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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Under 38 U.S.C. § 5110(b)(1), "[t]he 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*." (Emphasis added.) Veterans who miss this one-year statutory deadline—even if because of a service-connected physical or mental impairment—are barred from recovering retroactive disability benefits reaching back to their date of discharge. In *Irwin*, this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Despite this, an "equally divided" Federal Circuit held 6-6 that military veterans are categorically precluded from pursuing equitable tolling of § 5110(b)(1)'s one-year deadline, regardless of the facts and circumstances of their individual cases.

The questions presented are:

(1) Does *Irwin*'s rebuttable presumption of equitable tolling apply to the one-year statutory deadline in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits, and, if so, has the Government rebutted that presumption?

(2) If 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling, is Mr. Arellano entitled to a remand so the agency can consider his particular facts and circumstances in the first instance?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Adolfo R. Arellano was Claimant-Appellant in No. 20-1073.

Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee in No. 20-1073.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Arellano v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 20-1073
- *Arellano v. Wilkie*, United States Court of Appeals for Veterans Claims, No. 18-3908

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INTRODUCTION

When service-disabled veterans are discharged from military service, they have one year to file an application for disability benefits retroactive to their date of discharge. 38 U.S.C. § 5110(b)(1). If they fail to do so within one year, the effective date of any subsequent award "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). Thus, service-disabled veterans who fail to file a claim within one year of discharge lose the retroactive disability compensation to which they would otherwise be entitled. This case presents a simple but important question: can the one-year filing deadline of § 5110(b)(1) be equitably tolled for good cause?

Sitting en banc, the Federal Circuit split evenly on this question. Pet. App. 16a ("The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) . . . ."). Six judges concluded that the Federal Circuit's earlier decision in *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), which held that veterans may *never* request equitable tolling for the one-year period in § 5110(b)(1), was correctly decided and should remain in effect. Pet. App. 69a. The other six judges concluded that, under this Court's *Irwin* decision, a rebuttable presumption of equitable tolling applies to § 5110(b)(1) and the Government failed to rebut this presumption. Pet. App. 97a.

The issue presented here is important to tens of thousands of military veterans and their families. It

is an unfortunate reality that many members of the armed forces face a difficult path once discharged from service. Some suffer from severe service-connected physical and mental impairments such as brain injuries, post-traumatic stress disorder ("PTSD"), debilitating effects of military sexual trauma ("MST"),[1] and depression,[2] which can impair their ability to timely file a disability claim within one year of discharge. Indeed, the sad irony is that the very illnesses the veterans' benefits system is designed to address, such as PTSD, are often the ones that cause veterans to miss the one-year deadline of § 5110(b)(1), forfeiting retroactive benefits to which they would otherwise be entitled.

Other veterans are forced to live with service-connected injuries under strict secrecy orders, such as the veterans who were used as human test subjects during the now-declassified Edgewood experiments. Those veterans were made to sign nondisclosure agreements forbidding them from telling anyone (including their families and medical providers) about the chemical-weapons experiments that were

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[1] The Department of Veterans Affairs ("VA") reports that "about 1 in 3 women and 1 in 50 men" have experienced MST during their military service. U.S. DEP'T OF VETERANS AFFAIRS, MILITARY SEXUAL TRAUMA FACT SHEET 1, www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf (May 2021).

[2] According to the VA, the rate of suicide among veterans is greatest within three years of leaving service. U.S. DEP'T OF VETERANS AFFAIRS, SUICIDE RISK AND RISK OF DEATH AMONG RECENT VETERANS, https://www.publichealth.va.gov/epidemiology/studies/suicide-risk-death-risk-recent-veterans.asp (last visited May 5, 2022).

performed on them. When these experiments were eventually declassified, many of the affected veterans promptly applied to the VA for Edgewood-related disability coverage to their date of discharge under § 5110(b)(1), only to be turned away by the VA for being "too late" to file.[3]

The relief requested here flows naturally from this Court's decision in *Irwin*. According to *Irwin*, service-disabled military veterans with claims against the Government should, as a general principle, be placed on the same footing as private litigants with respect to the availability of equitable tolling in compelling circumstances. Yet the Federal Circuit's deadlocked decision below leaves its *Andrews* decision in place, which categorically precludes even the most deserving disabled veterans—those suffering from severe mental or physical injuries or laboring under cruel secrecy orders—from seeking to equitably toll the one-year deadline of § 5110(b)(1). This Court can and should rectify this situation by overruling *Andrews* and making clear that § 5110(b)(1)—like nearly all claim-processing rules in private litigation—may be equitably tolled in appropriate circumstances.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *Arellano v.*

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[3] *See, e.g.*, *Raybine v. Wilkie*, 31 Vet. App. 419, 421 (2019). Mr. Raybine's appeal is pending before the Federal Circuit.

McDonough, 1 F.4th 1059 (Fed. Cir. 2021) (en banc), and is reproduced at Pet. App. 14a-97a.

The opinion of the United States Court of Appeals for Veterans Claims is reported at *Arellano v. Wilkie*, No. 18-3908, 2019 WL 3294899 (Vet. App. July 23, 2019), and is reproduced at Pet. App. 2a-7a.

STATEMENT OF JURISDICTION

The Federal Circuit entered judgment on June 17, 2021. The petition for a writ of certiorari was timely filed on September 17, 2021, per the Court's March 19, 2020, order. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5110 of title 38 is titled "Effective dates of awards." Section 5110(a)(1) states:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a)(1).

Section 5110(b)(1) states:

> 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).

STATEMENT OF THE CASE

A. Background

Mr. Arellano served honorably in the U.S. Navy from November 1977 to October 1981. Pet. App. 23a. Mr. Arellano's psychiatric problems include prolonged schizoaffective disorder and bipolar disorder with PTSD. *Id.* The VA found that symptoms of these disorders were causally linked to trauma he suffered while in service when he was working on an aircraft carrier during a collision that killed and injured several of his shipmates and nearly swept him overboard. Pet. App. 23a-24a, 155a-156a.

In reaching this conclusion, the VA credited the medical opinion of Mr. Arellano's treating psychiatrist, Dr. Richard Douyon, Director of Hospital Programs, Mental Health Services, at the Miami VA Healthcare System, who concluded that "the cause of all of" Mr. Arellano's psychiatric symptoms "is the trauma which he suffered on July 29, 1980, when he was almost crushed and swept overboard while working on the flight deck of the USS Midway aircraft carrier, when the Cactus freighter collided with it in the Persian Gulf during the Iranian Hostage Crisis,

killing and injuring a number of his shipmates who were working near him." Pet. App. 119a-120a. Dr. Douyon concluded that "the psychiatric symptoms resulting from this well documented trauma rendered [Mr. Arellano] 100% disabled since 1980 . . . ." Pet. App. 120a.

B. Proceedings Before the VA and the Veterans Court

Mr. Arellano first applied for disability benefits in 2011 and was awarded a 100% disability rating for his psychiatric disorders with an effective date of June 3, 2011, the date of his application. Pet. App. 153a, 156a. Mr. Arellano, through his brother as his representative, appealed the decision to the Board of Veterans' Appeals ("Board"), arguing that the one-year filing deadline in § 5110(b)(1) should be equitably tolled to allow Mr. Arellano to request retroactive benefits back to the date of his discharge from service. Pet. App. 123a-139a.

The Board acknowledged that "the assertion has been raised that the Veteran's mental illness prevented him from filing a claim earlier than June 3, 2011." Pet. App. 116a. But the Board declined to consider Mr. Arellano's claim for equitable tolling because it construed Federal Circuit precedent as categorically barring equitable tolling of the one-year filing period of § 5110(b)(1) under all circumstances. Pet. App. 116a-117a.

Mr. Arellano timely appealed to the Court of Appeals for Veterans Claims ("Veterans Court") and again argued that his case warrants equitably tolling

the one-year filing deadline of § 5110(b)(1). Pet. App. 2a-3a. The Veterans Court dismissed that argument and held that the Federal Circuit's decision in *Andrews* categorically precludes equitable tolling of all deadlines in 38 U.S.C. § 5110 under any circumstances. Pet. App. 4a-5a ("Appellant's argument is squarely foreclosed by binding precedent. In *Andrews* . . . [,] the Federal Circuit addressed whether section 5110 was subject to equitable tolling. It rejected that argument." (citations omitted)). But despite finding that *Andrews* "binds the Court today," the Veterans Court acknowledged that, "[i]f we were writing on a blank slate, appellant's arguments would be worth exploring." Pet. App. 6a.

Thus, the Veterans Court did not reach the merits of Mr. Arellano's equitable tolling argument because it held that the one-year filing deadline in § 5110(b)(1) cannot be tolled as a matter of law. *Id.* Mr. Arellano timely appealed the Veterans Court's decision to the Federal Circuit.

C. The Federal Circuit's En Banc Decision

Following oral argument before the assigned three-judge panel, the Federal Circuit sua sponte ordered the case to be reheard en banc. Pet. App. 9a. The court requested supplemental briefing on several questions, including:

> A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin* . . . apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews* . . . ?

> B. Assuming *Irwin*'s rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?

Pet. App. 9a-10a.

On June 17, 2021, the Federal Circuit issued a per curiam decision affirming the Veterans Court's decision based on two evenly divided and contradictory grounds. Pet. App. 14a-97a. In a concurring opinion by Circuit Judge Chen, six judges concluded that, consistent with the Federal Circuit's earlier ruling in *Andrews*, "§ 5110(b)(1) is not a statute of limitations subject to *Irwin*'s presumption of equitable tolling." Pet. App. 69a. They further concluded that, "even if *Irwin*'s presumption were to apply, it would be rebutted by the statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period." *Id*.

The other six judges, in a concurring opinion by Circuit Judge Dyk, reached the opposite conclusion regarding the *Irwin* presumption and the availability of equitable tolling. They concluded that "§ 5110(b)(1) is a statute of limitations that is subject to the rebuttable presumption of equitable tolling under *Irwin*," and that "the presumption has not been rebutted." Pet. App. 97a. On the other hand, they found that Mr. Arellano's "specific circumstances" did not justify equitable tolling in this case, and they therefore concurred in the judgment affirming the Veterans Court's decision with respect to Mr. Arellano. *Id*.

The judges joining Judge Chen's concurrence disagreed with Judge Dyk as to whether, if equitable tolling is available, this appeal could be decided without a remand based on the facts of Mr. Arellano's particular case. As they explained, if equitable tolling were deemed to apply to § 5110(b)(1), "we would remand this case for further factual development—which is all the more justified because Mr. Arellano has expressly requested this outcome under such circumstances and no party has argued that we may affirm the Veterans Court's decision on factual grounds." Pet. App. 68a-69a.

Thus, although the judgment below is a per curiam affirmance, there is no single majority opinion supporting this outcome. As the Federal Circuit itself observed:

> The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances. The effect of our decision is to leave in place our prior decision, *Andrews . . .* , which held that principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5110(b)(1).

Pet. App. 16a.

SUMMARY OF THE ARGUMENT

I. The *Irwin* presumption in favor of equitable tolling applies to the one-year deadline set forth in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits. This deadline is part of a statute

in which Congress has waived sovereign immunity to allow service-disabled veterans to pursue disability claims against the Government. Accordingly, under *Irwin*, the one-year deadline of § 5110(b)(1) is presumptively amenable to equitable tolling in the same manner as other claim-processing rules in litigations between private parties.

A. This case does not turn on whether § 5110(b)(1)'s filing deadline constitutes a "statute of limitations" according to a strict dictionary or treatise definition. The new "general rule" announced in *Irwin* was intended to be broad and not subject to definitional carveouts like the one the Government seeks to impose here. Indeed, this Court and other courts have applied equitable tolling to filing deadlines that are not statutes of limitations in the traditional sense.

B. What matters, and what is clear from the statutory text, is that the one-year filing deadline in § 5110(b)(1) *functions* as a statute of limitations because it prescribes a period in which service-disabled veterans must exercise their right to receive retroactive disability compensation or else lose that right forever. This, in turn, serves the basic policies of repose, elimination of stale claims, and certainty about the defendant's potential liabilities, which are the hallmarks of a statute of limitations.

C. Any doubt as to whether the *Irwin* presumption applies to § 5110(b)(1) should be resolved in the veteran's favor. This Court has long employed a canon of statutory interpretation that holds that statutes concerning the provision of

veterans' benefits should be, in cases of interpretive doubt, construed in the veteran's favor. Here, the pro-veteran interpretation is one in which § 5110(b)(1) functions as a statute of limitations and is entitled to the *Irwin* presumption in favor of equitable tolling.

II. The Government bears the burden of rebutting the *Irwin* presumption and is unable to carry this burden.

A. First, there is no dispute that § 5110(b)(1) is nonjurisdictional. As this Court has held, absent a *clear* indication that Congress specifically intended to exclude equitable tolling for nonjurisdictional filing deadlines such as § 5110(b)(1), such deadlines are ordinarily subject to waiver, estoppel, and equitable tolling.

B. Second, the language of the statute does not rebut the *Irwin* presumption. The text of § 5110(b)(1) is simple, straightforward, and bears none of the complex or technical characteristics of other statutory language, like certain provisions of the federal tax code, that this Court has found sufficiently clear to rebut the *Irwin* presumption.

Moreover, the nature of the underlying subject matter here—veterans' disability benefits—easily distinguishes the cases relied on by the Government for its textual arguments. Compared to the federal tax code, for instance, the veterans' benefits statute addresses a much smaller population, and the veterans' benefits system already involves a case-by-case evaluation of each veteran's claims, medical condition, and individualized equities. And unlike

statutes involving land ownership, permitting veterans to seek equitable tolling of § 5110(b)(1) would not affect the property rights of any other person or upset long-settled property boundaries.

C. The statute's legislative history likewise does not rebut the *Irwin* presumption. Contrary to the Government's argument, the fact that Congress has not amended § 5110(b)(1) since *Andrews* was decided does not mean Congress specifically intended to preclude service-disabled veterans from seeking equitable tolling of that provision under any circumstances. This is especially true given that there was lingering uncertainty, even among the panel that decided *Andrews*, as to whether *Andrews* categorically barred equitable tolling of § 5110(b)(1) in all circumstances. In any event, congressional silence or inaction is not the type of clear and explicit evidence of congressional intent needed to rebut *Irwin*'s presumption and thereby eliminate equitable tolling from a nonjurisdictional claim-processing rule.

III. Depriving veterans of the opportunity to seek equitable tolling of § 5110(b)(1) is inconsistent with the pro-veteran nature of the veterans' benefits system.

A. Civilians who miss filing deadlines for applying for disability or other benefits have been afforded the opportunity to seek relief through equitable tolling. For instance, civil service employees have been given this opportunity, as have displaced manufacturing workers seeking benefits under the Government's trade adjustment assistance program. Given the great solicitude Congress has expressed for

veterans, especially service-disabled veterans, it defies logic that Congress would extend equitable tolling to civilian employees seeking benefits but not to service-disabled veterans.

B. The Federal Circuit's deadlocked opinion below leaves in place *Andrews*, which categorically precludes the Veterans Court from even considering facts and circumstances that may support a claim for equitable tolling of § 5110(b)(1). This, in turn, works an unnecessary hardship on service-disabled veterans and their families. This perverse scheme—where the most disabled veterans are also the ones most likely to suffer under *Andrews*'s inflexible rule—is unfair and should be overturned.

IV. If this Court holds that § 5110(b)(1) is amenable to equitable tolling, it should remand this case for further factual development. The specific facts of Mr. Arellano's equitable tolling claim were not litigated before the Federal Circuit. Indeed, even at the agency level, the factual record was not fully developed because Mr. Arellano was told at every stage that equitable tolling was categorically unavailable under *Andrews.* Accordingly, the only fair and logical course is to remand this case for further factual development.

ARGUMENT

I. THE *IRWIN* PRESUMPTION APPLIES TO THE ONE-YEAR FILING DEADLINE OF 38 U.S.C. § 5110(B)(1)

A. The *Irwin* Presumption Is Broad and Is Not Limited to Traditional Statutes of Limitations

In *Irwin*, this Court announced a new, "more general rule" to determine when equitable tolling is available in suits against the Government. 498 U.S. at 95-96. The Court 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.* The Court used broad language to describe the timing provisions to which this new rule would apply, including "statutory time limit[s]," "statutory filing deadline[s]," "time limits in suits against the Government," and "[t]ime requirements." *Id.* at 94-95. The Court gave no indication that the presumption could not apply to administrative deadlines or to deadlines set forth in federal disability benefits statutes. *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 v. Principi*, 541 U.S. 401, 422 (2004) (noting that *Irwin*'s presumption could extend to "the administration of benefit programs").

In his concurring opinion below, Judge Chen concludes that *Irwin*'s presumption of equitable

tolling is categorically inapplicable to the one-year deadline in 38 U.S.C. § 5110(b)(1) because, in his view, that filing deadline does not meet the traditional definition of a statute of limitations. Pet. App. 27a-29a, 54a-55a. But *Irwin* does not state that its new, "more general rule" regarding equitable tolling applies only to traditional statutes of limitations. Indeed, *Irwin* cites *Zipes* as informative on the issue of equitable tolling. *See* 498 U.S. at 95 & n.2 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). *Zipes* involved an administrative filing deadline that was "like" a statute of limitations in certain respects but was not one in the traditional sense. 455 U.S. at 393.

Zipes involved a 180-day administrative requirement for lodging a charge of workplace discrimination under Title VII of the Civil Rights Act. *Id.* at 388-89 & n.2 (citing 42 U.S.C. § 2000e-5(e)). In deciding whether failure to satisfy this provision constituted a nonwaivable impediment to maintaining a federal lawsuit, this Court applied the traditional distinction between jurisdictional and nonjurisdictional timing requirements. *Id.* at 392-93 (formulating the question as "whether the timely filing of an EEOC [Equal Employment Opportunity Commission] charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel"). The Court concluded that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, *like* a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (emphasis added). The word "like" indicates

that this Court considered the EEOC deadline to be similar to a statute of limitations, in the sense that it is nonjurisdictional and waivable, but nevertheless distinct.

Other courts have described the EEOC filing deadline as an exhaustion-of-remedies requirement rather than a statute of limitations. *See, e.g.*, *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489-90 (2d Cir. 2018) (holding that "the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement" (citation omitted)). Some courts have identified an important distinction between exhaustion-of-remedies requirements and statutes of limitations. *See, e.g.*, *Messa v. Goord*, 652 F.3d 305, 309-10 (2d Cir. 2011) ("While it is true that the two [doctrines] are similar in some ways—*e.g.*, both are non-jurisdictional affirmative defenses—they serve very different functions in our civil justice system. . . . [O]ne doctrine opens the courthouse door and the other closes it."); *Small v. Camden County*, 728 F.3d 265, 270 n.4 (3d Cir. 2013) ("Exhaustion and statutes of limitation are very different mechanisms, instituted to serve opposite purposes.").

Consistent with *Zipes*, this Court has held that timing provisions that are *similar to* or that *function as* statutes of limitations are subject to the *Irwin* presumption. For instance, 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*, 541 U.S. at 420-23. 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 (citation omitted). 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. The 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).

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. *See also Young v. United States*, 535 U.S. 43, 47-48 (2002) (applying the

presumption to a three-year lookback provision in the bankruptcy statute that operated as a "limited" statute of limitations); *accord DeBrunner v. Midway Equip. Co.*, 803 F.2d 950, 952 (8th Cir. 1986) ("The ADEA's [Age Discrimination in Employment Act] 180-day filing requirement is *in the nature of* a statute of limitations and may be subject to equitable tolling." (emphasis added)); *Truitt v. County of Wayne*, 148 F.3d 644, 646-47 (6th Cir. 1998) ("[T]he ninety-day filing requirement of 42 U.S.C. § 2000e–5(f)(1) is **not** a jurisdictional requirement but, instead, is a timing requirement *similar to* a statute of limitations, subject to waiver, estoppel and equitable tolling." (second emphasis added)).

This Court's ruling in *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989), discussed in Judge Chen's concurrence, *see* Pet. App. 35a-36a, is not inconsistent with this conclusion. At issue in *Hallstrom* was a provision in the Resource Conservation and Recovery Act ("RCRA") requiring plaintiffs to provide notice to the Environmental Protection Agency ("EPA") at least 60 days before bringing suit. This Court held that, unlike the EEOC filing requirement in *Zipes*, which "operated as a statute of limitations," the RCRA's 60-day waiting period was "[u]nlike a statute of limitations" and was not amenable to equitable tolling. *Hallstrom*, 493 U.S. at 27. This holding confirms that, pre-*Irwin*, there was not a bright-line distinction between statutes of limitations and all other statutory timing provisions, with equitable tolling only applicable to the former. Instead, the Court's observation that the filing deadline in *Zipes* "operated as" a statute of limitations makes clear that timing provisions that serve the

same purposes as a statute of limitations, but are nevertheless distinct, can still be amenable to equitable tolling. *Id*.

In short, the appropriate inquiry under *Irwin* is not, as the Government implies, whether the one-year deadline of § 5110(b)(1) meets a strict dictionary or treatise definition of a statute of limitations. *Cf.* Pet. App. 32a (Judge Chen's concurrence citing *Black's Law Dictionary* (10th ed. 2014)). Rather, the question is whether the provision is sufficiently similar to other claim-processing rules, such as statutes of limitations, administrative filing deadlines, and exhaustion requirements, that have traditionally been deemed amenable to equitable tolling in "private suits." *Irwin*, 498 U.S. at 94-97; *see also United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015) ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." (quoting *Henderson ex. rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

B. Section 5110(b)(1) Functions as a Statute of Limitations and Is Entitled to a Presumption of Equitable Tolling

In determining whether a timing provision functions as a statute of limitations for purposes of the *Irwin* presumption, this Court considers the provision's "functional characteristics," i.e., whether it serves the policies of a statute of limitations. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 14-15 & n.6 (2014). Statutes of limitations encourage "plaintiffs to

pursue 'diligent prosecution of known claims,'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (citation omitted), and thereby "protect defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Thus, in determining whether a timing provision functions as a statute of limitations, courts focus on whether the provision 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).

In *Young*, this Court considered whether equitable tolling was available for the three-year "lookback" period in 11 U.S.C. § 507(a)(8)(A)(i), which provides that a claim by the Internal Revenue Service ("IRS") for tax liabilities owed by a bankrupt taxpayer is nondischargeable if the tax return was due within three years before the bankruptcy petition was filed. 535 U.S. at 46-47. This Court agreed with the IRS that "[t]he three-year lookback period is a limitations period subject to traditional principles of equitable tolling." *Id.* at 47. The Court acknowledged that, "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). But it nevertheless 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." *Id.* (alteration in original) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The Court reasoned that this "makes it a

more limited statute of limitations, but a statute of limitations nonetheless." *Id.*

Section 5110(b)(1) of title 38 functions as a statute of limitations every bit as much as the three-year lookback period in *Young*, if not more. Like the lookback period in *Young*, § 5110(b)(1) "prescribes a period within which certain rights"—namely, a service-disabled veteran's right to claim retroactive disability benefits—"may be enforced." *Id.* at 47. Like the lookback period in *Young*, § 5110(b)(1) encourages service-disabled veterans to protect their rights by filing any ripe disability claims within one year of discharge. And, as in *Young*, if service-disabled veterans "sleep[] on [their] rights," they lose entitlement to any retroactive benefits they otherwise could have been awarded. *Id.* This, in turn, serves the "basic policies of . . . repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555.

In his concurring opinion, Judge Chen reasons that § 5110(b)(1) is not a statute of limitations because it "does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed." Pet. App. 30a. This ignores, however, that § 5110(b)(1) controls whether service-disabled veterans are entitled to *retroactive* disability benefits dating back to their discharge from service. *See* Pet. App. 77a. In other words, a claim for disability benefits filed within the deadline of § 5110(b)(1) has two components: (1) a retrospective claim for benefits for past disability, and (2) a prospective claim for future benefits. *Id.*; *see also*

Wright v. Gober, 10 Vet. App. 343, 348 (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."). As Judge Dyk correctly concludes in his concurrence, § 5110(b)(1) imposes "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." Pet. App. 77a.

Judge Chen also opines that § 5110(b)(1) "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." Pet. App. 30a. But this Court has deemed similar timing provisions to be statutes of limitations amenable to equitable tolling, despite being primarily related to the amount a claimant can recover. For instance, the Court has described the copyright damages statute as "a three-year look-back limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). As the Court explained in *Petrella*, the copyright damages statute, "coupled to the separate-accrual rule," means that a copyright owner can sue *anytime* during an ongoing infringement. *Id.* at 682-83. "She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered." *Id.* The six-year lookback period in the patent damages statute operates similarly, and this Court has likewise considered it to be a statute of limitations. *See*

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 961-62 (2017).

In his concurring opinion, Judge Chen attempts to distinguish copyright causes of action based on a "series of discrete infringing acts" from a veteran's claim for disability benefits, which he describes as a "*single* benefits claim for an ongoing disability." Pet. App. 37a-38a (quoting *Petrella*, 572 U.S. at 671-72). But as Judge Dyk correctly notes in his concurrence, a veteran's claim for disability benefits is, in reality, "not a single benefits claim, but a claim for a series of payments allegedly due." Pet. App. 80a (citations omitted); *see also* 38 U.S.C. § 1114 (providing monthly rates for disability compensation).

Judge Chen further contends that § 5110(b)(1) is not a statute of limitations because it "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." Pet. App. 30a-31a (citing 1 Calvin W. Corman, *Limitation of Actions* § 6.1, at 370 (1991)). But many statutory time periods and deadlines that do not fall within these rigid definitional constraints have been found amenable to equitable tolling. For instance, the 30-day deadline for an application for EAJA fees, held amenable to equitable tolling in *Scarborough*, 541 U.S. at 420-23, would not meet the Government's rigid definition of a statute of limitations because the application for EAJA fees is not triggered by a "breach of a legal duty owed by" the Government. Pet. App. 30a-31a (citation omitted). Thus, Judge Chen's attempt to use a strict treatise definition of "statute of limitations" as a

bright-line test for determining whether equitable tolling applies does not match the reality that equitable tolling has historically been extended to a variety of claim-processing rules that do not fit squarely within such a strict definition. *See, e.g.*, *Scarborough*, 541 U.S. at 420-23; *see also CTS*, 573 U.S. at 7-8, 13 (noting that "it must be acknowledged that the term 'statute of limitations' is sometimes used in a less formal way" that "can refer to any provision restricting the time in which a plaintiff must bring suit" (citations omitted)).

In a similar vein, Judge Chen contends that § 5110(b)(1) is not a statute of limitations "because it pertains only to the creation of the right to be paid benefits, and not to the provision of remedies for violations of that right." Pet. App. 48a. For this, Judge Chen relies on this Court's observation in *eBay Inc. v. MercExchange, L.L.C.* that "the creation of a right is distinct from the provision of remedies for violations of that right." 547 U.S. 388, 392 (2006) (emphases omitted). Again, this argument is rebutted by *Scarborough*. The 30-day deadline in *Scarborough* was not triggered by any "violation" of the claimant's right to EAJA fees, yet this Court deemed it amenable to equitable tolling just the same. 541 U.S. at 420-23. In doing so, the Court explained that in statutes authorizing claims against the Government, "such as the administration of benefits programs," *Irwin* does not require a "precise private analogue." *Id.* at 422.

Finally, Judge Chen's concurrence compares § 5110(b)(1) to the timing provisions at issue in *Lozano* and *Hallstrom*, which this Court found not

amenable to equitable tolling. Pet. App. 34a-36a. Those cases are distinguishable, however.

In *Lozano*, the Court considered a treaty provision—not a federal statute—providing 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 (quoting Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction [hereinafter "Hague Convention"]). 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 held 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 service-disabled veterans with the "continued availability" of a remedy to recover retroactive benefits dating back to their discharge from service. If the veteran fails to file a claim during the one-year period set forth in § 5110(b)(1), she forfeits any disability award she otherwise would have been entitled to during that year. That she might have a *future* 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.

In *Hallstrom*, the RCRA's 60-day notice provision required the plaintiff to wait 60 days after notifying the EPA of the alleged violation before filing suit. 493 U.S. at 26 (citing 42 U.S.C. § 6972(b)(1)). This Court held that, "[u]nlike a statute of limitations, RCRA's 60-day notice provision is not triggered by the violation giving rise to the action. Rather, petitioners have full control over timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days." *Id.* at 27.

Unlike the 60-day notice provision in *Hallstrom*, § 5110(b)(1) does not give service-disabled veterans "full control over timing of their" claims for retroactive benefits. Instead, service-disabled veterans must file a claim for retroactive benefits within one year of their discharge from service, or else lose their right to those benefits forever. In contrast, plaintiffs suing under the RCRA could file suit anytime; they simply needed to notify the EPA and "refrain from commencing their action for at least 60 days." *Id.*

C. Any Doubt as to Whether the *Irwin* Presumption Applies to § 5110(b)(1) Should Be Resolved in Favor of the Veteran

As explained above, there should be no doubt that the *Irwin* presumption in favor of equitable tolling applies to the one-year filing deadline of § 5110(b)(1), because this deadline is similar to other claim-processing rules that have been found amenable to equitable tolling in private litigation and in claims

against the Government, *See, e.g.*, *Zipes*, 455 U.S. at 394; *Young*, 535 U.S. at 47-48; *Scarborough*, 541 U.S. at 420-23. But to the extent any doubt exists, it should be resolved in favor of veterans.

"The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Veterans also incur "the economic and family detriments which are peculiar to military service." *Johnson v. Robison*, 415 U.S. 361, 380 (1974). In recognition of these sacrifices, Congress has chosen to favor "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 veterans' benefits system "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Notably, "the veteran is often unrepresented during the claims proceedings," and "VA has a statutory duty to help the veteran develop his or her benefits claim." *Sanders*, 556 U.S. at 412. "[I]n evaluating th[e] evidence" supporting the claim, "VA must give the veteran the benefit of any doubt." *Henderson*, 562 U.S. at 440.

In short, 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. Recognizing this solicitude, this Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (citation omitted). That is, when "interpretive doubt" exists in a statute or regulation governing veterans' benefits, the veteran's interpretation generally should prevail. *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

This pro-veteran canon helps ensure that veterans' benefits legislation is "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see also, e.g.*, *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.").

Here, to the extent there is any doubt as to whether § 5110(b)(1) is sufficiently analogous to the types of claim-processing rules that would ordinarily be subject to equitable tolling in private litigation, thereby warranting the *Irwin* presumption, that doubt should be resolved in Mr. Arellano's favor. Indeed, even aside from the pro-veteran canon of statutory interpretation, this Court has explained that whether a statutory time period is subject to equitable tolling depends in part on factors such as whether it resides within a benefits scheme that is "'unusually protective' of claimants" or "one 'in which laymen, unassisted by trained lawyers, initiate the

process.'" *Auburn*, 568 U.S. at 159-60 (citations omitted). Both of these factors strongly favor construing § 5110(b)(1) as warranting the *Irwin* presumption in favor of equitable tolling.

II. THE GOVERNMENT CANNOT REBUT THE *IRWIN* PRESUMPTION THAT 38 U.S.C. § 5110(B)(1) IS AMENABLE TO EQUITABLE TOLLING

"A rebuttable presumption, of course, may be rebutted, so *Irwin* does not end the matter." *Kwai Fun Wong*, 575 U.S. at 408. "The Government may . . . attempt to establish, through evidence relating to a particular statute of limitations, that Congress opted to forbid equitable tolling." *Id.* This inquiry has been expressed as "*Irwin*'s negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" in a claim against the United States? *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

There are several ways the Government can attempt to overcome the *Irwin* presumption to render a statutory time bar immune from equitable tolling. One way "is to show that Congress made the time bar at issue jurisdictional." *Kwai Fun Wong*, 575 U.S. at 408. Another way is to show that equitable tolling would be inconsistent with the text of the statute. *See Brockamp*, 519 U.S. at 352; *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001). Finally, the Government can attempt to show through legislative history that Congress did not intend for equitable tolling to apply. *See Auburn*, 568 U.S. at 159-60.

None of these avenues for overcoming the *Irwin* presumption is applicable here for the reasons explained below.

A. Section 5110(b)(1) Is Not Jurisdictional

This Court has "made plain that most time bars are nonjurisdictional." *Kwai Fun Wong*, 575 U.S. at 410 (noting the rarity of jurisdictional time limits). Here, the Federal Circuit unanimously agrees that § 5110(b)(1)'s one-year deadline is no exception. As Judge Chen acknowledges:

> Neither party here argues that § 5110(b)(1)'s effective-date provision is jurisdictional[,] [a]nd for good reason. Nothing 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 (citations omitted); *see also* Pet. App. 83a-84a (Judge Dyk agreeing that § 5110(b)(1) is nonjurisdictional).

Although the nonjurisdictional nature of § 5110(b)(1) does not end the inquiry as to whether the *Irwin* presumption can be rebutted, *see Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019), it does place a burden on the Government to show that Congress clearly intended to preclude equitable tolling from applying to a "mere claims-processing rule." *Kwai Fun Wong*, 575 U.S. at 420. As this Court explained in *Kwai Fun Wong*,

> *Irwin* requires an affirmative indication from Congress that it intends to preclude equitable tolling in a suit against the Government. Congress can provide that signal by making a statute of limitations jurisdictional. But that requires its own plain statement; otherwise, we treat a time bar as a mere claims-processing rule.

Id. (citations omitted).

B. The Text of § 5110(b)(1) Does Not Rebut the *Irwin* Presumption

Section 5110(a)(1) instructs that a day-of-receipt effective date applies "[u]nless specifically provided otherwise in this chapter." 38 U.S.C. § 5110(a)(1). Section § 5110(b)(1) gives life to this "unless" clause by permitting an award of retroactive benefits "if application therefor is received within one year from [the veteran's] date of discharge or release." 38 U.S.C. § 5110(b)(1). According to Judge Chen, this "unless" clause proves 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 . . . ." Pet. App. 57a-58a. That interpretation is incorrect.

As this Court has held, many limitations periods are framed in language far more emphatic and mandatory than § 5110(a)(1), yet they have nevertheless been found to be nonjurisdictional and

subject to equitable tolling. *See Henderson*, 562 U.S. at 439 ("[W]e have rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" (citation omitted)).

This Court has specifically rejected the notion that an "unless" clause to an otherwise general prohibition such as § 5110(a) creates a jurisdictional bar to equitable tolling. In *Kwai Fun Wong*, the Court considered such a provision in the Federal Tort Claims Act ("FTCA"). 575 U.S. at 410-11. Like § 5110(a)(1), the FTCA provision at issue in *Kwai Fun Wong* employed an "unless" clause to forbid all tort claims 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, this Court found it to be "of no consequence" to the *Irwin* presumption. *Kwai Fun Wong*, 575 U.S. at 410-11. As the Court explained, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.* at 410.

1. This Case Is Unlike *Brockamp*

This Court has recognized that certain textual clues embedded in a statute can evidence Congress's intent to halt equity's operation. *See Brockamp*, 519 U.S. at 350-52. But no such indicia are found in § 5110(b)(1). Indeed, the simplicity of the text in

§ 5110 cuts in favor of—not against—the availability of equitable tolling.

For example, in *Brockamp*, this Court found that applying equitable tolling would not be a realistic assessment of legislative intent because of the tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together." *Id.* at 352. Unlike the linguistic complexity of the *Brockamp* statute—which establishes a particular time limitation across multiple sections and subsections—§ 5110(b)(1) is a single sentence. *Compare* 26 U.S.C. § 6511, *with* 38 U.S.C. § 5110(b)(1). Section 5110(b)(1) has none of the dooming characteristics of the "unusually emphatic form" of § 6511 of the Internal Revenue Code that "sets forth its limitations in a highly detailed technical manner." *Brockamp*, 519 U.S. at 350-51. It does not reiterate its limitation in any form but one, does not list any exceptions to its one-year filing deadline for retroactive benefits, and does not impose substantive limitations that reinforce the procedural ones. Thus, § 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." *Id.* at 350.

Moreover, the "nature of the underlying subject matter" of § 5110(b)(1)— veterans' benefits—is quite different than "tax collection," which one would expect to be less likely to provide "case-specific exceptions reflecting individualized equities." *Id.* at 352. For one thing, veterans have been recognized as "a special class of citizens, those who risked harm to serve and

defend their country," rendering equitable exceptions particularly appropriate. *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring in the result). The "long applied" canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor" buttresses the conclusion that Congress did not intend to categorically exclude the application of equitable tolling to § 5110(b)(1). *Henderson*, 562 U.S. at 441 (citation omitted).

Furthermore, as compared to the tax code at issue in *Brockamp*, the veterans' benefits statute addresses a much smaller population than the entirety of the nation's taxpayers. This Court reasoned in *Brockamp* that government programs with tens of millions of participants are "not normally characterized by case-specific exceptions reflecting individualized equities." 519 U.S. at 352. But the substantially smaller population eligible for veterans' disability compensation, coupled with the pro-veteran nature of the application process itself, makes case-by-case consideration of equitable factors much less burdensome than in the income-tax context.

Unlike tax collection, the existing application process for veterans' benefits already provides a thoughtful and searching review of each applicant's records, including efforts to ensure those records are complete and to assist the veteran in obtaining additional evidence if necessary. *See* 38 U.S.C. § 5103A. This process typically includes one or more VA medical examinations to identify disabilities, rate their severity, and help evaluate service connection. 38 C.F.R. §§ 3.159(c)(4), 3.326. Thus, the veterans'

benefits process already requires a case-by-case analysis of "individualized equities," unlike the federal tax-collection system at issue in *Brockamp*. 519 U.S. at 352.

2. This Case Is Unlike *Beggerly*

This Court has held that the nature of the dispute can also be useful in determining whether Congress intended equitable tolling to apply. For instance, *Beggerly* involved a dispute over a land claim. 524 U.S. at 39-40. The Court explained that, in part because "[i]t is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge," equitable tolling was not appropriate. *Id.* at 49. Unlike the statute in *Beggerly*, however, tolling § 5110(b)(1) would not affect the rights of any party other than the veteran applying for benefits. Moreover, land law does not implicate any special class of citizens for whom an entire statutory scheme has been constructed to protect.

Section 5110(b)(1) is further distinguishable from the *Beggerly* statute because the time period is only a year, as opposed to the "unusually generous" twelve-year period in *Beggerly*, the length of which weighed against the applicability of equitable tolling. *Id.* at 48-49. Moreover, the statute in *Beggerly* "effectively allowed for equitable tolling" because the limitations period was not triggered until the "plaintiff 'knew or should have known of the claim of the United States.'" *Id.* at 48 (quoting 28 U.S.C. § 2409a(g)) (citing *Irwin*, 498 U.S. at 96). No such protection is included in § 5110(b)(1), as the one-year period runs "from [the]

date of discharge or release" regardless of the circumstances or knowledge of the veteran. 38 U.S.C. § 5110(b)(1).

3. This Case Is Unlike *TRW*

This Court held in *TRW* 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. The Court reasoned that a judicially recognized general discovery rule under the FCRA would render the narrower statutory misrepresentation exception "insignificant, if not wholly superfluous." *Id.* at 31 (citation omitted); *see also id.* at 28 ("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)).

Here, in contrast, no explicit exception exists for § 5110(b)(1)'s one-year deadline for seeking retroactive service-connected disability benefits. 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.

Judge Chen's concurrence focuses heavily on subsection (b)(4) (*see* Pet. App. 61a-65a), 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 Judge Chen, the fact that Congress considered this specific situation and applied a limited one-year grace period "only to a disability pension . . . and not 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). Pet. App. 61a. This conclusion is not supported by *TRW*.

Judge Chen's concurrence 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 the Government concedes. Pet. App. 61a. 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).

C. The Legislative History of § 5110(b)(1) Does Not Show Any Congressional Intent to Preclude Equitable Tolling

The Chen concurrence argues that Congress's failure to amend § 5110(b)(1) since 2003 shows a silent acceptance of *Andrews* as a complete bar to tolling. Pet. App. 63a. It notes that "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 (citing *Auburn*, 568 U.S. at 159).

Judge Chen wrongly assumes that Congress would have unambiguously understood *Andrews* to be a complete bar to equitable tolling—an understanding that not even the Federal Circuit could agree upon before this case. Judge Newman, one of the three *Andrews* judges, later disagreed that *Andrews* categorically bars equitable tolling in every circumstance. *See Butler v. Shinseki*, 603 F.3d 922, 927 (Fed. Cir. 2010) (Newman, J., concurring in the result) ("The *Andrews* court did not hold that equitable tolling is never available for the time period in § 5110(b)(1).").

The erstwhile ambiguity of *Andrews*'s scope and reach perhaps stemmed from its wording, which could be read to imply that it was limited to the specific

facts of the veteran involved. *See* 351 F.3d at 1137-38 (holding that "principles of equitable tolling, *as claimed by Andrews*, are not applicable to the time period in § 5110(b)(1)" (emphasis added) and comparing the veteran's factual basis for tolling to "'a garden variety claim of excusable neglect,' to which equitable tolling does not apply" (quoting *Irwin*, 498 U.S. at 96)).

It is therefore hardly clear, as Judge Chen suggests, that Congress would have had cause to hastily amend § 5110(b)(1) in response to *Andrews* when at least one member of the *Andrews* panel believed that it had not prevented future veterans from requesting tolling under compelling circumstances. Accordingly, Congress's silence and inaction following *Andrews* should not be taken as an imprimatur of approval for any particular interpretation of *Andrews*. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

III. DEPRIVING VETERANS OF THE OPPORTUNITY TO SEEK EQUITABLE TOLLING OF § 5110(B)(1) IS INCONSISTENT WITH THE PRO-VETERAN NATURE OF THE VETERANS' BENEFITS SYSTEM

The effect of the Federal Circuit's deadlocked decision below is to leave in place *Andrews*'s rigid rule barring all disabled veterans under all circumstances from seeking to equitably toll the one-year deadline of § 5110(b)(1). Unless this outcome is overturned,

Andrews will continue to tie the hands of the Veterans Court, preventing it from even considering extenuating circumstances that, if presented in a private litigation, might have the power to persuade a court to equitably toll deadlines similar to § 5110(b)(1) in order to prevent manifest injustice.

Allowing *Andrews* to stand is not only contrary to this Court's decision in *Irwin*, as explained above, but also to the concept of a pro-veteran benefits system specifically "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311.

A. *Andrews* Treats Service-Disabled Veterans Worse Than Other Litigants

Equitable tolling is the rule, not the exception. It is unsurprising, therefore, that it is available in other contexts involving private claims and claims against the Government. *See Irwin*, 498 U.S. at 95-96 ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.").

For instance, civil-service employees who retire due to disability must file their application for disability benefits within one year of their retirement, not unlike service-disabled veterans. 5 U.S.C. § 8337(b). But unlike for service-disabled veterans, the Federal Circuit permitted equitable tolling of that deadline for an Assistant United States Attorney because the Government failed to inform him that he could seek disability benefits for his bipolar disorder. *Winchester v. Off. of Pers. Mgmt.*, 449 F. App'x 936,

938-39 (Fed. Cir. 2011) (nonprecedential). The court held that permitting equitable tolling of this one-year deadline "conforms to the general legislative purpose" of the disability retirement statute. *Id.*

Manufacturing workers who lose their jobs due to the effects of international trade also have one year to apply for benefits under the Government's trade adjustment assistance program. 19 U.S.C. § 2273(b)(1) (2002). But unlike for service-disabled veterans, the Court of International Trade, relying on *Irwin*, allowed workers who were not informed of that program to equitably toll the one-year deadline. *Former Emps. of Fisher & Co. v. U.S. Dep't of Lab.*, 31 C.I.T. 1272, 1278-79 (2007) (applying *Irwin*, 498 U.S. at 95-96).

Retirees seeking long-term disability benefits from an insurance plan administered under the Employee Retirement Income Security Act ("ERISA") typically must file a claim within a specified time after leaving employment. In *Chapman*, a retired employee missed her plan's one-year deadline for filing a long-term disability claim, and she sought to have this deadline equitably tolled due to her severe mental disability. *Chapman v. Choicecare Long Island Long Term Disability Income Plan*, No. 98-CV-4475 (DRH) (MLO), 2004 U.S. Dist. LEXIS 26546, at *1-3 (E.D.N.Y. May 28, 2004). Unlike for service-disabled veterans, the district court found that "Plaintiff's mental illness significantly impaired her ability to timely file her request for disability benefits, and thus, equitable tolling should apply." *Id.* at *12; *see also Torello v. UNUM Life Ins. Co. of Am.*, No. 98-4338, 1999 U.S. App. LEXIS 32228, at *10-11 (6th Cir.

Dec. 3, 1999) (finding a similar deadline for disability benefits amenable to equitable tolling but finding it inapplicable under the facts of the case).

Equitable tolling has been deemed available to toll deadlines in Title VII employment discrimination cases, *see, e.g.*, *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988), *abrogated on other grounds by Holland v. Florida*, 560 U.S. 631 (2010); immigration cases, *see, e.g.*, *Attipoe v. Barr*, 945 F.3d 76, 82-83 (2d Cir. 2019); and cases filed under the FTCA, *see, e.g.*, *Kwai Fun Wong*, 575 U.S. at 418-20. Even the IRS may benefit from equitable tolling when pursuing delinquent taxpayers who have filed for bankruptcy. *Young*, 535 U.S. at 46-47.

That *Andrews* bars service-disabled veterans from seeking equitable tolling of § 5110(b)(1)'s one-year application deadline, while other, similarly situated litigants are allowed to pursue equitable tolling claims, is unjustifiable. Veterans, for whom Congress has expressed the most solicitude, should not receive worse treatment under *Irwin* than civilian litigants. Such disparate impact at the expense of service-disabled veterans cannot be a "realistic assessment" of Congress's intent in drafting § 5110(b)(1). *Irwin*, 498 U.S. at 95-96.

B. *Andrews* Inflicts Additional and Unnecessary Hardship on Disabled Veterans and Their Families

Mr. Arellano, suffering from severe service-connected cognitive impairments and unrepresented by counsel, missed his one-year deadline for filing a

claim for retroactive disability benefits. But he is hardly alone in doing so. Other veterans have likewise argued that they lacked the mental capacity or competence during this one-year period to file a disability claim, yet the Veterans Court has consistently dismissed such arguments as being "foreclosed" by *Andrews* and its progeny. *See, e.g.*, *Kappen v. Wilkie*, No. 18-3484, 2019 WL 3949462, at *3 (Vet. App. Aug. 22, 2019); *Savage v. Wilkie*, No. 18-6687, 2020 WL 1846012, at *2 (Vet. App. Apr. 13, 2020); *Ford v. McDonald*, No. 15-3306, 2016 WL 4137532, at *3-4 (Vet. App. Aug. 3, 2016).

At times, the Veterans Court has acknowledged the harshness of *Andrews*. For instance, the veteran in *Savage* began experiencing severe psychological symptoms while on active duty in the Navy. 2020 WL 1846012, at *1. With his mother's assistance, in October 2009, he filed a claim seeking service connection for his bipolar disorder. *Id.* The VA granted the claim, but with an effective date of October 2009—nearly eight years after his honorable discharge. *Id.*

Proceeding pro se (as most veterans do), Mr. Savage appealed repeatedly. The Veterans Court ultimately rejected his argument, but not without acknowledging his awful predicament and the legal rule that had exacerbated it:

> We have profound sympathy for appellant and his family and their collective struggles with mental illness. We do not question that appellant suffered from a severe mental illness

> during the period after his separation from service and when he filed a claim for VA benefits. However, we cannot provide the relief sought in this appeal under the law that binds us.

Id. at *2 (citation omitted). In Mr. Arellano's case, the Veterans Court expressed a similar sentiment. Pet. App. 6a ("If we were writing on a blank slate, appellant's arguments would be worth exploring. But our slate is far from blank." (citation omitted)).

Aside from psychological impairments such as those at issue here and in *Savage*, there are other extenuating reasons why service-disabled veterans sometimes miss the one-year deadline of § 5110(b)(1). Some veterans are simply unaware of their eligibility for disability compensation.[4] Others are misled or confused by contradictory—and sometimes incorrect—information provided by VA personnel.

For instance, in *Butler*, the veteran alleged that VA personnel actively "discouraged" him from filing a timely claim within one year of his discharge from service, resulting in him losing retroactive benefits. *Butler v. Peake*, No. 07-1985, 2008 WL 5101007, at *3 (Vet. App. Nov. 26, 2008), *aff'd*, 603 F.3d 922 (Fed. Cir. 2010). Relying on *Andrews*, the Veterans Court held that, "[e]ven if it is assumed that VA personnel discouraged [Mr. Butler] from filing a claim *and that*

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[4] *See* WESTAT, NATIONAL SURVEY OF VETERANS—FINAL REPORT, at xiii (Oct. 18, 2010), https://www.va.gov/SURVIVORS/docs/NVSSurveyFinalWeightedReport.pdf (reporting 17.1% of veterans who failed to apply for disability benefits were not aware of the VA's disability benefits program).

such an action was unlawful," § 5110 is not subject to equitable tolling under those circumstances. *Id.* (emphasis added) (citing *Andrews*, 351 F.3d at 1137-38). Thus, under *Andrews*, even *unlawful* efforts by the VA to discourage a veteran from filing a timely disability claim are not enough to warrant equitable tolling.

Another reason some service-disabled veterans fail to meet the one-year deadline of § 5110(b)(1) is that they are under secrecy orders not to disclose the very facts and circumstances that gave rise to their injuries. For instance, in *Taylor*, the veteran was subjected to military experiments involving chemical-warfare agents and was required to sign a secrecy oath preventing him from divulging "any information" about these experiments, even to his family and medical providers. *Taylor v. McDonough*, 3 F.4th 1351, 1356 (Fed. Cir.) (citation omitted), *reh'g en banc granted and op. vacated*, 4 F.4th 1381 (Fed. Cir. 2021). During these experiments, "Mr. Taylor was exposed to EA-3580 (a nerve agent akin to VX and sarin), EA-3547 (also called CR, a tear gas agent), and other chemical agents." *Id.* at 1357 (citations omitted).

In 2006, the Department of Defense declassified the names of the military members who had volunteered for these human experiments. *Id.* at 1358 (citation omitted). The following year, in 2007, Mr. Taylor filed a claim for a service-connected disability relating to his involvement in the previously classified program. *Id.* The VA granted his 2007 claim for prospective benefits but denied his request for retroactive benefits dating back to his

discharge from service, notwithstanding that he was prohibited from disclosing the existence of the military's secret chemical/biological human testing program earlier than he did. *Id.* at 1358-59. The Veterans Court affirmed the VA's ruling, citing *Andrews* for the proposition that § 5110 is not subject to equitable tolling under any circumstances, no matter how compelling the facts. *Id.* at 1360 (citing *Taylor v. Wilkie*, 31 Vet. App. 147, 154 (2019)). The *Taylor* case is currently pending en banc review at the Federal Circuit.[5]

Still another reason some service-disabled veterans fail to file a claim for disability benefits within the one-year deadline of § 5110(b)(1) is the nature of PTSD itself. A common symptom of PTSD is avoidance. *See* U.S. DEP'T OF VETERANS AFFAIRS, WHAT IS PTSD, AVOIDANCE, https://www.ptsd.va.gov/understand/what/avoidance.asp (last visited May 5, 2022). Avoidance occurs "when a person avoids thoughts or feelings about a traumatic event." *Id.*

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[5] On June 30, 2021, a panel of the Federal Circuit held that, although *Andrews* precludes equitably tolling the one-year deadline of § 5110(b)(1), principles of equitable *estoppel* precluded the VA from asserting § 5110(a)(1)'s default rule against Mr. Taylor to deprive him of retroactive benefits dating back to his discharge from service. *Taylor*, 3 F.4th at 1372 n.13, 1374. On July 22, 2021, the Federal Circuit sua sponte vacated the panel decision and ordered the case to be reheard en banc, but only as to the issue of equitable estoppel, not equitable tolling. *Taylor*, 4 F.4th at 1381-82. On February 22, 2022, the Federal Circuit issued a stay in *Taylor* pending this Court's disposition in the instant case. Order Staying Proceeding, *Taylor v. McDonough*, No. 19-2211, Doc. No. 91 (Fed. Cir. 2022).

Avoidance causes the veteran to shun reminders of the trauma. *Id.*

This avoidance phenomenon is particularly prevalent among veterans suffering from PTSD caused by military sexual trauma, an unfortunately growing problem. Evidence shows MST victims are reluctant to file for VA disability compensation due to avoidance, stigma, or concerns the VA will erroneously deny their claims. *See* DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL, REP. NO. 17-05248-241, DENIED POSTTRAUMATIC STRESS DISORDER CLAIMS RELATED TO MILITARY SEXUAL TRAUMA, at i-ii, 1-4, 8-9 (Aug. 21, 2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf. As the VA's own Office of Inspector General report found, "the trauma of restating or reliving stressful events could cause psychological harm to MST victims and prevent them from pursuing their claims." *Id*. at 9.

The facts of *Savage, Butler*, and *Taylor* are hardly unique. Instead, these cases are representative of many veterans who have suffered unnecessarily from the rigid and unforgiving rule of *Andrews*. As it stands, *Andrews* creates a perverse 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. This Court should end this cruel practice by overruling *Andrews* and making clear that § 5110(b)(1) may be equitably tolled in appropriate circumstances.

IV. IF 38 U.S.C. § 5110(B)(1) IS AMENABLE TO EQUITABLE TOLLING, MR. ARELLANO'S CASE SHOULD BE REMANDED FOR FURTHER FACTUAL DEVELOPMENT

The only issue raised before the Federal Circuit in this case was whether 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling as a matter of law. Pet. App. 18a. The Chen concurrence correctly explains that "[b]ecause both the Board and the Veterans Court concluded that equitable tolling was categorically unavailable for § 5110(b)(1) as a matter of law, neither had reason to consider whether the specific facts of Mr. Arellano's case justified equitable tolling." Pet. App. 67a. Nevertheless, Judge Dyk would find in the first instance that Mr. Arellano's specific facts do not warrant equitable tolling in this case. Pet. App. 96a-97a. While Judge Dyk's concurrence purports to be merely applying the legal standard to undisputed facts, it errs by relying on an undeveloped evidentiary record to do so.

Judge Dyk's analysis relies primarily on the absence of an "allegation that Mr. Lamar [Mr. Arellano's brother] was somehow prevented from filing, or faced obstacles in his attempt to file, Mr. Arellano's request for benefits sooner." Pet. App. 96a. But Mr. Arellano had no reason to present such an allegation, if it exists, because he was instructed at every stage of his claim that equitable tolling was categorically unavailable to him as a matter of law. Moreover, it is far from clear that Judge Dyk's proposed caregiver rule applies so rigidly. *See* Pet. App. 68a ("[I]t is unsurprising that Mr. Arellano has

not alleged 'any special circumstances' in relation to his caregiver, as Judge Dyk observes, since no one until today had suggested that having a caregiver creates a default presumption against equitable tolling in this context or in any other setting where equitable tolling can arise.").

As Judge Dyk acknowledges, "the mere fact that a guardian has been appointed for a claimant is a factor in the equitable tolling inquiry, *but only one factor*." Pet. App. 93a (emphasis added) (citing *K. G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020)). Judge Dyk attempts to dispense with all the other potential factors by alleging that "there is no claim that Mr. Arellano was estranged from Mr. Lamar or refused to interact with him," a factual scenario present in the *K. G.* case. Pet. App. 96a-97a (citing *K. G.*, 951 F.3d at 1377). Again, the Federal Circuit has no way of knowing whether those (or other compelling) facts might exist in this case because Mr. Arellano was never given an opportunity to develop the evidentiary record in support of equitable tolling.

It is undisputed that neither the Board nor the Veterans Court made any factual findings relevant to whether Mr. Arellano would be entitled to equitable tolling if it was available for § 5110(b)(1). *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."). As the Chen concurrence correctly observes, 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.

Id. Indeed, far from indicating that Mr. Arellano's facts could never support a claim for equitable tolling, the Veterans Court 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 arguments would be worth exploring.").

Because Mr. Arellano has yet to be afforded the opportunity to develop and argue his facts, and because the agency specifically refrained from making any factual findings relating to equitable tolling, a remand is appropriate if this Court holds that 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *accord INS v. Orlando Ventura*, 537 U.S. 12, 16-17

(2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *cf. Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings . . . ." (citation omitted)).

Other circuits have routinely abided by the jurisprudential principle that factual questions should not be resolved in the first instance on appeal. *See, e.g.*, *Goonsuwan v. Ashcroft*, 252 F.3d 383, 390 n.15 (5th Cir. 2001) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."); *Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992), *as modified on denial of reh'g and reh'g en banc* (Nov. 4, 1992) ("We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980) ("[T]his court does not sit as an administrative agency for the purpose of fact-finding in the first instance . . . ."); *Uanreroro v. Gonzales*, 443 F.3d 1197, 1208 (10th Cir. 2006) ("[W]e will not, as a reviewing court, step into the agency's role and engage in our own fact-finding.").

CONCLUSION

For the reasons explained above, this Court should reverse the Federal Circuit's judgment and

remand for further fact-finding on Mr. Arellano's equitable tolling claim.

Respectfully submitted,

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