2020-1073

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ADOLFO R. ARELLANO,
Claimant-Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE ON HEARING EN BANC

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent-appellee's counsel states that she is unaware of any other appeal in or from this action that was previously before this court or any other appellate court under the same or similar title. Respondent-appellee's counsel is also unaware of any case pending in this or any other court that will directly affect or be affected by this Court's decision in this appeal.

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STATEMENT OF THE ISSUES

1. Whether a presumption in favor of equitable tolling applies to 38 U.S.C. § 5110(b)(1).

2. If a presumption in favor of equitable tolling did apply, whether it would be rebutted by evidence that Congress did not intend an implicit exception for equitable tolling to be read into 38 U.S.C. § 5110.

3. If this Court were to hold that a presumption in favor of equitable tolling applies to section 5110(b)(1), whether that holding would result in the application of the same presumption to other provisions of 38 U.S.C. § 5110.

4. Whether and to what extent courts have addressed the application of the doctrine of equitable tolling to statutes containing timing provisions similar to those of 38 U.S.C. § 5110.

STATEMENT OF THE CASE

I. Statutory Background

Congress has provided by statute for the payment of monthly compensation to veterans with disabilities arising from active service. 38 U.S.C. § 1110 (wartime compensation); *id.* § 1131 (peacetime compensation). To obtain such disability compensation, a veteran must submit a claim to the VA, 38 U.S.C. § 5101(a)(1)(A), and the record evidence must "establish: '(1) the existence of a present disability; (2) inservice incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service.'" *Morris v. Shinseki*, 678 F.3d 1346, 1353 (Fed. Cir. 2012) (citation omitted); *see* 38 U.S.C. § 1110. If those elements are proven, then the veteran's "present disability" is considered "service-connected," and the veteran may receive monthly compensation based upon that disability. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

To determine the amount of compensation that is to be paid to a veteran each month in connection with a given service-connected disability, the VA assesses the

severity of the disability and assigns the veteran's condition a rating, ranging from zero to 100 percent, intended to reflect the impairment of earning capacity typically caused by the type and degree of symptoms exhibited by the veteran. *See* 38 U.S.C. § 1155; *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affairs*, 927 F.3d 1263, 1264 (Fed. Cir. 2019). Congress sets by statute the amount of monthly compensation payable for each possible disability rating. 38 U.S.C. § 1114 (wartime rates); *id.* § 1134 (peacetime rates).

Although the veteran's rating determines the base level of disability compensation to be paid each month, it does not establish the month in which such a payment should first be made. When the VA awards disability compensation to a claimant, that compensation may not be paid "for any period before the first day of the calendar month following the month in which the award or increased award became effective." 38 U.S.C. § 5111(a)(1). Generally, the date on which an award becomes "effective" is established by 38 U.S.C. § 5110. That statute provides a default rule for determining the effective date of an award of certain types of VA benefits, including disability compensation:

> 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). In other words, the effective date of an award of disability compensation "is generally determined by the date the disabling condition arose, or the date the claim was submitted, whichever is later." *Blubaugh v. McDonald*, 773 F.3d 1310, 1311 (Fed. Cir. 2014). By default, then, no disability compensation is payable for periods predating the VA's receipt of the veteran's claim.

In addition to the general rule for establishment of an effective date, section 5110 sets out approximately 15 exceptions to that rule, each typically providing that, in specified circumstances, the effective date of an award may precede the date of receipt of claim by, at most, one year. *See* 38 U.S.C. § 5110(b)-(n). Subsection (b)(1), for example, allows a veteran to collect disability compensation for a period of up to a year prior to the VA's receipt of the underlying claim, so long as the VA receives the claim within one year of the veteran's separation from service:

> 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.

Id. § 5110(b)(1). For the sake of brevity, we sometimes refer to this provision in this brief as the "discharge rule."

In *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), this Court considered whether the "time period" described in the discharge rule – the one-year period following a claimant's separation from service – is subject to "principles of equitable tolling." 351 F.3d at 1137. "Equitable tolling may be applied to toll a statute of limitations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Id.* (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The appellant in *Andrews* had submitted a claim for disability compensation approximately 14 months after her discharge. *Id.* at 1135. She was awarded compensation effective as of the date her claim was received by the VA. *Id.* at 1136. Although her claim had been submitted too late to qualify for an earlier effective date under the discharge rule, she argued that, as an equitable matter, the day after her date of discharge should be treated as the effective date for her award because the VA had not notified her "of the one-year filing provision of" 38 U.S.C. § 5110(b)(1). *Id.* That failure to notify, according to the appellant, justified tolling the year after her discharge. *Id.* at 1137.

The Court rejected the notion that the failure to notify alleged by the appellant could justify the assignment of an effective date not permitted by the

terms of section 5110. *Id.* The doctrine of equitable tolling provided no support for the appellant's position because "principles of equitable tolling . . . are not applicable to the time period in § 5110(b)(1)." *Id.* Although statutes of limitations are subject to tolling, section 5110 "does not contain a statute of limitations, but merely indicates when benefits may begin and provides for an earlier date under certain limited circumstances." *Id.* at 1138. Because the one-year period described in the discharge rule is not a statute of limitations, the concept of tolling does not apply. *Id.*

The *Andrews* Court noted that its conclusion regarding tolling was supported by the result in a prior case, *McCay v. Brown*, 106 F.3d 1577, 1582 (Fed. Cir. 1997), which addressed 38 U.S.C. § 5110(g). That statutory subsection provides:

> . . . where compensation, dependency and indemnity compensation or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall . . . not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefore or the date of administrative determination of entitlement, whichever is earlier.

38 U.S.C. § 5110(g). The appellant in *McCay* sought an earlier effective date for his award of disability compensation and relied in part upon an equitable-tolling theory, asserting that he had delayed in filing his application for benefits because

of statements made by the Government. *McCay*, 106 F.3d at 1581-82. That theory lacked merit, according to this Court, because Mr. McCay was not "seek[ing] to toll a statute of limitations in order to bring a claim that would otherwise be time barred," but was instead "seek[ing] to obtain benefits retroactive to more than one year prior to the time he filed his application for such benefits." *Id.* at 1582. "[T]he doctrine of equitable tolling is inapplicable" in such circumstances. *Id.* This same reasoning animated the result in *Andrews*: in each case, the appellant did "not seek to toll any statutory limitations period," but rather "ask[ed] th[e] court to waive the express statutory requirements for an earlier effective date for compensation, which [the Court] cannot do." *Andrews*, 351 F.3d at 1138.

In the years since *Andrews* was decided in 2003, this Court has repeatedly cited it with approval and followed its holding, reiterating that the doctrine of equitable tolling is not applicable to the effective-date rules set forth in 38 U.S.C. § 5110. *See Titone v. McDonald*, 637 F. App'x 592, 593 (Fed. Cir. 2016); *Butler v. Shinseki*, 603 F.3d 922, 926 (Fed. Cir. 2010); *AF v. Nicholson*, 168 F. App'x 406, 408 (Fed. Cir. 2006); *Ashbaugh v. Nicholson*, 129 F. App'x 607, 609 (Fed. Cir. 2005).

II. Factual Background And Prior Proceedings

Mr. Arellano served in the Navy from 1977 to 1981. Appx1443. In the years after his service, he suffered from delusions, anxiety, and other psychiatric symptoms. Appx1444-1445. In June 2011 – approximately 30 years after his discharge – the VA received Mr. Arellano's claim for disability compensation. Appx1444. A VA regional office (RO) granted his claim in December 2014, finding that Mr. Arellano had service-connected "schizoaffective disorder bipolar type, with post-traumatic stress disorder." Appx1443. The RO assigned a 100-percent disability rating and an effective date of June 3, 2011 – the date the RO received "[i]nformal assessments" of Mr. Arellano's condition that served as an informal claim for benefits. Appx1444.[1]

Mr. Arellano appealed the RO's decision to the Board of Veterans' Appeals (board), arguing, among other things, that his illness constituted "extraordinary circumstances" warranting the "equitable toll[ing]" of section 5110(b)(1)'s discharge rule so that his compensation award could be assigned an effective date of October 30, 1981 – the day after his separation from service. Appx556-557. The board concluded that, because Mr. Arellano had not submitted his claim

[1] A formal claim was received by the RO on June 13, 2011. Appx1444.

within the time required by the discharge rule, the VA was not authorized to assign an earlier effective date for his award. Appx509-510.

Mr. Arellano appealed that decision to the Veterans Court, which also rejected his arguments concerning the availability of equitable tolling. Appx2-5. Citing *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), among other cases, the court concluded that "section 5110 is not subject to equitable tolling." Appx5.

This appeal followed. On August 5, 2020, after the parties had submitted their merits briefs and presented oral argument to a three-judge panel, the Court, *sua sponte*, ordered that this matter be heard *en banc* in the first instance.

SUMMARY OF THE ARGUMENT

No presumption in favor of equitable tolling applies to 38 U.S.C. § 5110(b)(1). Pursuant to *Irwin*, courts are to presume, absent evidence of contrary congressional intent, that a Federal statute of limitations is amenable to equitable tolling, even if that limitations statute is invoked for the protection of the interests of the United States as a defendant. The discharge rule, however, does not function as a statute of limitations, and so does not fall within the ambit of that presumption. Instead, the discharge rule operates as a rule of decision on the merits of a successful claim for benefits. Every court that has considered whether

the timing requirement of an analogous provision may be subject to equitable exceptions has found that equitable relief is unavailable.

If this Court were to hold that a presumption in favor of equitable tolling applies to section 5110(b)(1), it would expand the reach of that presumption in an unprecedented manner. Whether such a holding would render other provisions of 38 U.S.C. § 5110 subject to the same presumption would, of course, depend upon the reasoning underlying the Court's holding. If that reasoning tracked the arguments of Mr. Arellano, the equitable-tolling presumption could be argued to be applicable to any provision of section 5110 – and any provision of any other statute – that conditions a particular result upon the timing of claim submission.

Regardless of the applicability of the presumption in favor of equitable tolling, the result in this matter should be the same. The text and structure of section 5110, along with the surrounding statutory scheme and relevant legislative history, make clear that Congress did not intend to allow the VA or the courts to create open-ended, equitable exceptions to the statute's carefully calibrated and extensive set of rules for the determination of effective dates. As a result, even if a presumption in favor of equitable tolling were applicable to section 5110(b)(1), that presumption would be rebutted. The decision of the Veterans Court in this matter should therefore be affirmed.

ARGUMENT

I. Standard Of Review

This Court possesses exclusive jurisdiction to review the validity of the Veterans Court's decision on "a rule of law or of any statute or regulation" or "any interpretation thereof" that the Veterans Court relied on in making its decision. 38 U.S.C. § 7292(a); *see id.* § 7292(d). Such legal determinations are reviewed *de novo*. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009).

II. No Presumption In Favor Of Equitable Tolling May Be Applied To Section 5110(b)(1)

A. Section 5110(b)(1) May Not Be Presumed To Be Amenable To Equitable Tolling Because It Is Not A Statute Of Limitations

The judge-made doctrine of equitable tolling cannot justify or legitimize the assignment of an earlier effective date under section 5110(b)(1) despite a veteran's failure to submit a claim within one year of discharge. "[E]quitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). In *Irwin*, "the Supreme Court established a presumption that all federal statutes of limitations are amenable to equitable tolling," in the absence of indications of contrary congressional intent. *Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322,

1341-42 (Fed. Cir. 2011) (*en banc*) (citing *Irwin*, 498 U.S. at 95-96). But, as this Court readily and correctly determined in *Andrews*, section 5110 "does not contain a statute of limitations." *Andrews*, 351 F.3d at 1138. *Irwin's* "rebuttable presumption of the availabity of equitable tolling" therefore has no application to the discharge rule provided by section 5110(b)(1). Order, ECF No. 45, at 1.

1. The Presumption Regarding The Availability Of Equitable Tolling Discussed In *Irwin* Applies Only To Statutes Of Limitations

Mr. Arellano argues for an open-ended interpretation of *Irwin*, asserting that any statutory "'[t]ime requirements'" or "'time limits'" related to "'suits against the Government'" are presumptively susceptible to equitable tolling. Suppl. Br. for Appellant, ECF No. 50 (Arellano Br.), at 15 (quoting *Irwin*, 498 U.S. at 95). Mr. Arellano offers no definition for these putative statutory "time requirements" or "time limits" to distinguish them from statutes of limitations, leaving the reach of *Irwin*, as envisioned by the appellant, entirely unclear. The actual import of that case is not so difficult to discern: *Irwin*'s reasoning and subsequent Supreme Court precedent demonstrate unmistakably that the presumption in favor of equitable tolling applies only to provisions that function as statutes of limitations, as this Court and other United States courts of appeals have recognized.

a. The Supreme Court Has Made Clear That The Presumption Discussed In *Irwin* Concerns Only Statutes Of Limitations

In *Irwin*, the Supreme Court considered whether equitable tolling could be invoked to suspend the running of the statute of limitations for filing an action in district court under Title VII of the Civil Rights Act of 1964. *Irwin*, 498 U.S. at 91-92; *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-37 (2008). The Court noted that, in past cases, it had attempted to determine "on an ad hoc basis" whether Congress intended to allow equitable tolling of a particular "statutory filing deadline." *Id.* at 94-95. That approach had proven unsatisfactory, creating "unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95. The Court therefore adopted a new interpretive rule: that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. That rule, in the Court's view, was "likely to be a realistic assessment of legislative intent." *Id.* at 95. But the Court warned against stretching its interpretive rule too far: "Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed

against the Government than is employed in suits between private litigants." *Id.* at 96.

"[T]he rebuttable presumption of equitable tolling" that the Supreme Court identified as "applicable in lawsuits between private litigants" is a presumption that statutes of limitations may be equitably tolled. To support the proposition that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" the *Irwin* Court cited *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989), which states: "[B]oth the language and legislative history of § 2000e-5(e) [which sets out the timing requirements for filing suit under Title VII] indicate that the filing period operated as a statute of limitations. The running of such statutes is traditionally subject to equitable tolling." Even as it affirmed that proposition, the Court in *Hallstrom* rejected the notion that a type of timing requirement that was "[u]nlike a statute of limitations" – a "60-day notice provision" – "should be subject to equitable modification and cure." 493 U.S. at 27.

Thus, although *Irwin* variously uses the terms "statutory time limits," "statutory limitations on suits," and "[t]ime requirements," 498 U.S. at 94-95, the historical presumption invoked by the Supreme Court in that case, and made applicable to "suits against the Government," *id.* at 95, was a presumption that

statutes of limitations may be equitably tolled – not a presumption that every statutory provision that refers to the timing of a filing is subject to alteration by a court on equitable grounds. The reasoning of *Irwin* does not permit a contrary conclusion. In making applicable to actions against the Government the same presumption typically applied in suits between private parties, the Court adopted a rule it believed "likely to be a realistic assessment of legislative intent." *Id.* at 95. In other words, as the Court subsequently explained in another case, "Congress must be presumed to draft limitations periods in light of th[e] background principle" that "limitations periods are 'customarily subject to equitable tolling.'" *Young v. United States*, 535 U.S. 43, 49-50 (2002) (quoting *Irwin*, 498 U.S. at 95); *see Lozano*, 572 U.S. at 10-11.

The proposition that statutes of limitations may be equitably tolled is "a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Lozano*, 572 U.S. at 10-11 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Accordingly, that proposition easily qualifies as a "background principle" of which Congress is presumably aware. *Young*, 535 U.S. at 49. We are unaware, however, of any "background principle" providing that timing requirements other than statutes of limitations may be equitably tolled; certainly, Mr. Arellano has identified none. As a result, it cannot be reasonably presumed

that Congress drafts timing requirements other than statutes of limitations with the understanding that courts may enlarge, suspend, or otherwise alter those requirements by invoking the doctrine of equitable tolling. To the contrary, given the absence of a historical practice of making equitable adjustments to timing requirements other than limitations periods, there is no sound basis for believing that Congress, in drafting those requirements, intended for them to be altered based upon a court's sense of equity. Any presumption that those requirements could be equitably tolled, therefore, would not represent "a realistic assessment of legislative intent." *Irwin*, 498 U.S. at 95.

If *Irwin* left any doubt about the question, the Supreme Court has subsequently made clear that the "rebuttable presumption of equitable tolling applicable to suits against private defendants" – the presumption that *Irwin* made "applicable to suits against the Government" as well – applies only to statutes of limitations, not to just any timing requirement found in a statute. 498 U.S. at 95. In *Lozano*, the Court was asked to decide whether the doctrine of equitable tolling could be invoked to suspend an unusual timing requirement. 572 U.S. at 4. Under the Hague Convention on the Civil Aspects of International Child Abduction, an international treaty ratified by the United States and implemented by Federal statute, "[w]hen a parent abducts a child and flees to another country," that country

is "generally require[d] . . . to return the child immediately if the other parent requests return within one year." *Id.* If the other parent petitions for return of the child after a year has elapsed, the court receiving that petition must "order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Id.* at 5. The petitioner in *Lozano* argued that equitable tolling was available to suspend or extend the one-year period in which the filing of a petition requires the immediate return of the child. *Id.* at 9-10.

To address that question, the Supreme Court first considered, in general, the availability of equitable tolling in American judicial actions: "We . . . presume that equitable tolling applies *if the period in question is a statute of limitations* and if tolling is consistent with the statute." *Id.* at 11 (emphasis added). Although the Court first determined that American principles of equitable tolling should not be applied to interpret an international treaty, *id.* at 11-13, the Court then proceeded to consider whether tolling would be available "if the presumption in favor of equitable tolling had force outside of domestic law." *Id.* at 13. The one-year period could not be equitably tolled even in that circumstance, in the Court's view, because that period "is not a statute of limitations," and so cannot be presumed to be subject to equitable tolling. *Id.* at 13-15.

Lozano thus clarifies, to the extent clarification is necessary, the reach of the "presumption" made applicable to the Government in *Irwin*: the presumption concerns statutes of limitations, not timing requirements generally. That conclusion is consistent with numerous decisions, of both the Supreme Court and this Court, that specifically link the presumptive availability of equitable tolling to statutes of limitations. *See, e.g.*, *United States v. Kwai Fun Wong*, 575 U.S. 402, 407-08 (2015) ("In *Irwin*, we recognized that time bars in suits between *private* parties are presumptively subject to equitable tolling. That means a court usually may pause the running of a limitations statute in private litigation when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline." (citation omitted)); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681 (2014) ("Tolling, which lengthens the time for commencing a civil action in appropriate circumstances, applies when there is a statute of limitations; it is, in effect, a rule of interpretation tied to that limit."); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 115 (2013); *Holland v. Florida*, 560 U.S. 631, 645-46 (2010); *Cloer*, 654 F.3d at 1341-42.

As this analysis demonstrates, this Court reasoned correctly in *Andrews* when it held that equitable tolling may not be presumed to apply to a statute that "does not contain a statute of limitations." 351 F.3d at 1137-38. Other circuits

have reached the same conclusion. *See In re Neff*, 824 F.3d 1181, 1184 (9th Cir. 2016) ("The presumption that Congress intended to allow equitable tolling does not apply . . . if the time period in question is not a statute of limitations."); *Garcia Ramos v. 1199 Health Care Emps. Pension Fund*, 413 F.3d 234, 238 (2d Cir. 2005) (concluding that a provision that "does not set forth a statute of limitations . . . is not subject to traditional principles of equitable tolling").

b. Mr. Arellano Fails To Identify Authority Supporting His Sweeping Interpretation Of The Scope Of The Equitable-Tolling Presumption

Mr. Arellano contends that the equitable-tolling presumption has a vast scope, encompassing all manner of "time limitations or filing deadlines." Arellano Br. 10. But no authority cited by Mr. Arellano supports the proposition that time periods described in provisions that do not function as statutes of limitations are presumptively subject to equitable tolling.

As an initial matter, Mr. Arellano mistakes the issue, asserting, "Under *Irwin*, . . . applicability of equitable tolling is not limited to statutes of limitations." Arellano Br. 19. The pertinent question, however, is not whether a provision other than a statute of limitations could ever be subject to equitable tolling; Congress could, if it so desired, allow equitable tolling of any statutory time period, simply by stating its intent to do so. *See Lozano*, 572 U.S. at 10 ("Because the doctrine

effectively extends an otherwise discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent."). The question is whether a court may presume, under *Irwin*, that it has the authority to disregard the express language of a statutory timing condition when the statute in question does not function as a statute of limitations, and despite the absence of any affirmative evidence of a congressional intent to allow equitable tolling.

Mr. Arellano has identified no authority that suggests, much less establishes, that a court may do so. This Court's opinion in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (*en banc*), does not stand for the proposition that all sorts of "time limits and deadlines that may be found in statutes involving claims against the government" are presumptively amenable to equitable tolling. Arellano Br. 19. *Bailey*, which was briefly overruled by this Court's *en banc* opinion in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*), before *Henderson* was itself overturned by the Supreme Court, 562 U.S. 428 (2011), addresses whether the 120-day period in which claimants may appeal from the Board of Veterans' Appeals to the Veterans Court may be equitably tolled. *Bailey*, 160 F.3d at 1363. In *Bailey*, this Court characterized the statute that establishes that period, 28 U.S.C. § 7266, as a "statute[] specifying the time of review" – that is, a "time limit[]" that

"specif[ies] the time in which a person must remove from one adjudicative forum to another." *Id.* at 1364. The Court contrasted that "time of review" statute with a statute of limitations, narrowly characterized as "addressed to the time period . . . within which a litigant must first file suit following the point at which the cause of action arose," and then sought to determine whether a presumption regarding the availability of equitable tolling, under *Irwin*, should apply to both types of statutes. *Id.* In that context, the Court stated that *Irwin* did "not distinguish among the various kinds of time limitations that may act as conditions to the waiver of sovereign immunity required to permit a cause of action to be pitched against the United States." *Id.*

That statement falls far short of sweeping within the ambit of the equitable-tolling presumption any time limitation affecting the Government's liability on a claim. The Court, in making that statement, was addressing time limitations that perform a distinctive function: barring a court from entertaining the merits of a claim after the passage of a specified amount of time, in order to provide repose to the opposing party. That is the function of a statute of limitations, *see Lozano*, 572 U.S. at 14 – and not the function of section 5110(b)(1). *See infra* at 22-25. Indeed, soon after *Bailey*, this Court, sitting *en banc*, clarified the basis for the result in that case by repeatedly characterizing section 7266's 120-day filing period as a "statute

of limitations." *Jaquay v. Principi*, 304 F.3d 1276, 1283-84 (Fed. Cir. 2002) (*en banc*); *see also Henderson*, 589 F.3d at 1224 (Mayer, J., dissenting) (arguing that section 7266 "is properly viewed as a statute of limitations"). Thus, to the extent that *Bailey* could be read to suggest that the presumption in favor of equitable tolling has application beyond statutes of limitation, this Court subsequently corrected for any such misimpression.

2. The Discharge Rule Is Not A Statute Of Limitations

As we have demonstrated, only statutes of limitations are presumptively subject to equitable tolling. Because section 5110(b)(1) is not a statute of limitations, there is no basis for presuming that the discharge rule may be equitably tolled.

Its "functional characteristics" define a statute of limitations. *Lozano*, 572 U.S. at 15 n.6; *see In re Neff*, 824 F.3d at 1184. A limitations statute is "designed to encourage plaintiffs 'to pursue diligent prosecution of known claims,'" *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted), by "'establish[ing] the period of time within which a claimant must bring an action.'" *Lozano*, 572 U.S. at 14 (citation omitted). If a claim is not brought within the limitations period, the courts are barred from providing a remedy for the violation alleged. *Kwai Fun Wong*, 575 U.S. at 409; *Young*, 535 U.S. at 47-48. By

barring stale claims, a statute of limitations "assure[s] fairness to defendants," "prevent[ing] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (citation omitted). It "foster[s] . . . 'certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Lozano*, 572 U.S. at 14 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

Section 5110(b)(1) has none of those essential characteristics. The provision's function within the larger structure of section 5110 as a whole is not to encourage "diligent prosecution of known claims," *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2049, but instead, to a limited extent, to do the opposite: by providing an exception to the rule that benefits are not payable for dates prior to the date of receipt of claim, section 5110(b)(1) provides a one-year grace period in which veterans may *delay* filing a claim while still retaining the right to receive benefits for that period of delay. *See* 89 Cong. Rec. A4026 (1943) (statement of Rep. Rankin) (explaining that the discharge rule was adopted to "remove[] injustices where there is delay in filing [a] claim due to no fault of the veteran and payment could otherwise be made only from date of claim"); *Gaston v. Shinseki*, 605 F.3d 979, 983 (Fed. Cir. 2010).

Furthermore, unlike a plaintiff who brings a cause of action that is subject to a statute of limitations, a veteran seeking disability compensation "faces no time limit for filing a claim." *Henderson*, 562 U.S. at 431. Even if a veteran's last period of service was completed decades before, he or she may still bring and prevail on a new claim for disability compensation – as was the case for Mr. Arellano. During a veteran's lifetime, the Government can never be certain about its potential liability for VA benefits to that person, because a new "present disability" may emerge at any time, and the amount owed in connection with such a disability depends on factors including the disability's future duration, its severity over time, and the number of the veteran's dependents over time – all factors largely or entirely outside the Government's control and outside its ability to predict. Unsurprisingly, given these facts, Mr. Arellano does not make any discernible attempt to argue that the discharge rule functions as a statute of limitations,[2] nor could he persuasively do so. Because section 5110(b)(1) is not a

[2] Mr. Arellano does repeatedly conflate section 5110(b)(1) with a "time bar" – a term that typically refers to a statute of limitations, which *bars* relief for untimely claims. Arellano Br. 24-28; *see Kwai Fun Wong*, 575 U.S. at 407-11 (using the terms "time bar" and "statute of limitations" interchangeably). But he makes no express argument purporting to show that the discharge rule actually functions as a statute of limitations.

statute of limitations, Congress cannot be presumed to have intended courts to invoke equitable tolling as a means of altering the provision's timing requirement.

B. There Is No Background Principle Of Law Permitting Equitable Tolling Of Statutes Functionally Similar To Section 5110(b)(1)

Under *Irwin*'s logic, a presumption in favor of equitable tolling would apply to the discharge rule only if historical precedents disclose a well established practice of applying equitable tolling to functionally similar statutes. So far as the Government is aware, *no* precedents apply equitable tolling to a statute that serves a function similar to that of section 5110(b)(1).

1. No Court Has Equitably Tolled A Provision That, Like Section 5110(b)(1), Serves As A Rule Of Decision On The Merits Of A Successful Claim

Because disability compensation is defined, in part, by the periods of time for which it is payable, the effective date is an essential element of an award. *See* 38 U.S.C. § 5111(a); *Read v. Shinseki*, 651 F.3d 1296, 1300 (Fed. Cir. 2011) ("In *Collaro*, this court noted the 'five common elements to a veteran's application for benefits: [1] status as a veteran, [2] the existence of disability, [3] a connection between the veteran's service and the disability [(*i.e.* service connection)], [4] the degree of the disability, and [5] the effective date of the disability.'" (quoting *Collaro v. West*, 136 F.3d 1304, 1308 (Fed. Cir. 1998)). Section 5110, including section 5110(b)(1), supplies the rules of decision to be used in deciding that

essential element and, in so doing, helps to establish the amount of compensation payable based on a successful claim.[3]

Mr. Arellano cites, and we are aware of, no precedent supporting the application of equitable tolling to a statutory provision performing that function. The discharge rule is not, contrary to Mr. Arellano's argument, "similar" to 17 U.S.C. § 507(b). Arellano Br. 15-16. That statute provides, with respect to the United States Code title governing copyrights, that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). As that language indicates, the provision does not "measure[] the accrual of damages," Arellano Br. 16; rather, it is simply a statute of limitations. *Petrella*, 572 U.S. at 670-71. Consequently, if section 507(b) is subject to equitable tolling, as Mr. Arellano contends, Arellano Br. 16, that proposition says nothing about the extent to which a presumption of tolling may be applied to section 5110(b)(1).

[3] By contrast, a non-jurisdictional statute of limitations generally serves as an affirmative defense, *see* Fed. R. Civ. P. 8(c); *Allen v. Siebert*, 552 U.S. 3, 6-7 (2007), and, as such, may be waived if not raised timely by the defendant. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Because an effective date must be assigned to complete the adjudication of a granted claim for disability compensation, and because the VA is not present as a defendant during the adjudication of a claim for benefits, the provisions of 38 U.S.C. § 5110 cannot logically be viewed as either waivable or as defenses.

For similar reasons, Mr. Arellano's citation of 5 U.S.C. § 8337(b), Arellano Br. 41-42, and 19 U.S.C. § 2273(b), Arellano Br. 43-44, is also unavailing. The former provision creates a limitations period for the submission of claims for disability retirement to the Office of Personnel Management (OPM): "A claim may be allowed under this section only if the application is filed with the Office before the employee or Member is separated from the service or within 1 year thereafter." 5 U.S.C. § 8337(b). In an unpublished opinion, this Court held that section 8337(b)'s limitations period may be tolled when OPM fails to meet the notice requirements imposed by regulation. *Winchester v. Office Pers. Mgmt.*, 449 F. App'x 936, 938-39 (Fed. Cir. 2012). As with the statute of limitations for copyright infringement, however, the availability of equitable tolling with respect to section 8337(b) does not support the inference that tolling is available with respect to the discharge rule. Section 8337(b) may potentially be classified as a statute of limitations: it furthers the policies of repose and certainty by barring OPM from granting relief based on untimely applications. Section 5110(b), by contrast, does not operate in that manner.

Mr. Arellano also cites *Former Employees of Fisher & Co., Inc. v. United States Department of Labor*, 507 F. Supp. 2d 1321 (Ct. Int'l Trade 2007), in which the Court of International Trade held that equitable tolling could be invoked to

suspend "the one-year deadline for filing a petition for [trade adjustment assistance] certification contained in 19 U.S.C. § 2273(b)(1)." 507 F. Supp. 2d at 1326. But that statute, too, is fundamentally dissimilar to the discharge rule. Unlike section 5110(b)(1) – and like a statute of limitations – 19 U.S.C. § 2273(b)(1) bars the adjudicator – here, the Secretary of Labor – from granting relief in response to an untimely claim. *See* 19 U.S.C. § 2273(b) ("A certification under this section shall not apply to any worker whose last total or partial separation from the firm before the worker's application under section 2291 of this title occurred more than one year before the date of the petition on which such certification was granted."). Because section 2273(b) is not functionally similar to section 5110(b)(1), the possibility that its filing period may be tolled does not support the inference that section 5110(b)(1) is amenable to tolling.

As this analysis demonstrates, in response to the Court's question regarding the extent to which courts have "ruled on the availability of equitable tolling under statutes under other benefits programs that include timing provisions similar to § 5110," Mr. Arellano has cited two cases dealing with statutes that do not, in fact, "include timing provisions similar to" section 5110. Order, ECF No. 45, at 3 (Aug. 5, 2020). So far as we have been able to discern, there are no cases in which a court has held that a timing provision functionally similar to that of section

5110(b)(1) may be equitably tolled. That fact is fatal to Mr. Arellano's argument. In the absence of a "common-law adjudicatory principle[]" allowing equitable tolling of similar provisions, there can be no basis to read an implied tolling provision into section 5110(b)(1), and no basis to presume that equitable tolling is an available form of relief. *Lozano*, 572 U.S. at 10-11. Not even one precedent – much less an "adjudicatory principle[]" emerging from a line of such precedents – supports the proposition that a statute functionally similar to the discharge rule may be equitably tolled. Because the logic supporting the creation of the equitable-tolling presumption does not apply in this case, the presumption does not apply either.

2. Courts That Have Considered Provisions Functionally Similar To The Discharge Rule Have Refused To Find Them Subject To Equitable Exceptions

Although we have identified no cases interpreting a statute entirely analogous to section 5110, several cases address functionally similar provisions – that is, provisions that use the date on which a claim is filed to establish the date when benefits become payable, and thus help to establish the amount of compensation to be paid. The courts have consistently rejected the notion that the requirements of such provisions can be altered or excused by reliance upon an equitable doctrine.

In *Garcia Ramos v. 1199 Health Care Employees Pension Fund*, 413 F.3d 234 (2d Cir. 2005), the Second Circuit considered an employee benefits plan that provided for the payment of a pension for disability retirement. 413 F.3d at 236. According to the plan's terms, the "payment commencement date" for the disability pension would be "the first day of the month in which the payment of the Participant's Social Security disability benefits commence(d), but no earlier than two (2) years prior to the date of the filing of the application" for pension. *Id.* In other words, the plan's equivalent of an "effective date" could be as early as the date on which the plan participant began receiving Social Security disability benefits, but only if the application for pension benefits was submitted within two years of that date.

The appellant in *Garcia Ramos* retired after a fall in June 1996 and began receiving Social Security disability benefits in December 1996. *Id.* at 235-36. She did not apply for a disability pension under her employer's benefit plan until July 2001, however. *Id.* at 236. As a result, she received benefits payable beginning in August 1999 – two years prior to the submission of her application. *Id.* Before the district court for the Southern District of New York and then the Second Circuit, she argued that "a very significant mental disorder" had prevented her from filing an earlier application for pension benefits, and asserted that, pursuant to the

doctrine of equitable tolling, she should be permitted to receive benefits as of the date in 1996 she began receiving Social Security benefits. *Id.*

Both the district court and the court of appeals rejected the argument that equitable tolling could serve to alter the date as of which benefits became payable. *Id.* at 236-38. The Second Circuit, assuming for the sake of argument that equitable tolling might apply in appropriate circumstances to the terms of benefit plans, concluded that tolling could not be used to afford relief to the appellant in the circumstances presented:

> [P]laintiff-appellant is not seeking tolling of any *time limit*. She is not seeking relief from a limitations period or some other procedural provision that poses a complete bar to benefits or to review. Section 8.1 of the Plan does not set forth a statute of limitations, but, rather, provides for the 'payment commencement date' of the disability pension benefit . . . . Accordingly, section 8.1 is not subject to traditional principles of equitable tolling.

Id. at 238. In support of its reasoning, the court cited a Second Circuit case, and this Court's opinion in *Andrews*. *See id.* The Second Circuit thus has adopted the same reasoning this Court articulated in *Andrews* with respect to provisions that set an effective date based upon the time in which the underlying claim was submitted: such provisions do not serve as statutes of limitations and are therefore not subject to equitable tolling.

Like section 5110(b)(1) and the benefit plan at issue in *Garcia-Ramos*, the statutory scheme governing Social Security disability insurance identifies the date on which benefits first become payable by reference to, among other considerations, the date of claim submission. Disabled individuals who qualify for benefits may receive them for a month preceding the date of their application only if that application was submitted within one year of the month for which benefits are sought. 42 U.S.C. § 423(b). That provision, in effect, limits the period for which retroactive benefits may be paid to the year prior to the date of application. *Boock v. Shalala*, 48 F.3d 348, 350 (8th Cir. 1995). Spouses or children of disabled individuals entitled to Social Security insurance payments may also qualify for benefits, but similar statutory restrictions provide that they may receive retroactive benefits for a given month only if their own application was submitted within either the six or the 12 succeeding months, depending on specified circumstances. 42 U.S.C. § 402(j)(1).

The courts have consistently rejected arguments that those statutory restrictions should be excused or altered on equitable grounds, treating "[t]he application filing date" as a "condition precedent to entitlement to retroactive benefits." *Card v. Colvin*, No. 5:13-cv-177, 2014 WL 2510568, at *2 (N.D.N.Y. June 4, 2014); *see Yeiter v. Sec'y of Health & Hum. Servs.*, 818 F.2d 8, 10 (6th Cir.

1987) (pointing out that appellant was not entitled to retroactive benefits from an earlier date because she had not filed an application within 12 months of that date, and "'filing is a substantive condition of eligibility'" (quoting *Johnson v. United States*, 572 F.2d 697, 699 (9th Cir. 1978)); *Morton v. Barnhart*, No. 02 Civ. 4166, 2003 WL 1856530, at *4-5, 9 (S.D.N.Y. Apr. 22, 2003). Although, as Mr. Arellano points out, Arellano Br. 46, it does not appear that any court has specifically addressed the doctrine of equitable tolling as a potential means of altering the conditions imposed by sections 402(j) and 423(b), several courts have discussed a similar issue: whether a court may afford relief from the applicable limitation on retroactive benefits when a plaintiff was prevented by circumstances outside of his or her control from submitting an application on an earlier date. In each case, the court determined that such relief was unavailable because there was no permissible basis on which to deviate from the unequivocal restriction imposed by statute. *See, e.g.*, *Yeiter*, 818 F.2d at 9 (rejecting the contention that "the one-year limit on retroactive benefits" should not "apply where the failure to file for benefits arises from the disability itself, *e.g.*, as in mental incompetency"); *Donnelly v. Gardner*, 286 F. Supp. 288, 289-90 (D. Wis. 1968) (rejecting a similar argument); *Howard v. Barnhart*, No. 04 Civ. 3737, 2006 WL 305464, at *1-2

(S.D.N.Y. Feb. 7, 2006); *Carpenter v. Barnhart*, No. CV020828, 2003 WL 22071574, at *2-4 (E.D.N.Y. Aug. 29, 2003).

Amici National Veterans Legal Services Program and National Organization of Veterans' Advocates attempt to manufacture a counterweight to those decisions, asserting that "courts weighing equitable tolling of the one-year statutory deadline to file for retroactive Social Security disability insurance benefits . . . have suggested that courts also can equitably toll that statute." *Amicus* Br., ECF No. 62, at 31. That assertion lacks merit. Of the two cases said to support it, one does not address equitable tolling at all, instead discussing whether the plaintiff might be entitled to relief pursuant to a regulation permitting the Commissioner of Social Security to treat an application as having been filed earlier if a delay in filing resulted from incorrect information provided by the Social Security Administration. *See Levy v. Astrue*, No. CV 07-6412, 2009 WL 2163512, at *7 (C.D. Cal. July 16, 2009) (citing 20 C.F.R. § 416.351); *see also* 42 U.S.C. § 1383(e)(5) (authorizing the assignment of earlier, "deemed" filing date in specified circumstances). In the second case, the court, responding to the plaintiff's equitable-estoppel argument, noted in passing that "equitable tolling of limitations periods is granted in 'rare and exceptional circumstances.'" *Henry v. Comm'r of Soc. Sec.*, Civ. Action No. 2:09-CV-206, 2010 WL 11523750, at *8 (D.

Vt. July 26, 2010) (citation omitted). Then, after observing that "[c]ourts . . . have declined to find equitable exceptions to the statutory limit on retroactive [Social Security] benefits," the court rejected the plaintiff's argument. *Id.* at *8-9 (citation omitted).

Thus, in contrast to the ample body of precedent supporting the proposition that courts may toll statutes of limitations on equitable grounds, no precedent – much less a historical body of precedents sufficient to establish a background principle of law – supports the notion that courts may apply a similar approach to effective-date provisions such as the discharge rule. That fact is fatal to Mr. Arellano's argument. In the absence of a "common-law adjudicatory principle[]" allowing equitable tolling of similar provisions, there can be no basis to read an implied tolling provision into section 5110(b)(1), and no basis to presume that equitable tolling is an available form of relief. *Lozano*, 572 U.S. at 10-11; *see Meyer v. Holley*, 537 U.S. 280, 286 (2003) (stating that congressional "silence, while permitting an inference that Congress intended to apply *ordinary* background" legal principles, "cannot show that it intended to apply an unusual modification of those rules").

C. Any Logic Used To Justify The Application Of A Presumption In Favor Of Equitable Tolling To Section 5110(b)(1) Could Likely Be Extended To Support The Application Of That Presumption To Numerous Provisions That Have Never Before Been Deemed Subject To Equitable Exceptions

For the reasons already provided, there exists no reasonable basis for inferring that Congress intended to allow the VA or the courts to apply the doctrine of equitable tolling to the one-year period described in section 5110(b)(1). Without such a basis for believing that equitable tolling would be consistent with congressional intent, no presumption in favor of such tolling may be applied to the discharge rule.

Given those facts, the Government cannot predict with confidence the legal consequences for other provisions of section 5110 – or other Federal statutes – if this Court were to "hold[] that *Irwin*'s rebuttable presumption applies to § 5110(b)(1)." Order, ECF No. 45, at 3. The logical implications of such a holding would depend upon the reasoning underpinning it, and we do not know what such reasoning would be. If the Court were to adopt the reasoning urged by Mr. Arellano, as we understand it, the Court would hold that a presumption in favor of equitable tolling applies to any nonjurisdictional statutory provision that conditions any result upon the time period in which a filing is submitted or received. *See* Arellano Br. 10, 15. Such reasoning could sweep within the reach of

the equitable-tolling presumption every subsection contained in 38 U.S.C. § 5110 – even the default effective-date rule, section 5110(a)(1).

Although section 5110(a)(1) does not, unlike section 5110(b)(1), specify a time period in which a claim must be received in order to result in the assignment of the specified effective date, it could easily be framed as "contain[ing] a filing deadline that affects a veteran's ability to seek compensation in a claim against the government." Arellano Br. 15. Barring the applicability of an exception to the default rule, if a veteran wishes to have the opportunity to receive compensation for a given date, the underlying claim must be received by the VA before "the first day of the calendar month" containing that date. 38 U.S.C. § 5111(a)(1). A claimant therefore could – and no doubt would, if this Court were to adopt a view of the applicability of the tolling presumption as sweeping as that urged by Mr. Arellano – argue that the last day of the calendar month preceding the month containing the date for which benefits are sought serves as the "filing deadline that affects a veteran's ability to seek compensation in a claim against the government." Arellano Br. 15.

That the tolling presumption might theoretically be applicable to section 5110(a)(1) under Mr. Arellano's reasoning emphasizes the extent to which that reasoning is flawed. Tolling traditionally refers to the temporary suspension of the

passage, or running, of the time period in which a filing must be made. *See United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991). As even Mr. Arellano concedes, the operation of tolling is incompatible with the structure of section 5110(a)(1), which does not describe a "defined time period . . . that could be paused and then restarted via tolling," Arellano Br. 41, but instead merely says that the date the VA receives an application will serve as the effective date.

In addition to the default effective-date rule and the discharge rule, Mr. Arellano's expansive approach to equitable tolling would likely render the tolling presumption applicable to every paragraph in section 5110 that refers to the timing of claim receipt or submission, requiring "one . . . to assume an implied exception for tolling virtually every time a number appears." *United States v. Brockamp*, 519 U.S. 347, 352 (1997). Such a result is consistent neither with Supreme Court precedent nor with congressional intent, as reflected in the carefully drawn system of effective-date rules codified in section 5110.

III. Even If A Presumption In Favor Of Equitable Tolling Were Applicable To 38 U.S.C. § 5110(b)(1), That Presumption Would Rebutted By The Text And History Of Section 5110, As Well As The Statutory Scheme Governing Veterans Benefits

For the reasons already provided, no presumption in favor of equitable tolling applies to the discharge rule. But even if such a presumption were applicable, it would be rebutted: equitable tolling is not compatible with the

language of section 5110 or with the statutory scheme governing veterans' benefits. *See United States v. Beggerly*, 524 U.S. 38, 48 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."); *Brockamp*, 519 U.S. at 350 (stating that the doctrine of equitable tolling does not apply if "there [is] good reason to believe that Congress did *not* want [it] to apply").

A. Equitable Tolling Is Incompatible With The Text Of 38 U.S.C. § 5110

Both the plain language and the structure of 38 U.S.C. § 5110 make clear that Congress did not intend to include an implied exception for equitable-tolling in its carefully drawn set of rules for determining effective dates. As a result, section 5110(b)(1) may not be equitably tolled.

1. Section 5110 Expressly Prohibits Implied Exceptions, And Therefore Prohibits Equitable Tolling

By default statutory rule, "the effective date of an award . . . of compensation, dependency and indemnity compensation, or pension" may not precede the date of the VA's receipt of the underlying application for the benefit in question. 38 U.S.C. § 5110(a)(1). The numerous subsections of 38 U.S.C. § 5110 set out more than a dozen exceptions to that rule. *Id.* § 5110(b)-(n). Section 5110(b)(1), the discharge rule, serves as such an exception by providing that the

day after the date of discharge will serve as the effective date if the veteran's application for benefits is received by the VA within a year of discharge. *Id.* § 5110(b)(1).

Application of the doctrine of equitable tolling to the discharge rule would, in effect, insert an additional, unwritten exception into section 5110, providing that the day after the date of discharge will be treated as the effective date of an award even if the veteran did *not* submit the underlying application within one year of discharge, so long as the veteran, despite due diligence, was prevented by "some extraordinary circumstance" from filing within that period. *Lozano*, 572 U.S. at 10; *see Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014). Section 5110 expressly prohibits any such implied exception:

> *Unless specifically provided otherwise in this chapter*, the effective date of an award . . . 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) (emphasis added). By stating that any exceptions to its rule must be provided both "specifically" and "in this chapter," that language makes plain that Congress did not want the VA or the courts to create additional exceptions to the default effective-date rule based upon such extra-statutory authority as the judge-made doctrine of equitable tolling. Section 5110's express

prohibition of precisely the outcome that would result from the application of equitable tolling to section 5110(b)(1) would easily rebut any presumption in favor of tolling, even if one were applicable.

2. Section 5110's Enumeration Of Exceptions, Including Exceptions Accounting For Equitable Concerns, Indicates That No Further Exceptions Are To Be Implied

Section 5110's enumeration of a wide range of detailed, technical exceptions to the default effective-date rule weighs against the proposition that additional, unwritten exceptions are permissible. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980))); *Brockamp*, 519 U.S. at 352 (explaining that a statute's "detail," "technical language," and "explicit listing of exceptions" were factors pointing to the conclusion that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote").

Those specifically enumerated exceptions include several provisions that permit the assignment of an effective date preceding the date of application receipt in response to events or circumstances that may cause life disruptions and so delay the submission of a claim: discharge from the military, 38 U.S.C. § 5110(b)(1); an

increase in the severity of a disability, *id.* § 5110(b)(3); the progression of a disability to the point that a veteran has become "permanently and totally disabled," *id.* § 5110(b)(4); the death of a spouse, *id.* § 5110(d); the need to obtain a correction of military records in order to qualify for VA benefits, *id.* § 5110(i). Again, these enumerated exceptions indicate that Congress has already identified those "equitable" concerns that it believes warrant an easing of the default effective-date rule – and has not left room for the VA or the courts to improvise. *See, e.g.*, *Brockamp*, 519 U.S. at 351-52; *Elgin v. Dep't of Treasury*, 567 U.S. 1, 13 (2012) (inferring that, because Congress had expressly provided for a specified exception to the general rule providing for exclusive Federal Circuit review of certain decisions of the Merit Systems Protection Board, the absence of additional statutory exceptions "indicates that Congress intended no such exception").

That proposition is confirmed by the legislative history of section 5110(b)(1), which was adopted as an exception to the default effective date rule in order to "remove injustices where there is delay in filing claim due to no fault of the veteran and payment could otherwise be made only from the date of claim." 89 Cong. Rec. A4026 (1943) (statement of Rep. Rankin regarding Pub. L. No. 78-144). Congress has thus already weighed the extent to which it wished to make an exception to the default effective-date rule for veterans for whom there was "delay

in filing" through "no fault" of their own – and it determined that one year of relief from the operation of the default rule after discharge was appropriate to account for such equitable concerns. Relying upon the doctrine of equitable tolling to create an additional exception to address those same concerns "would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the" default rule. *Stephens v. United States*, 884 F.3d 1151, 1159 (Fed. Cir. 2018) (quoting *United States v. Dalm*, 494 U.S. 596, 610 (1990)).

Furthermore, the text of section 5110 makes clear that Congress considered precisely the sort of circumstances that Mr. Arellano alleges prevented him from filing a claim within one year of his discharge – and chose not to afford relief from the default effective-date rule based on such circumstances in connection with claims for disability compensation. Section 5110(b)(4) addresses the situation of a "veteran who is permanently and totally disabled and who is prevented by a disability from" submitting an application to the VA "for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled." 38 U.S.C. § 5110(b)(4)(B). If a veteran meeting those criteria applies for disability *pension* – not compensation – within one year from "the date on which the veteran became permanently and totally disabled," then the VA may use that date as the effective date of the award. *Id.* § 5110(b)(4)(A). No provision

allows the same relief for similarly-situated veterans seeking disability *compensation*, however.[4]

The inclusion of that provision in section 5110 clearly indicates that Congress considered the possibility that the very disability leading a veteran to apply for benefits might delay the submission of an application. By providing an alternative effective-date rule for some, but not all, applicants facing those circumstances, Congress implied that it did not intend an alternative rule to apply to those applicants not meeting section 5110(b)(4)'s criteria. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate where, as here, Congress has shown that it knows how to adopt the omitted language or provision."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

Significantly, even when Congress did craft a more lenient effective-date rule for certain totally disabled veterans, it still limited to one year the period by

[4] Disability pension is payable to "each veteran of a period of war" who meets specified "service requirements" and "is permanently and totally disabled from non-service-connected disability not the result of the veteran's willful misconduct." 38 U.S.C. § 1521.

which the effective date could precede the date of the underlying application. *See* 38 U.S.C. § 5110(b)(4)(A). In fact, in almost every instance in which it authorized the assignment of an effective date preceding the date of application, Congress limited the duration of the period that could separate the effective date and the application date to, at most, one year. *See id.* § 5110(b)(1), (b)(2)(A), b(4)(A), (c), (d), (e)(1), (e)(2), (f), (g), (i), (j), (k), (l), (n).[5] That emphatic insistence upon a one-year limit is also inconsistent with the "open-ended" exceptions that could be read into section 5110 in reliance upon the doctrine of equitable tolling. *Brockamp*, 519 U.S. at 352; *see also id.* at 351 (finding a statute incompatible with equitable tolling in part because that statute "reiterates its limitations several times in several different ways").

In sum, section 5110 "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* at 350. The statutory text removes any doubt on that score by expressly providing that its default rule does not allow for implicit exceptions. *See*

[5] Even when adopting remedial legislation specifically intended to address the situation of veterans whose claims may have been denied because supporting evidence was classified and veterans were "sworn to secrecy," Congress declined to allow the award of compensation for any period preceding the date of a previously denied application. Harry W. Colmery Veterans Educational Assistance Act of 2017, Pub. L. No. 115-48, § 502(a)(4)(A), (a)(6).

38 U.S.C. § 5110(a)(1). Because the application of equitable tolling to the discharge rule would require the existence of just such an implicit exception, the text of section 5110 would rebut any presumption in favor of equitable tolling even if one were applicable.

B. As A Limitation Upon The Amount Of Recovery, The One-Year Period Of Section 5110(b)(1) Is Not Subject To Equitable Tolling

The statutory scheme creating and governing the right to disability compensation heavily favors the payment of limited amounts of compensation on a monthly basis, as opposed to the award of large lump sums. Qualifying veterans with service-connected disabilities are entitled to "compensation as provided" by statute, 38 U.S.C. § 1110; the "compensation" in question is defined, in relevant part, as "a monthly payment made by the Secretary [of Veterans Affairs] to a veteran because of service-connected disability." 38 U.S.C. § 101(13). Similarly, rates of compensation, fixed by statute, are expressed as amounts payable monthly. *Id.* § 1114.

Although disability compensation is, by definition, a monthly payment, awards of compensation for periods preceding the date of award are paid in a lump sum. *See Nolan v. Nicholson*, 20 Vet. App. 340, 348 (2006). Section 5110's effective-date scheme is structured to minimize the size of such lump-sum payments. In general, as provided by 38 U.S.C. § 5110(a), "the effective date of an

award of disability benefits can be no earlier than the date of application for such benefits." *McCay*, 106 F.3d at 1579. By preventing any right to payment from accruing prior to the submission of an application, the default effective-date rule ensures that, to the extent any lump-sum payment is made upon the granting of a claim, it results only from the accumulation of monthly payments during the time the claim is under review – a factor at least partially within the VA's control, and therefore consistent with the proposition that Congress wished to limit the Government's exposure to liability for large amounts of retroactive compensation. Although section 5110 establishes exceptions to its default rule, those exceptions also limit the size of lump-sum awards by incorporating timing requirements that function as caps on the amount of compensation recoverable for periods preceding the VA's receipt of the underlying claim.

For example, in providing that the day after discharge will be assigned as an effective date if an application is received within a year of a veteran's discharge, section 5110(b)(1) does not simply prescribe a timing condition: it limits the amount of benefits that may be paid for the period preceding an application. If the day after discharge may be assigned as an effective date only for claims that are submitted within 12 months after discharge, then any awards to which section 5110(b)(1) is applicable will result in the payment of retroactive compensation for

no more than 12 months preceding the date of application. That limitation upon the time for which retroactive compensation is payable serves, in turn, as a restriction upon the amount of benefits that may be paid in a lump sum upon issuance of an award.

Because the one-year period described in section 5110(b)(1) functions as a limitation upon the initial amount payable upon the award of benefits, it may not be equitably tolled. *See Brockamp*, 519 U.S. at 352 (declining to interpret a statute of limitations as subject to tolling where, among other factors, such an interpretation "would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery – a kind of tolling for which we have found no direct precedent"); *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996) (holding that a statutory provision was not amenable to tolling because it "is not a statute of limitation; rather, it is a cap on permissible recovery amounts"). A contrary rule would allow courts to usurp Congress' constitutional prerogative to make the "difficult judgments" that determine how "public funds will be spent" – a result prohibited by the Appropriations Clause. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990).

C. Equitable Tolling Of The Discharge Rule Is Inconsistent With The Statutory Scheme Governing Veterans' Benefits

Equitable tolling of section 5110(b)(1) is inconsistent with the statutory scheme governing veterans' benefits at in least two distinct ways. First, to read an implied exception for equitable tolling into the discharge rule, this Court would have to conclude that Congress intended the VA, an administrative agency possessing only the authority conferred by statute, to wield the equitable power of an Article III court – an untenable proposition. Second, allowing equitable tolling of section 5110(b)(1) would introduce a new, fact-intensive, highly individualized inquiry into a process – the determination of an effective date – that would otherwise be relatively straightforward. The introduction of that additional complexity into the VA benefits system would have predictable adverse effects upon the efficiency of adjudication, while yielding advantages to very few claimants. There can be no reasonable basis for attributing to Congress the intent to produce such a result.

1. Reading An Exception For Equitable Tolling Into Section 5110(b)(1) Would Require The Attribution Of Non-Existent Equitable Power To The VA

To accept the proposition that Congress intended section 5110(b)(1) to be subject to equitable tolling, it is necessary to believe that Congress expected the VA to exercise the equitable powers of a court – a dubious proposition. The

provision now codified at section 5110(b)(1) was adopted, with minor linguistic variations from its current form, in 1943. *See* Pub. L. No. 78-144, § 17, 57 Stat. 554, 560 (1943). It was subsequently re-enacted in 1957, along with several other effective-date provisions now found in section 5110, as part of an effort to simplify and clarify the laws governing veterans' benefits. Pub. L. No. 85-56, § 910, 71 Stat. 83, 119 (1957). Judicial review of the VA's decisions regarding benefits, on the other hand, was not instituted until 1988. *Wingard v. McDonald*, 779 F.3d 1354, 1357 (Fed. Cir. 2015).

Given those facts, Congress could only have intended the discharge rule to be subject to equitable tolling if it expected the VA to exercise a court's equitable authority. The doctrine of equitable tolling, after all, "derive[s] from the traditional power of the court to 'apply the principles . . . of equity jurisprudence.'" *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2050 (quoting *Young*, 535 U.S. at 50); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013) ("*Irwin* itself, and equitable-tolling cases we have considered both pre- and post-*Irwin*, have generally involved time limits for filing suit in federal court."). But an administrative agency such as the VA, unlike Article III courts, has no traditional equitable power; an agency is "a 'creature of statute, having no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" *Nat. Res.*

Def. Council v. Nat'l Highway Safety Admin., 894 F.3d 95, 108 (2d Cir. 2018) (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)).

No statute confers authority akin to a court's equitable power upon the VA, with the sole, narrow exception of 38 U.S.C. § 503. That statute, titled "Administrative error; equitable relief," authorizes the VA to "provide such relief . . . as the [VA] determines is equitable" if an individual has been deprived of benefits because of an administrative error, or has "suffered loss" in reliance upon an erroneous VA entitlement decision. 38 U.S.C. § 503(a)-(b). That provision plainly does not encompass the full doctrine of equitable tolling.

In light of these considerations, it is simply not plausible to suggest that Congress, having placed unambiguous statutory limits upon the availability of the effective date identified in the discharge rule, implicitly intended the VA to draw upon the traditional equitable powers of the courts to deviate from those statutory limits in circumstances agency employees found appropriate. Nor is there a convincing argument to be made that Congress' intentions on that score might have changed when the Veterans' Judicial Review Act was passed in 1988. Even when Congress made the VA's decisions subject to regular judicial review, it still required the VA to "decide *all* questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to

veterans," 38 U.S.C. § 511(a) (emphasis added) – meaning that, if a request for equitable tolling must be resolved to decide a claim for benefits, the VA, an administrative agency with no judicial equitable power, must resolve it.[6] Both historically and currently, then, the notion that section 5110(b)(1) is amenable to equitable tolling is fundamentally incompatible with the structure of the system by which claims for veterans' benefits are decided.

2. Equitable Tolling Of Section 5110(b)(1) Would Introduce A Fact-Intensive, Open-Ended Inquiry Into The Administration Of An Otherwise Straightforward Effective-Date Rule

The discharge rule, like many other subsections of section 5110, shares with the default effective-date rule set forth in section 5110(a)(1) a characteristic that is particularly salient here: ease of administration. The default rule sets as the earliest possible effective date of an award a date that is easily ascertainable by the VA: the date on which the underlying claim is received. 38 U.S.C. § 5110(a)(1). Section

[6] We do not mean to suggest that the VA lacks any power to excuse the failure to meet a true filing deadline. The VA is authorized by regulation, for example, 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). But the VA's authority to issue that regulation arises from its "authority to prescribe all rules and regulations which are necessary and appropriate to carry out the laws administered by the Department," not from an inherent equitable power. 38 U.S.C. § 501(a). The VA has promulgated no regulation permitting the agency to waive section 5110(b)(1)'s timing condition – nor would such a regulation comport with the statutory text.

5110(b)(1) sets as the earliest possible effective date for a qualifying claim another easily ascertainable date: the day after the veteran's date of discharge. *Id.* § 5110(b)(1).

Bright-line rules turning upon easily ascertainable facts serve a vital function in a large administrative program. *See Brockamp*, 519 U.S. at 352-53. During the 2019 fiscal year, the Veterans Benefits Administration (VBA) managed the cases of more than 5.7 million veterans and survivors of veterans who received compensation or pension benefits. U.S. Dep't of Veterans Affairs, 3 FY 2021 Budget Submission: Benefits and Burial Programs and Departmental Administration, at VBA-50 (2020).[7] VBA completed review of more than 1.4 million claims for compensation or pension during that same year. *Id.* at VBA-51. For their part, the roughly 100 administrative judges serving on the Board of Veterans' Appeals issued approximately 95,000 decisions during the 2019 fiscal year, leaving roughly 121,000 appeals pending with the board and awaiting decision at the conclusion of that time period. Board of Veterans' Appeals, Annual

[7] *Available at* https://www.va.gov/budget/docs/summary/fy2021VAbudgetvolumeIIIbenefitsBurialProgramsAndDeptmentalAdministration.pdf.

Report Fiscal Year (FY) 2019, at 23, 26, 29.[8] Due in part to that massive volume of claims and appeals, veterans have endured long delays in receiving decisions on their claims. *See, e.g.*, H.R. Rep. No. 115-135, at 5 (2017).

"To read an 'equitable tolling' exception into" section 5110 "could create serious administrative problems by forcing" the VA to assess a large volume of claims submitted by veterans asserting entitlement to an award effective as of the day after discharge even though they failed to submit their claims within a year of that date. *Brockamp*, 519 U.S. at 352. Deciding such claims would require VA regional offices and the Board of Veterans Appeals to ascertain, in a nonadversarial system involving little traditional discovery, whether each veteran claiming the right to equitable tolling had, in fact, been prevented from filing within the year after discharge by some extraordinary circumstance – a notoriously "fact-intensive" inquiry. *Holland*, 560 U.S. at 654 (citation omitted). The results produced by such an open-ended inquiry would likely vary widely between adjudicators, resulting either in disparate outcomes or additional layers of review in an attempt to ensure some degree of uniformity.

[8] *Available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf.

Equitable tolling would thus add even more complexity to an already overburdened administrative system, slowing the claims-resolution process further. At the same time, because equitable tolling is, by tradition and design, a form of relief that is to be afforded "only sparingly," *Irwin*, 498 U.S. at 96, it is likely that the number of requests for tolling would far exceed the number of cases in which it was properly granted. For most individuals seeking benefits, such programmatic results are not "pro-claimant," Arellano Br. 28, nor are they likely to be consistent with congressional intent. *See Brockamp*, 519 U.S. at 353 (concluding that, given the "administrative problem" that would have been posed by allowing equitable tolling of the statute of limitations for filing a request for tax refund, "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires").

D. The History Of Section 5110 Indicates That This Court Reached The Correct Result in *Andrews*

The history of section 5110 supports the conclusion that the doctrine of equitable tolling may not be invoked to alter the timing requirement of the discharge rule. Section 5110 is an often amended statute. Since 2003, when this Court held that "principles of equitable tolling . . . are not applicable to the time

period in § 5110(b)(1)," *Andrews*, 351 F.3d at 1137, Congress has passed at least three laws making significant changes to section 5110's effective date provisions, including revisions made in 2017 as part of the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55, § 2(l), 131 Stat. 1105, 1110. *See also* Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 305, 118 Stat. 3598, 3611-12 (liberalizing an exception to the default effective-date rule concerning the effective date of death pension); Honoring America's Veterans and Caring for Camp LeJeune Families Act of 2012, Pub. L. No. 112-154, § 506, 126 Stat. 1165, 1193-94 (adding an exception to the default rule to be applied in the case of "an original claim that is fully-developed").

Congress, presumed to be aware of this Court's holding in *Andrews*, *see Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010), thus has had "ample opportunity to amend" section 5110 to allow for equitable tolling of the one-year period referenced in the discharge rule. *Burris v. Wilkie*, 888 F.3d 1352, 1360 (Fed. Cir. 2018). The lack of congressional action on that score points again to the same proposition that follows from the statutory text: Congress did not intend the VA or the courts to read an exception for equitable tolling into section 5110. *See id.*

E. The Nonjurisdictional Character Of Section 5110 Does Not Indicate That Section 5110(b)(1) Is Amenable to Equitable Tolling

Mr. Arellano dedicates a significant portion of his brief to the argument that section 5110(b)(1) "is not jurisdictional," Arellano Br. 24, apparently in the belief that "[w]ithout a clear indication' that Congress intended § 5110 to cabin the jurisdiction of the Veterans Court, it must be treated as a nonjurisdictional claim-processing rule subject to equitable exceptions." *Id.* at 27. The first proposition – that section 5110 does not limit the jurisdiction of the Veterans Court or VA adjudicators – is obviously true. The second – that, if section 5110 does not limit the jurisdiction of adjudicators, it "must be treated as a nonjurisdictional claim-processing rule subject to equitable exceptions" – is plainly wrong.

A statute or rule is "jurisdictional" if it imposes a condition whose failure "deprives a court of all authority to hear a case." *Kwai Fun Wong*, 575 U.S. at 408-09. Indisputably, neither the discharge rule itself nor section 5110 as a whole fits that definition. The failure of the timing condition set forth in section 5110(b)(1) – the claimant's failure to transmit the claim to the VA within a year of discharge – does not result in the VA or any court losing "jurisdiction" to adjudicate the claim; instead, the discharge rule simply does not apply, and so another provision of section 5110 must serve to establish the effective date of the award. Similarly, section 5110 as a whole obviously does not define the extent of

any tribunal's power to review a claim; it simply prescribes rules for setting an effective date. Indeed, section 5110 only becomes relevant when the VA does have authority to decide a claim; if the claim is not meritorious, so as to warrant an award, there is no need to assign an effective date.

That section 5110 does not define a tribunal's jurisdiction, however, does not render the statute a mere "claim-processing rule" or weigh in favor of the application of "equitable principles." Arellano Br. 27. Many, if not most, statutory provisions governing the extent to which a court may grant relief on a claim are neither jurisdictional limitations nor claim-processing rules; instead, they are "elements of a cause of action" – the rules of decision on the merits of the claim. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding that "the threshold number of employees for application of Title VII [of the Civil Rights Act of 1964] is an element of a plaintiff's claim for relief, not a jurisdictional issue"). Section 5110, because it supplies the rules that determine, in part, the amount of compensation due on a successful claim, falls into that category. *See Read*, 651 F.3d at 1300.

More importantly for present purposes, Mr. Arellano mistakes the relationship between a statute's (non)jurisdictional character and equitable tolling. Plainly, a jurisdictional statute cannot be equitably tolled. *Kwai Fun Wong*, 575

U.S. at 408. The inverse proposition – that a nonjurisdictional statute necessarily *can* be equitably tolled – does not logically follow and, indeed, has been expressly rejected by the Supreme Court. *Id.* n.2 (agreeing that even a "nonjurisdictional statute of limitations" may not allow equitable tolling); *see Henderson*, 562 U.S. 428, 442 n.4 (2011) (determining that the time limit for filing a notice of appeal in the Veterans Court is nonjurisdictional, but "express[ing] no view on" whether "the 120-day deadline . . . is subject to equitable tolling"). To determine whether a nonjurisdictional statute permits equitable tolling, a court must gauge congressional intent on that specific issue, not on the matter of jurisdiction. *See Lozano*, 572 U.S. at 10.

The jurisdictional character of a statute is thus determinative in an equitable tolling context only if the statute does define the court's jurisdiction and, hence, prohibit tolling. If it does not – as in this case – then the question of jurisdiction has no further relevance in determining the extent to which tolling is permitted.

In this case, the text, context, and history of section 5110 make plain that Congress did not intend for the VA – or courts – to disrupt the statute's carefully drawn scheme for effective dates by invoking the doctrine of equitable tolling. As a result, the one-year period described in section 5110(b)(1) may not be equitably

tolled – regardless of the statute's nonjurisdictional character, and regardless of the extent to which a presumption in favor of equitable tolling does or does not apply.

CONCLUSION

For these reasons, we respectfully request that the judgment of the Veterans Court in this matter be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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