for VA benefits. *Id*. *2. The agency informed her that she was too young at the time to qualify for VA benefits. *Id*. Based on this advice, which VA concedes was "inaccurate," she did not file a claim until 2012. *Id*. After she filed her 2012 claim, VA granted DIC benefits based on the statutory presumption that her husband's death was caused by his exposure to herbicide agents during his service in Vietnam. *See id*.; 38 U.S.C. § 1116. Notwithstanding its admission that it wrongly informed her in 1994 that she was not eligible for benefits, VA has denied retroactive DIC benefits back to the day after the Veteran's death.[2] *Id*.

This case presents a question that is important to the Nation's disabled veterans and their families and is especially germane to Mrs. Kirby. Like Mrs. Kirby, VA claimants often seek assistance from DAV representatives in prosecuting their VA benefits claims and securing the proper effective date for any award of benefits. And some of those claimants, including Mrs. Kirby, failed to promptly file their compensation claims due to VA's erroneous advice. *See* 2021 WL 3282761 at *2; *Butler v. Shinseki*, 603 F.3d 922, 925 (Fed. Cir. 2010) (VA personnel discouraged veteran from filing a claim).

The Federal Circuit's decisions in *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003) and *Arellano v. McDonough*, 1 F.4th 1059 (Fed. Cir. 2021) foreclose

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[2] Mrs. Kirby has appealed VA's denial to the United States Court of Appeals for Veterans Claims. *See Kirby v. McDonough*, Vet. App. No. 21-5588. Proceedings in her appeal have been stayed pending the Court's decision in this case.

the possibility of equitable tolling as a remedy for VA's misdeeds. DAV and Mrs. Kirby believe that these decisions overlook Congress's intent that, consistent with the pro-claimant, paternalistic nature of the VA adjudication process, the one-year limitation period in 38 U.S.C. § 5110(b)(1) be subject to equitable tolling.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the veterans benefits arena, Congress legislates against the background of an ex-parte system of adjudication that is meant to benefit veterans and their families. And, as in any area, it also legislates against the background principle of the general availability of equitable tolling. As a result, the *Irwin* presumption in favor of equitable tolling applies to 38 U.S.C. § 5110(b)(1), regardless of whether it has the functional characteristics of a statute of limitations. That presumption cannot be rebutted with respect to section 5110(b)(1) because there is no explicit statutory prohibition against equitable tolling and the statute appears in a scheme that is uniquely pro-claimant.

The Federal Circuit has barred equitable tolling of the one-year deadline in section 5110(b)(1) even when it is undisputed that VA unlawfully induced a claimant to delay filing a claim. This unfair approach applies equally to amicus Mrs. Kirby, who (as VA concedes) the agency erroneously advised she was too young to qualify for benefits within the first year of her husband's death in 1994. The Federal Circuit's

ruling is antithetical to Congress's emphasis on fairness and the appearance of fairness in VA claims adjudication. Amici DAV and Mrs. Kirby therefore support Mr. Arellano's request that the Court reverse the Federal Circuit's holdings.

ARGUMENT

I. Congress intended that the limitation period in 38 U.S.C. § 5110(b)(1) be subject to equitable tolling, consistent with the paternalistic, non-adversarial system of VA claims adjudication.

The presumption that "statutory time limits," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990), are subject to equitable tolling "was adopted in part on the premise that '[s]uch a principle is likely to be a realistic assessment of legislative intent,'" *Sebelius v. Auburn Reg. Med. Center*, 568 U.S. 145, 159 (2013) (quoting *Irwin*, 498 U.S. at 95). "Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler v. Commissioner*,142 S.Ct. 1493, 2022 WL 1177496, *5 (April 21, 2022). And Congress does not "alter that backdrop lightly." *Id*.

In the VA claims adjudication system, Congress legislates against another background principle—its "longstanding solicitude for veterans, [which] is plainly reflected in . . . laws that place a thumb in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson v. Henderson*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v.*

Sanders, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)) (citation omitted). Congress envisioned "'a completely ex-parte system of adjudication.'" *Hodge v. West*, 155 F.3d 1356, 1362 (1998) (quoting H.R. Rep. No. 100-963, at 13 (1988)). "[T]he relationship between the veteran and the government is non-adversarial and pro-claimant," *Jaquay v. Principi*, 304 F.3d 1267, 1282 (Fed. Cir. 2002), and "the importance of systemic fairness and the appearance of fairness carries great weight" in this system, *Hodge*, 155 F.3d at 1363. "The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1028, 1044 (Fed. Cir. 2006).

The Federal Circuit's ruling that the statutory limitation period in 38 U.S.C. § 5110(b)(1) is not subject to equitable tolling flies in the face of these background principles. *See Andrews*, 351 F.3d at 1137-38; *see also Arellano*, 1 F.4th at 1061.

First, the ruling wrongly assumes that the one-year period in section 5110(b)(1) is not a "statutory time limit," *Irwin*, 498 U.S. at 95, that Congress understood would be subject to equitable tolling. *Andrews*, 351 F.3d at 1137-38. The *Andrews* Court concluded that section 5110(b)(1) "does not contain a statute of limitations" and for that reason alone, the presumption in favor of equitable tolling was inapplicable. *Id*. at 1138. Likewise, Judge Chen, in his concurrence in *Arellano*, argued that the one-year period in section 5110(b)(1) could not be equitably tolled because it did not have the "functional characteristics'" of a statute of limitation. 1 F.4th at 1067.

DAV and Mrs. Kirby agree with Judge Dyk's conclusion that the one-year limitation period in section 5110(b)(1) is, in fact, a statute of limitations. *See Arellano*, 1 F.4th at 1087-92 (Dyk, J., concurring). As Judge Dyk explained, the one-year limitation period is like the limitation in the statute at issue in *Young v. United States*, which "bar[red] only *some*, and not *all*, legal remedies," 535 U.S. 43, 47 (2002) (emphases in original). *Arellano*, 1 F.4th at 1089-90. Like that statute, section 5110(b)(1) is "a more limited statute of limitations, but a statute of limitations nonetheless," *Young*, 535 U.S. at 48. *Accord Arellano*, 1 F.4th at 1090 (Dyk, J., concurring). The presumption in favor of equitable tolling therefore applies.

Second, the Federal Circuit's ruling that the *Irwin* presumption does not apply to section 5110(b)(1) misapprehends that even if it is not a traditional statute of limitations, section 5110(b)(1) is still a "statutory time limit[]," *Irwin*, 498 U.S. at 95, that is subject to equitable tolling. *See also Boechler*, 2022 WL 1177496, at *5 ("[N]onjurisdictional limitations periods are presumptively subject to equitable tolling.") It is true that thus far, this Court has applied the *Irwin* presumption only to a particular kind of "statutory time limit"—statutes of limitations. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 15 (2014); *see also Boechler*, 2022 WL 1177496 (post-*Lozano* decision applying the presumption to a deadline to seek judicial review). But the *Irwin* presumption is much broader—it applies to "statutory time limits," not just those deadlines that have the characteristics of a statute of limitations. *Irwin*, 498 U.S. at 95; *see Arellano*, 1 F.4th at 1067-76 (J. Chen, concurring) (describing

the "functional characteristics" of a statute of limitations).

As Judge Chen discussed, whether Congress intended equitable tolling to apply to a time limitation that is not a statute of limitations depends on "whether some other background principle of law supports" it. *Arellano*, 1 F.4th at 1076 (Chen, J., concurring). This is consistent with the *Irwin* Court's conclusion that equitable tolling itself is a "background principle of law," *id.*, against which Congress legislates. *Irwin*, 498 U.S. at 95. As argued above, solicitude for veterans and the ex-parte nature of the VA claims adjudication process is another "background principle of law" against which Congress legislates in the veterans benefits arena. *See Hodge*, 155 F.3d at 1362.

The background principle of an ex-parte claims adjudication system weighs heavily in favor of the presumption of equitable tolling. The presumption is particularly strong in "statutory scheme[s] [that are] designed to be 'unusually protective of claimants.'" *Auburn*, 568 U.S. at 160. There can be no doubt that the paternalistic, non-adversarial VA claims adjudication system fits this description. *See Henderson*, 562 U.S. at 440; *Hodge*, 155 F.3d at 1362. The system is not "meant to be . . . a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him." *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009). Applying the *Irwin* presumption to 5110(b)(1) is fully consistent with this principle.

Judge Chen allowed in his concurring opinion in *Arellano* that this bedrock principle of veterans benefits law is among the "general background principles" against which Congress legislates. *Arellano*, 1 F.4th at 1085. But he dismissed it as insufficient to "override the unambiguous meaning of the statutory text." *Id*. According to Judge Chen, by codifying narrow exceptions to the general rule that the effective date of benefits is the date of the claimant's application, *see* 38 U.S.C. § 5110(a)(1), Congress unambiguously intended to preclude *any* equitable tolling of the one-year period in subsection (b)(1). *Arellano*, 1 F.4th at 1082. But as Judge Chen also acknowledged, "[t]he implication that section 5110's explicitly enumerated exceptions preclude the judicial recognition of additional equitable exceptions can, of course, be overcome by 'contrary legislative intent.'" *Id*. (quoting *TRW v. Andrews*, 534 U.S. 19, 28 (2001)).

Congress's "longstanding solicitude for veterans, [which] is plainly reflected in . . . laws that place a thumb in the veteran's favor in the course of administrative and judicial review of VA decisions," *Henderson*, 562 U.S. at 440, is the evidence of "contrary legislative intent," *TRW*, 534 U.S. at 28. Judge Chen's conclusion that the pro-claimant, paternalistic nature of the VA claims adjudication system could not "override the unambiguous meaning of the statutory text" under-values this congressional intent. *Arellano*, 1 F.4th at 1085. And it unduly downgrades the very "general background principles" that are to inform whether the presumption applies. *See Irwin*, 498 U.S. at 95.

For these reasons, DAV and Mrs. Kirby urge this Court to hold that the *Irwin* presumption in favor of equitable tolling applies to the one-year limitation period in section 5110(b)(1). And, because section 5110(b)(1) "does not expressly prohibit equitable tolling" and appears in a statutory scheme that is "unusually protective" of claimants, that presumption is not rebutted. *See Boechler*, 2022 WL 1177466, at *6.

II. The Federal Circuit's decisions in *Andrews* and *Arellano* leave claimants like Mrs. Kirby with no recourse when VA unlawfully induces them to delay the filing of a meritorious claim.

Equitable tolling is available "where the complainant has been induced . . . by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. However, under *Andrews*, 351 F.3d at 1137-38, and *Arellano*, 1 F.4th at 1061, a veteran who has been induced by VA to delay filing a claim until after the first year from discharge is forever barred from recovering retroactive benefits back to the day after discharge. *See Butler*, 603 F.3d at 926.

In *Butler*, the Veterans Court held that even when VA unlawfully discourages a veteran from filing a claim during the one-year period under section 5110(b)(1), equitable tolling is unavailable. 603 F.3d at 925. The Federal Circuit agreed, noting its holding in *Andrews* that equitable tolling is unavailable under section 5110(b)(1). *Id*. at 926. Under *Butler*, no matter how unfair it is, a veteran cannot collect benefits to which he or she would have been entitled but for

VA's wrongful conduct. *Id*. This result is antithetical to the VA claims adjudication system's pro-claimant, nonadversarial nature and should not stand.

The same unjust result applies to section 5110(d), which provides that the effective date for an award of DIC is the first day of the month in which the death occurred if an "application [for DIC] is received within one year of the date of death." Like section 5110(b)(1), subsection (d) provides a one-year limitation period that is subject to the *Irwin* presumption in favor of equitable tolling. But because of the Federal Circuit's holdings in *Andrews*, 351 F.3d at 1137-38, and *Arellano*, 1 F.4th at 1061, surviving spouses like Mrs. Kirby who were induced by VA to delay filing a claim until more than a year after their spouse's death are forever barred from obtaining DIC benefits retroactive to the date of death.

It is undisputed that during the first year following her husband's service-connected death, Mrs. Kirby contacted VA to inquire about her benefits eligibility. 2021 WL 3282761 at *2. It is also undisputed that she did not file a claim at that time because VA erroneously informed her that she was ineligible for DIC benefits due to her age. *Id*. This is precisely the type of misinformation that justifies the application of equitable tolling. *See Butler*, 603 F.3d at 927 (Newman, J., concurring).

"[T]he importance of systemic fairness and the appearance of fairness carries great weight" in the VA claims adjudication system. *Hodge*, 155 F.3d at 1363. The circumstance in which Mrs. Kirby finds herself—unable to recover benefits to which she would have

been entitled had VA not wrongly informed her that she was ineligible—is *un*fair. By holding that the *Irwin* presumption in favor of equitable tolling applies to section 5110(b)(1) and has not been rebutted, this Court will ensure that claimants like Mrs. Kirby are afforded the protections Congress intended for them.

CONCLUSION

Congress intended that the ex-parte VA claims adjudication system favor claimants. The *Irwin* presumption is consistent with the bedrock principles of this system, and the Federal Circuit's conclusion to the contrary flies in the face of congressional intent. The Court should therefore reverse the Federal Circuit's ruling that the *Irwin* presumption does not apply to 38 U.S.C. § 5110(b)(1).

Respectfully submitted,

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