No. 21-432

IN THE
Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

James R. Barney
Counsel of Record

Kelly S. Horn
Alexander E. Harding
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000
james.barney@finnegan.com

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ARGUMENT IN REPLY

I. The One-Year Filing Deadline in 38 U.S.C. § 5110(b)(1) Functions as a Statute of Limitations and Is Amenable to Equitable Tolling

The Secretary contends *Irwin*'s presumption of equitable tolling cannot apply to the one-year filing deadline in 38 U.S.C. § 5110(b)(1) because: (1) the *Irwin* presumption only applies to "traditional" or "typical" statutes of limitations, Gov't Br. 9, 13-18; and (2) § 5110(b)(1) does not function as a statute of limitations, Gov't Br. 18-26. The Secretary is wrong on both points.

A. *Irwin*'s Presumption Is Not Limited to "Traditional" or "Typical" Statutes of Limitations

The Secretary relies heavily on this Court's statement in *Lozano* that "we have only applied [the] presumption [of equitable tolling] to statutes of limitations." Gov't Br. 14 (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13-14 (2014)). The Secretary seeks to expand this statement into a bright-line prohibition against applying *Irwin*'s presumption to any timing provision other than so-called "traditional" or "typical" statutes of limitations. *See, e.g.,* Gov't Br. 9 ("Traditional statutes of limitations do not operate in that manner."), 20 ("Unlike the tolling of a typical statute of limitations . . ."). *Lozano*, however, pronounced no such limitation on *Irwin*'s reach.

Lozano did not address whether *Irwin*'s presumption should apply to the timing provision at issue in that case because it appeared in an international treaty, not a statute drafted by Congress. 572 U.S. at 12–14. Although the *Lozano* Court performed an alternative analysis beginning with the premise that "we have only applied [the] presumption [of equitable tolling] to statutes of limitations," *id.* at 13–14, the Court was employing a functional understanding of what constitutes a statute of limitations, rather than a formulaic or dictionary definition as the Secretary seems to assert here.

Lozano's functional approach is evident from its reliance on the "three-year lookback period" in *Young* as an example of a statute of limitations amenable to equitable tolling. *Lozano*, 572 U.S. at 14 (citing *Young v. United States*, 535 U.S. 43, 47 (2002)). *Young* involved a timing provision that was not a traditional statute of limitations in the sense that it did not preclude the Internal Revenue Service ("IRS") from bringing a claim but instead limited the priority and nondischargeability that any such claim would enjoy under the bankruptcy code. 535 U.S. at 47–48, *see also id.* at 47 n.1 ("Equitable remedies may still be available."). The Court in *Young* nevertheless held that this "three-year lookback period is a limitations period subject to traditional principles of equitable tolling." *Id.* at 47.

The Secretary fails to grapple with this aspect of *Young.* Namely, unlike a "traditional" statute of limitations, the timing provision in *Young* did not prevent the IRS from bringing a *claim* for unpaid

taxes; it only affected the priority and nondischargeability that any such claim would enjoy under the bankruptcy code. *Id.* at 47-48. Despite this, the 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." *Id.* at 47. 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* at 48.

This aspect of *Young* undercuts the Secretary's premise that *Irwin*'s presumption can only apply to "traditional" or "typical" statutes of limitations. *See* Gov't Br. 9, 20. The Secretary contends that "[a] statute of limitations is a 'law that bars claims after a specified period.'" *Id.* at 18 (quoting *Black's Law Dictionary* 1636 (10th ed. 2014)). But the timing provision in *Young* did not bar the IRS from bringing a claim for unpaid taxes after three years. Instead, it merely eliminated certain procedural advantages the IRS otherwise enjoyed under the bankruptcy statute for claims filed within three years. *Young*, 535 U.S. at 47-48. The *Young* Court found this timing provision amenable to equitable tolling nonetheless. *Id.*

This Court's decision in *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385 (1982), is likewise consistent with a broader, more functional approach for determining whether a timing provision is amenable to equitable tolling. *Zipes* involved 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 and therefore amenable to equitable tolling. *Id.* at 393. Other courts have described this same 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); *cf.* *Messa v. Goord*, 652 F.3d 305, 309–10 (2d Cir. 2011) (noting that exhaustion-of-remedies requirements and statutes of limitations "serve very different functions in our civil justice system . . . [O]ne doctrine opens the courthouse door and the other closes it."). Thus, *Zipes* can be read as applying equitable tolling to an administrative deadline that, while not a statute of limitations in the traditional sense of barring claims after a specified time period, nevertheless *operated as* a statute of limitations in key respects. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (noting that the timing provision in *Zipes* "operated as a statute of limitations").

The Secretary attempts to distinguish *Zipes* because it predated *Lozano* and did not address the applicability of the *Irwin* presumption. Gov't Br. 17. Neither criticism is apt. Although *Zipes* predated *Lozano*, there is no reason to believe that this Court intended to overrule or limit *Zipes* in its *Lozano* decision—especially since *Lozano* did not even cite *Zipes*, let alone criticize it. *See Lozano*, 572 U.S. at 1-18. And although *Zipes* did not address the *Irwin* presumption (because it predated *Irwin*), the more salient point is that the *Irwin* Court favorably cited *Zipes* as an example of the traditional application of

equitable tolling to timing provisions in "lawsuits between private litigants," which, going forward, presumptively applies equally in claims against the Government. *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 n.2, (1990).

The Secretary's attempt to distinguish *Scarborough v. Principi*, 541 U.S. 401 (2004), is similarly misplaced. The Secretary notes that *Scarborough* did not actually address whether *Irwin's* presumption of equitable tolling should apply because the case was decided on other grounds. Gov't Br. 17-18 (citing *Scarborough*, 541 U.S. at 421 n.8). Nevertheless, the *Scarborough* Court identified *Irwin* as "enlightening" on the issue before it, particularly the proposition that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Scarborough*, 541 U.S. at 421 (quoting *Irwin*, 498 U.S. at 95 (additional citation omitted)).

Pertinent here, the Court in *Scarborough* rejected the Government's attempt to distinguish *Irwin* on the ground that the 30-day deadline for applying for fees under the Equal Access to Justice Act had "no analogue in private litigation." *Id.* at 422. As the Court explained, "[b]ecause 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.* Thus, consistent with *Zipes* and *Young*, equitable tolling can apply to unique statutory timing provisions, even if they lack a precise private analogue and do not look

like "traditional" or "typical" statutes of limitations. Nothing in *Lozano* diminishes this reasoning.

B. Section 5110(b)(1) Functions as a Statute of Limitations

As the parties agree, *see* Gov't Br. 18-19, in determining whether a timing provision functions as a statute of limitations for purposes of determining if equitable tolling should apply, this Court considers the provision's "functional characteristics," *i.e.*, whether it serves the policies of a statute of limitations. *Lozano*, 572 U.S. at 14-15, 15 n.6. Statutes of limitations "encourage the prompt presentation of claims," *United States v. Kubrick*, 444 U.S. 111, 117 (1979), and thereby "protect defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

The Secretary contends that the one-year filing deadline in § 5110(b)(1) "shares none" of these attributes. Gov't Br. 19. According to the Secretary, § 5110(b)(1) "does not establish a deadline by which a veteran must bring a claim, and it does not bar or eliminate claims after the one-year period expires." *Id*. The Secretary is mistaken.

The Secretary's assertion that § 5110(b)(1) does not establish a deadline by which a veteran must bring a claim ignores that § 5110(b)(1) specifically governs claims for *retroactive* service-connected disability benefits, which are not otherwise recoverable under § 5110(a)(1). *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.").

Contrary to the Secretary's assertion, a veteran who misses § 5110(b)(1)'s one-year deadline for seeking retroactive disability benefits forfeits the ability to do so later, and is left only with the prospective relief provided by § 5110(a)(1). That the Veterans Administration ("VA") does not require veterans to "file separate applications for prospective and retrospective relief," Gov't Br. 26, is immaterial because the statute itself clearly creates these two distinct categories of relief. Specifically, § 5110(b)(1) creates a retrospective type of relief that is not otherwise available under § 5110(a)(1), and it imposes a one-year deadline for applying for such relief. Whether this one-year statutory deadline operates as a statute of limitations for purposes of the *Irwin* presumption should not depend on the idiosyncrasies of the VA's informal application process. Rather, the focus should be on the "functional characteristics" of the statutory provision itself. *Lozano*, 572 U.S. at 14-15, 15 n.6.

The Secretary notes that "a veteran seeking disability compensation 'faces no time limit for filing a claim.'" Gov't Br. 19 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011)). This ignores that the ability to file "*a* claim" in the future does not mean the veteran can file a claim for *retroactive* disability benefits after missing § 5110(b)(1)'s one-year filing deadline. She cannot, which is why § 5110(b)(1) very much operates as a statute of limitations for

retroactive benefits claims. A veteran wishing to claim retroactive service-connected disability benefits dating back to her date of discharge must do so within one year of discharge. Otherwise, any claim she might have had to those benefits will be extinguished.

The Secretary further notes that "a veteran who applies for disability compensation outside the one-year window does not lose his right to *all* benefits; the effective date of his application is simply determined in accordance with the default rule in Subsection (a)(1)." *Id*. at 22 (emphasis added). The word "all" here gives the game away. As the Secretary tacitly concedes, a disabled veteran who misses § 5110(b)(1)'s one-year filing deadline will lose his right to *some* benefits, which puts this timing provision squarely into the category of a "limited statute of limitations, but a statute of limitations nonetheless." *Young*, 535 U.S. at 47–48.

Indeed, precisely because the one-year filing deadline in § 5110(b)(1) puts recently discharged disabled veterans at risk of losing *some* benefits (*i.e.*, retroactive disability benefits), it naturally has the effect of "encourag[ing] the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. It thus serves "the main goal of a statute of limitations: encouraging plaintiffs to prosecute their actions promptly or risk losing rights." *In re Neff*, 824 F.3d 1181, 1185 (9th Cir. 2016).

The Secretary next argues that "an application for benefits is not analogous to a lawsuit alleging the past (or ongoing) violation of a legal right." Gov't Br. 19. This argument, aside from being incorrect,

exposes a fundamental flaw in the Secretary's logic. As this Court cautioned in *Scarborough*, "[l]itigation 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*." 541 U.S. at 422 (emphasis added). Because of this, it is not always possible to find a "precise private analogue" to peculiar timing provisions set forth in government-benefits schemes, nor is it necessary under *Irwin*. *Id.*

In any event, an application for service-connected disability benefits filed in compliance with § 5110(b)(1) can reasonably be considered analogous to an action for past damages and prospective relief for continuously accrued claims like patent or copyright infringement. Each month a veteran suffers with a service-connected disability is akin to a separate injury for which the government owes the veteran a specific monthly benefit based on the nature and severity of the disability. *See* 38 U.S.C. § 1114 (providing monthly rates for disability compensation). The one-year deadline in § 5110(b)(1) serves as a statute of limitations for the *retrospective* portion of this claim. That is, after this one-year period has expired, the veteran is forever barred from filing a claim for any unpaid benefits (analogous to "past damages") owed for the service-connected injury (analogous to a continuously accrued claim) that occurred between his date of discharge from service and his application for benefits.

In the analogous examples of copyright and patent infringement, this Court has historically considered the relevant timing provisions that govern past damages to be statutes of limitations. For instance, the copyright limitations period is governed by 17 U.S.C. § 507, which this Court has described as a "limitations period [that] allows plaintiffs during [the copyright term] to gain retrospective relief running only three years back from the date the complaint was filed." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 672 (2014). Similarly, patent damages are governed by 35 U.S.C. § 286, which states that, "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." The Court has deemed this, too, to be a statute of limitations. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961 (2017).

Just as the copyright and patent statutes of limitations are presumptively amenable to equitable tolling, *see, e.g.*, *Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 264 (5th Cir. 2014), so too should the one-year filing deadline in § 5110(b)(1). In each case, the relevant timing provision sets forth a specific deadline (1 year, 3 years, or 6 years) for an injured party to file an action seeking to recover past damages for a continuously accruing claim.

The Secretary next argues that § 5110(b)(1) is unlike a statute of limitations because it does not "promote repose" for the VA. Gov't Br. 24. The Secretary notes that a veteran can bring "the same

claim again at any time if it is supported by new and material evidence." Gov't Br. 20–21. Yet as the Secretary concedes, if a veteran fails to file a claim within the one-year limitations period of § 5110(b)(1), the VA escapes any liability predating the veteran's actual application for disability benefits, whenever that may be. Gov't Br. 3–4; 38 U.S.C. § 5110(a)(1). This is not an insignificant degree of repose for the VA, and it fits easily into the Court's instruction that a "limited statute of limitations" is "a statute of limitations nonetheless." *Young*, 535 U.S. at 47–48.

The Secretary's comparison of § 5110(b)(1) to the untollable timing provision in *Lozano* is unpersuasive. Gov't Br. 18. The treaty in *Lozano* provided that when a parent abducts a child and flees to another country and "a court receives a petition for return within one year after the child's wrongful removal, the court 'shall order the return of the child forthwith.'" 572 U.S. at 4–5 (citing Art. 12 of the Hague Convention on the Civil Aspects of International Child Abduction). Importantly, the expiration of the one-year period did not cut off any rights held by the left-behind parent; it merely allowed a court to consider the child's interests along with those of the parent. *Id.* at 14–15. Because "[t]he continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent," the Court concluded that the one-year period was not a statute of limitations. *Id.* at 15.

Unlike the treaty provision in *Lozano*, the one-year deadline in § 5110(b)(1) does not provide a veteran with the "continued availability" of a remedy

for retroactive service-connected disability benefits. If the veteran fails to file a claim during the one-year period set forth in § 5110(b)(1), he forfeits any and all claims to these retroactive benefits. That he might have a *prospective* claim that can be adjudicated for a *future* time period simply means that § 5110(b)(1) operates as a "limited statute of limitations, but a statute of limitations nonetheless." *Young*, 535 U.S. at 47–48.

II. The Pro-Veteran Canon Is Relevant Here; The Federal Circuit's 6-6 Split on Section 5110(b)(1) Evidences Its Ambiguity

The Secretary contends the pro-veteran canon does not apply to this case. According to the Secretary, "Section 5110(b)(1) presents no interpretive doubt," and the "question in this case is whether a judge-made equitable doctrine can displace the operation of that unambiguous text." Gov't Br. 42. This is incorrect. *Irwin*'s equitable-tolling analysis turns on statutory interpretation because it was founded on a "realistic assessment of legislative intent." *Irwin*, 498 U.S. at 95–96. Indeed, the parties' briefs are replete with opposing interpretations of whether Section 5110's "text and structure" rebut the *Irwin* presumption. *Compare* Opening Br. 13 *with* Gov't Br. 26.

The Secretary's argument is also belied by the record below. It defies logic that an important question concerning the interpretation of a veterans' benefits statute would cause an irreconcilable 6-6 split at the Federal Circuit if Section 5110(b)(1) presented "no interpretive doubt" as the Secretary

contends. This is especially true considering that the Federal Circuit has exclusive appellate jurisdiction over this subject matter, *see* 38 U.S.C. § 7292(c), and has more experience interpreting veterans' benefits statutes than any other federal circuit court in the country.

The pro-veteran canon, like the *Irwin* presumption, finds its roots in congressional intent. Congress "has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits," particularly for "service-connected disability compensation." H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. "This entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (citation omitted). Here, between *Irwin*'s presumptive force and the pro-veteran canon, petitioner starts with two thumbs on the scale, whereas the Secretary starts with zero. *Cf. Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J. 1 (Summer 2013), (J. Scalia describing the pro-veteran canon as "more like a fist than a thumb, as it should be.").

III. The Secretary Cannot Rebut the *Irwin* Presumption

A. *Beggerly* and *TRW* Do Not Control; § 5110(b)(1)'s One-Year Deadline Has Zero Express Exceptions

The Secretary first attempts to dislodge *Irwin* by arguing that the "text and structure" of the statute

rebut its presumption. Gov't Br. 26–30. Because the Government cannot find any "text or structure" to support this argument in § 5110(b)(1), however, it instead pins the argument to § 5110(a)(1). *Id.* at 28. This provision gives a veteran's claim a day-of-receipt effective date "[u]nless specifically provided otherwise in this chapter." *Id.* (quoting 38 U.S.C. § 5110(a)(1)). The Secretary characterizes this as a "general rule," to which § 5110(b)(1) is one of "sixteen exceptions." Gov't Br. 3, 10, 29-30. The Secretary then argues that allowing equitable tolling of § 5110(b)(1) would create an additional exception to § 5110(a)(1), which it contends would run afoul of this Court's holdings in *Beggerly* and *TRW*. Gov't Br. 26–30 (citing *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)). This is incorrect.

The Government does not dispute that there are *zero* express exceptions to § 5110(b)(1)'s one-year clock, which alone is fatal to its argument. Both *Beggerly* and *TRW* involved limitations periods where Congress had already built an express tolling provision into the *very same limitations period. See Beggerly*, 524 U.S. at 48; *TRW* 534 U.S. at 27–29. The Court reasoned that equitably tolling a limitations period for which Congress has already provided express exceptions would render those exceptions "superfluous." *TRW*, 534 U.S. at 31 (citation omitted).

Here, by contrast, no explicit exception exists for § 5110(b)(1)'s one-year deadline for seeking retroactive service-connected disability benefits, and § 5110(a)(1) provides no tollable limitations period of its own. Section 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). But these have no nexus with § 5110(b)(1) and can never stop or slow its one-year clock.

The Secretary also argues that because § 5110(a)(1) states that a day-of-receipt effective date will apply to a veteran's claim "[u]nless specifically provided otherwise in this chapter," any tolling of § 5110(b)(1) has been "foreclose[d]" by Congress. Gov't Br. 28-29 (quoting 38 U.S.C. § 5110(a)(1)). Specifically, the Secretary argues that this wording "confirms Congress's intent to pretermit judicial discretion." Gov't Br. 28–29.

Although the Secretary avoids using the word "jurisdictional," this "pretermit[ting] judicial discretion" reasoning is fundamentally a jurisdictional argument—*i.e.*, that Congress forbade equitable tolling. *See John R. Sand*, 552 U.S. at 133–34 (referring to "jurisdictional" as a "convenient shorthand" for absolute time limits that forbid equitable tolling (citation omitted)). Yet the Secretary concedes that the Federal Circuit was correct in holding that "[n]othing in § 5110 purports to define a tribunal's jurisdiction, and the filing of a benefits claim more than one year after discharge does not deprive any tribunal of jurisdiction to adjudicate that claim." Pet. App. 56a; *accord* Pet. App. 82a; *see also* Gov't Br. 41.

Moreover, the Secretary's focus on the "unless" phraseology of § 5110(a)(1) is misplaced. Limitations periods framed as an exception to a general prohibition using language far more emphatic and

mandatory than § 5110(a)(1)'s "unless" clause have been found tollable. *See, e.g.*, *United States v. Kwai Fun Wong*, 575 U.S. 402, 410–13 (2015). The Federal Tort Claims Act ("FTCA") is one such example. Like § 5110(a)(1), it employs an "unless" clause to forbid a tort claim against the United States "unless" certain criteria are met: "A tort claim against the United States shall be forever barred *unless* it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b) (emphasis added). Despite the FTCA's emphatic "forever barred" language, the Court found it to be "of no consequence" to the *Irwin* presumption. *Kwai Fun Wong*, 575 U.S. at 411. The Secretary's arguments here relying on § 5110's "unless" structure should likewise be dismissed.

Finally, the Secretary relies on *Rotkiske v. Klemm* to argue that "Subsection (b)(4) directly addresses the concern that the very disability for which a veteran seeks benefits might delay the filing of an application," and application of equitable tolling to Subsection (b)(1) would "subvert the balance struck by Congress." Gov't Br. 32 (citing 140 S. Ct. 355, 361 (2019)). But that logic would only follow if Congress wished to permit tolling of § 5110(b)(1) for total disability *and nothing else*. When Congress wants a limitations period to follow the broader rule of equitable tolling for "good cause," it instead remains silent. *See Meyer v. Holley*, 537 U. S. 280, 286 (2003) ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background . . . principles, cannot show that it intended to apply an unusual modification of those rules"). And

remaining silent is precisely what Congress did when it drafted § 5110(b)(1).

B. The Limitations Period in *Holland* is More like § 5110(b)(1) than *Brockamp*'s Tax Code

The Secretary also invokes *United States v. Brockamp*, 519 U.S. 347 (1997), which held equitable tolling inapplicable to 28 U.S.C. § 6511's deadline for taxpayers to file refund claims. Gov't Br. 27–30. But *Brockamp*'s holding rested on several distinctive features of 28 U.S.C. § 6511 that are absent here.

Section 5110(b)(1)'s one-year deadline is a far cry from the one in *Brockamp*. For one thing, the deadline in § 5110(b)(1) has zero express exceptions, compared to *Brockamp*'s six. *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1501 (2022) (citing *Brockamp*, 519 U.S. at 350–52). That alone "makes this case less like *Brockamp* and more like *Holland*," in which the Court "applied equitable tolling to a deadline with a single statutory exception." *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 647–48 (2010)). Indeed, § 5110(b)(1) is more like the "fairly simple language" of the time limits that "can often plausibly [be] read as containing an implied 'equitable tolling' exception." *Brockamp*, 519 U.S. at 350.

The Secretary also does not dispute that the "nature of the underlying subject matter" of § 5110(b)(1)—veterans' disability benefits—is riper for equitable doctrines than "tax collection," which rarely provides "case-specific exceptions reflecting individualized equities." *Id.* at 352. As the Court reflected in *Boechler*, "[i]f anything, the differences

between the statute at issue in *Brockamp* and this one underscore the reasons why equitable tolling applies." 142 S. Ct. at 1501.

C. Equitable Tolling for § 5110(b)(1) Does Not Imply Other "Superfluous" Grants of Tolling Authority

The Secretary next argues that "Petitioner's position, if accepted, would require the VA itself to apply tolling," but "the statutory scheme indicates that Congress did not intend to grant the agency that authority." Gov't Br. 32–35. It then points to two limitations periods elsewhere in the Veterans Code that it contends would be superfluous grants of authority from Congress if § 5110(b)(1) were held amenable to equitable tolling. Gov't Br. 33–35. This argument is without merit.

As a threshold matter, the VA is authorized by regulation to forgive, for "good cause," a failure to comply with a "[t]ime limit[] within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision." 38 C.F.R. § 3.109(b). The VA's authority to do so arises from Congress, which granted the VA the "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department." 38 U.S.C. § 501(a). Because the VA's power to forgive untimely filings ultimately flows from Congress—and because *Irwin*'s presumption is founded on "a realistic assessment" of congressional intent—the inquiry is the same as it ever was: did Congress evidence an intent to bar tolling for this particular limitations period? *Cf.*

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."); *Scarborough*, 541 U.S. at 422 (noting that *Irwin*'s presumption could extend to "the administration of benefit programs").

To the extent the Secretary is suggesting that the presumption in favor of equitable tolling cannot apply to § 5110(b)(1) because the claim is not initially presented to an Article III court, this Court has already rejected similar arguments. *See Boechler*, 142 S. Ct. at 1500 n.1 ("We have already applied it in other non-Article III contexts . . . ." (citing *Young*, 535 U.S. at 47 (bankruptcy court limitations period); *Kwai Fun Wong*, 575 U.S. at 407, 420 (deadline to present claim to agency)).

Nor do the two particular timing provisions raised by the Secretary supplant the *Irwin* presumption in this case. First, the Secretary points to 38 U.S.C. § 5113, which "concerns the effective dates of educational benefits." Gov't Br. 34. The Secretary argues that 38 U.S.C. § 5113(a) provides express tolling provisions for educational benefits under "certain specific circumstances," and that "[t]he obvious inference from the absence of comparable language in Section 5110 is that respondent possesses no such authority with respect to service-connected disability compensation." *Id.* (citing 38 U.S.C. § 5113(b)(1), (b)(2)(A)–(C)).

But the Secretary's argument is once again defeated by *Young*, which explained that the inclusion

of equitable exceptions in neighboring timing provisions in the Bankruptcy statute, "[i]f anything, . . . demonstrates that the Bankruptcy Code *incorporates* traditional equitable principles." 535 U.S. at 53. After all, if Congress *does* want the general equitable tolling rule to apply for a given limitations period, then staying silent is exactly what it needs to do. *See Meyer*, 537 U. S. at 286.

The Secretary also points to a 1949 statute that provided an earlier effective date for World War II veterans who were prisoners of war. Gov't Br. 35 (citing Act of Aug. 1, 1949, ch. 376, 63 Stat. 485). It argues that allowing equitable tolling for § 5110(b)(1) would render this 1949 statute "largely superfluous and inexplicable." *Id.*

But as the Secretary concedes, the 1949 statute only operated if a veteran sought adjustment "before August 1, 1950." *Id.* at 34–35. The earliest version of 38 U.S.C. § 5110, on the other hand, was not signed into law until September 2, 1958. *See* Pub. L. No. 85-857, § 3010, 72 Stat. 1105, 1226–27, (1958). Nothing about the admittedly "lapsed" August 1, 1949, statute would be rendered "superfluous" by finding that § 5110(b)(1) is amenable to equitable tolling. Gov't Br. 34–35; *TRW*, 534 U.S. at 31. Nor does the Secretary explain how the intent of a 1949 Congress enacting legislation specific to World War II veterans bars a 1958 Congress from enacting a more general rule for all veterans subject to more general exceptions like equitable tolling.

D. Policy Considerations Do Not Rebut the *Irwin* Presumption

The Secretary speculates that if § 5110(b)(1) followed the general rule of equitable tolling, "immense practical problems" of administrability would allegedly result. Gov't Br. 38–41. This argument is irrelevant in law and incorrect in fact.

While policy considerations may sometimes be pertinent in statutory interpretation, the Court has relied on them only to "underscore[]" a statute's plain language when evaluating whether tolling would "create serious administrative problems" for an agency. *Brockamp*, 519 U.S. at 352; *accord PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2066 (2019) (Kavanaugh, J., concurring in the judgment) ("[Government's] policy-laden argument cannot overcome the text of the statute and the traditional administrative law practice."). But even if the Court were to consider the practical consequences of tolling § 5110(b)(1), it would find that they are not as significant as the Secretary suggests. *See* MVA Brief at 20–29.

First, the VA already has a statutory duty to make "reasonable efforts" to ensure that the records of each claimant are complete and, if necessary, assist them in obtaining any additional "evidence necessary to substantiate the claimant's claim for a [disability] benefit." 38 U.S.C. § 5103A(a)(1); *see also id.* § 5103A(b)–(c) (establishing duty to assist claimants in obtaining relevant records, including private ones). In other words, the VA must already collect the same

kinds of evidence that would be relied upon to support a request for equitable tolling. *Id.* §5103A(a)(1), (b)–(c).

Second, the veteran population that may submit a claim for disability compensation is significantly smaller than the population of taxpayers considered by the Court in *Brockamp*. *See* U.S. CENSUS BUREAU, THOSE WHO SERVED: AMERICA'S VETERANS FROM WORLD WAR II TO THE WAR ON TERROR 1 (2020), https://tinyurl.com/yza3axuj (reporting that veterans made up "about 7 percent of the adult population" in 2018).

Third, equitable tolling is a venerable doctrine with roots in equity, *see Bailey v. Glover*, 88 U.S. 342, 348 (1874), for which there exists a wide body of law demarking its boundaries and customary application. *See Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). There is no reason to believe that the burden of applying this doctrine in cases involving § 5110(b)(1) will be any more burdensome on the VA or the Court of Appeals for Veterans Claims ("Veterans Court") than it is on state and federal courts across the country that routinely deal with limitations periods subject to equitable tolling.

IV. If the *Irwin* Presumption Applies to Section 5110(b)(1), this Case Should Be Remanded

The Secretary contends that "[e]ven if tolling of the Subsection (b)(1) deadline were available in some circumstances, petitioner would not be entitled to

tolling here." Gov't Br. 43. To support this argument, the Secretary dives into the facts of Mr. Arellano's case, even though 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.").

The Secretary 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. Any suggestion that Mr. Arellano would not prevail under the doctrine is merely speculative, as the factual record is undeveloped.

The Secretary relies on *RadLAX* to argue that "Congress addressed precisely [petitioner's] circumstance[s] in Subsection (b)(4)," and any tolling of § 5110(b)(1) for similar circumstances "would negate the specific limits that Congress placed on relief under Subsection (b)(4)." Gov't Br. 45–46 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–46 (2012)). But Subsection (b)(4) undisputedly does *not* cover petitioner's circumstances, since petitioner applied for disability compensation, not a pension. *See* 38 U.S.C. §§ 5110(b)(1) ("disability compensation"), (b)(4) ("disability pension").

RadLAX also does not bar Congress from targeting two different problems with two different solutions. The statute at issue in *RadLAX* provided competing specific and general options for certifying an objected-to bankruptcy plan, whereas Sections 5110(b)(1) and 5110(b)(4) cover two entirely different types of awards that cannot be interchanged. *See* 38 U.S.C. §§ 5110(b)(1) ("disability compensation"), (b)(4) ("disability pension"); *see also RadLAX*, 566 U.S. at 648 ("What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*."). Respondent also fails to reconcile its broad reading of *RadLAX*'s general rule with this Court's more specific-to-equitable-tolling instructions in *Young* and *Holland*, where it found specific exceptions in nearby limitations periods to be no obstacle to general equitable tolling. *Young*, 535 U.S. at 52-53; *Holland*, 560 U.S. at 647-48.

The most logical and prudent course would be for the Court to follow the same tack as in *Boechler* and find that the availability of tolling for Mr. Arellano's case is best "determined on remand." 142 S. Ct. at 1501. This approach ensures fairness to both the Board and the Veterans Court, which never made any factual findings in Mr. Arellano's case, and Mr. Arellano, who was barred at every stage from fully presenting and developing his facts.

CONCLUSION

"Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler*, 142 S. Ct. at 1500. It is customarily available to private litigants. *Hallstrom*, 493 U.S. at 27. It is afforded to claims by civil-service employees, manufacturing workers, and ERISA retirees. *See* Opening Br. 41–42. It is even available to the IRS. *Young*, 535 U.S. at 49–50. If Congress's longstanding solicitude for veterans is to be more than lip service, it must *at least* afford the same opportunity to "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

The Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

James R. Barney
Counsel of Record

Kelly S. Horn
Alexander E. Harding
FINNEGAN, HENDERSON,
FARABOW, GARRETT
& DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000
james.barney@finnegan.com

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