2020-1073

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ADOLFO R. ARELLANO,

Claimant-Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims, Judge Allen in Case No. 18-3908.

SUPPLEMENTAL BRIEF FOR APPELLANT ADOLFO R. ARELLANO ON SUA SPONTE REHEARING EN BANC

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September 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1073

Short Case Caption Arellano v. Wilkie

Filing Party/Entity Adolfo R. Arellano

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: September 21, 2020 Signature: /s/ *James R. Barney*

Name: James R. Barney

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
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Adolfo R. Arellano	Adolfo R. Arellano	

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

No other appeal in or from this action was previously before this or any other appellate court, other than the United States Court of Appeals for Veterans Claims ("Veterans Court"), the judgment of which is the subject of this appeal.

Counsel knows of no other case pending in this Court or any other court that may directly affect, or be directly affected by, the Court's decision on appeal.

STATEMENT OF JURISDICTION

This appeal is from a final judgment of the Veterans Court, issued August 14, 2019, in Case No. 18-3908, finding the application of equitable tolling unavailable for 38 U.S.C. § 5110(b)(1) as a matter of law. The Veterans Court had jurisdiction to make this ruling under 38 U.S.C. § 7252(a).

Appellant Adolfo R. Arellano ("Appellant" or "Mr. Arellano") filed a timely notice of appeal on October 7, 2019. This Court has jurisdiction under 38 U.S.C. § 7292(c).

I. QUESTIONS PRESENTED IN THE EN BANC ORDER

This Court has requested supplemental briefing on the following questions:

A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)?

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

C. Assuming this Court holds that *Irwin*'s rebuttable presumption applies to § 5110(b)(1), would such a holding extend to any additional provisions of § 5110, including but not limited to § 5110(a)(1)?

D. To what extent have courts ruled on the availability of equitable tolling under statutes in other benefits programs that include timing provisions similar to § 5110?

II. INTRODUCTION

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). On the other hand, if a disability claim is not filed within this one-year period, the effective date of any award "shall

not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). Thus, the one-year filing deadline of § 5110(b)(1) can significantly limit a veteran's award of compensation for a service-connected disability. This appeal presents a simple but important question: can the one-year filing period of § 5110(b)(1) be equitably tolled for good cause?

Mr. Arellano suffers from a severe schizoaffective disorder, which the Department of Veterans Affairs ("VA") has found to be service connected with an effective date of June 3, 2011. Appx1443.[1] Mr. Arellano contends that he is entitled to an earlier effective date and that his mental disorder prevented him from timely filing an application for disability within one year of his discharge from the U.S. Navy. Appx553. In the proceedings below, he presented facts showing that the one-year filing period of § 5110(b)(1) should be equitably tolled based on exceptional circumstances. Appx554-565.

The Veterans Court refused to consider whether the particular facts of this case warrant equitable tolling because, under its interpretation of this Court's decision in *Andrews*, any equitable tolling of § 5110(b)(1) "is squarely foreclosed by binding precedent." Appx4. The Veterans Court held that *Andrews* "dooms

[1] References to "Appx" are to the joint appendix submitted with the briefing before the panel.

appellant's sole argument" because, "[a]s the law stands today, . . . section 5110 is not subject to equitable tolling." Appx5.

In a footnote, the Veterans Court acknowledged Judge Newman's concurrence in *Butler* but failed to grapple with its substance. Appx5 n.20 (citing *Butler v. Shinseki*, 603 F.3d 922, 926-28 (Fed. Cir. 2010) (Newman, J., concurring in the result)). The concurrence in *Butler* provides a clear explanation for why this Court's decision in *Andrews* should *not* be interpreted in the manner the Veterans Court has done here:

> The Veterans Court held that the Federal Circuit decision in *Andrews* . . . bars the availability of equitable tolling or extension of the § 5110(b)(1) one-year retroactivity period, whatever the circumstances. *That is an incorrect interpretation of our decision*, and requires clarification lest the error be perpetuated.

Butler, 603 F.3d at 926 (emphasis added) (citation omitted); *see also id.* at 927 ("The *Andrews* court did not hold that equitable tolling is never available for the time period in § 5110(b)(1).").

The error that Judge Newman feared would be perpetuated by the Veterans Court has indeed been perpetuated and now presents itself here. *See also Noah v. McDonald*, 28 Vet. App. 120, 128-29 (2016) (interpreting *Andrews* to bar tolling of not only § 5110 but *all* "effective-date provisions for the award of VA benefits"); *Titone v. McDonald*, 637 F. App'x 592, 593 (Fed. Cir. 2016) (interpreting *Andrews* as holding that "equitable tolling does not apply to § 5110(b)(1)"). For the reasons

explained below, this Court should reverse the Veterans Court's holding that equitable tolling is categorically unavailable for the filing deadline of § 5110(b)(1) under any circumstances. The Court should also take this opportunity, while sitting en banc, to overrule or clarify *Andrews* to make clear that it does not categorically preclude the application of equitable tolling to § 5110(b)(1).

III. BACKGROUND

A. The Statute at Issue

Section 5110 of title 38 is titled "Effective dates of awards." 38 U.S.C. § 5110. Two of its provisions are at issue here. First, § 5110(a)(1) sets forth the basic rule that the effective date of a disability award cannot be earlier than the date the application for that award was received, except as "provided otherwise in this chapter":

> 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) provides a retroactivity allowance for awards that are applied for within one year of 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.

38 U.S.C. § 5110(b)(1).

B. Appellant's Military Service and Related Disabilities

Mr. Arellano served honorably in the U.S. Navy from November 1977 to October 1981. Appx865. Mr. Arellano's psychiatric problems include prolonged schizoaffective disorder and bipolar disorder with post-traumatic stress disorder ("PTSD"). Appx2780. The VA found that symptoms of these disorders were causally linked to trauma he suffered while in service when he was working on the USS Midway aircraft carrier during a collision that killed and injured several of his shipmates. Appx1444.

Mr. Arellano's treating physician at the Miami VA Healthcare System determined that the causation of Mr. Arellano's mental illness "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 . . . ." Appx529. He concluded that "the psychiatric symptoms resulting from this well documented trauma rendered [Mr. Arellano] 100% disabled since 1980." Appx529.

C. Proceedings Below

1. Proceedings Before the Department of Veterans Affairs

The VA Regional Office ("RO") in St. Petersburg, Florida, assigned Mr. Arellano a 100% disability rating for his psychiatric disorders with an effective

date of June 3, 2011, which was the date the RO received his original claim for service connection. Appx1445; Appx1447. Mr. Arellano, through his brother as his representative, appealed the decision, claiming an earlier effective date of January 1, 1982, for his psychiatric disability. Appx955. The Board of Veterans' Appeals ("Board"), like the RO, found that "the RO assigned the earliest possible effective date for its grant of service connection for schizoaffective disorder bipolar type with PTSD" because the claim for service connection based on mental disability was originally filed on June 3, 2011. Appx506-507.

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." Appx508. Nevertheless, the Board declined to even consider a claim for equitable tolling because it construed this Court's decisions as categorically barring equitable tolling of the one-year filing period of § 5110(b)(1) under any circumstances. Appx508-509 (citing *Rodriguez v. West*, 189 F.3d 1351 (Fed. Cir. 1999)).

2. Proceedings Before the Veterans Court

Mr. Arellano timely appealed the decision of the Board to the Veterans Court and again argued that the unique facts of this case warrant equitably tolling the one-year filing deadline of § 5110(b)(1). Appx100-101. The Veterans Court dismissed that argument and held that *Andrews* categorically precludes application of equitable tolling to § 5110. Appx4 (Mem. Decision 3) ("Appellant's argument is squarely

foreclosed by binding precedent. In *Andrews v. Principi*[,] the Federal Circuit addressed whether section 5110 was subject to equitable tolling. It rejected that argument." (citations omitted)); *see also* Appx4 ("[T]his Court and the Federal Circuit have considered whether section 5110 is subject to equitable tolling and have found that it is not." (quoting *Taylor v. Wilkie*, 31 Vet. App. 147, 154 (2019))).

Thus, the Veterans Court did not reach the merits of Mr. Arellano's equitable tolling argument because it held that equitable tolling is inapplicable to § 5110 under any circumstances. Appx4.

IV. STANDARD OF REVIEW

This Court reviews a statutory interpretation by the Veterans Court de novo. *Dambach v. Gober*, 223 F.3d 1376, 1380 (Fed. Cir. 2000). This Court has exclusive jurisdiction to "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [§ 7292], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c); *Smith v. Nicholson*, 451 F.3d 1344, 1347 (Fed. Cir. 2006).

Except where a constitutional issue is presented, this Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

V. ARGUMENT

A. Response to Question A of the En Banc Order

1. Under *Irwin*, There Is a Rebuttable Presumption That 38 U.S.C. § 5110(b)(1) Is Amenable to Equitable Tolling

In *Irwin*, the Supreme Court set forth the proper framework for deciding "the applicability of equitable tolling in suits against the Government." 498 U.S. at 95. The *Irwin* Court began by acknowledging that its previous approach of deciding equitable tolling cases "on an ad hoc basis" had "the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* Accordingly, the Court decided to "adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id.*

The general rule adopted in *Irwin* is that the same equitable tolling principles available in private litigation are available to claims brought against the government, barring congressional instruction otherwise. As the Court explained:

> Once Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

Id. at 95-96. This rebuttable presumption is the appropriate starting point for determining whether the statute at issue here, 38 U.S.C. § 5110(b)(1), is amenable to equitable tolling.[2] *See United States v. Kwai Fun Wong*, 575 U.S. 402, 407-08 (2015) (applying *Irwin*'s rebuttable presumption as the starting point in determining whether 28 U.S.C. § 2401(b) is subject to equitable tolling); *Bailey v. West*, 160 F.3d 1360, 1363-64 (Fed. Cir. 1998) (en banc) (applying *Irwin*'s rebuttable presumption in determining whether 38 U.S.C. § 7266(a) is subject to equitable tolling).

The Supreme Court and this Court have recognized that the rebuttable presumption of *Irwin* applies to various types of statutes containing time limitations or filing deadlines. For instance, in *Kwai Fun Wong*, the Supreme Court held that *Irwin*'s rebuttable presumption applies to 28 U.S.C. § 2401(b), despite its strict language that a tort claim against the United States "shall be forever barred" unless it is presented to the "appropriate Federal agency within two years after such claim accrues." 575 U.S. at 405 (quoting 28 U.S.C. § 2401(b)). The Court ultimately held that the government failed to rebut the *Irwin* presumption and, therefore, the statute was subject to equitable tolling. *Id.* at 418-20.

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[2] As used herein, "amenable" or "subject" to equitable tolling means that a statute *can* be equitably tolled if the facts warrant it. But even when a statute is deemed to be amenable to equitable tolling, there still must be an evaluation of each individual case to determine if equitable tolling is warranted. *See Irwin*, 498 U.S. at 94-96 (finding the 42 U.S.C. § 2000e-16(c) filing deadline to be subject to equitable tolling, but still refusing to grant it on the facts of the case).

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court held that the rebuttable presumption of *Irwin* applies to 28 U.S.C. § 2244(d), which states that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The Court ultimately held that "neither [the statute's] textual characteristics nor the statute's basic purposes 'rebut' the basic presumption set forth in *Irwin*," and, therefore, the statute is subject to equitable tolling. *Holland*, 560 U.S. at 649; *accord Sneed v. Shinseki*, 737 F.3d 719, 728 (Fed. Cir. 2013) ("[T]he equitable principles invoked in *Holland* . . . apply just as strongly in veterans cases as they do in the habeas corpus context.").

This Court's first interpretation of *Irwin* arose in another veteran's case, *Bailey v. West*. There, the Court drew the following rule from *Irwin*:

> [T]he doctrine of equitable tolling, when available in comparable suits of private parties, is available in suits against the United States, unless Congress has expressed its intent to the contrary.

Bailey, 160 F.3d at 1364. The Court ultimately concluded that 38 U.S.C. § 7266(a), which governs the timing for appeals to the Veterans Court, is subject to equitable tolling. *Id.* at 1368.[3]

[3] As explained *infra*, the ruling in *Bailey* was briefly overturned by *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc) ("*Henderson I*"), but was

In *Scarborough v. Principi*, 541 U.S. 401 (2004), the Supreme Court relied on *Irwin* in finding that 28 U.S.C. § 2412(d)(1)(B)—which sets forth a thirty-day deadline for filing an application for fees under the Equal Access to Justice Act ("EAJA")—was subject to equitable principles.[4] *Id.* at 426-27. The Court rejected the government's argument that *Irwin* did not apply to the EAJA statute because there is no analogue in private litigation. *Id.* at 421-22. As the Court explained:

> [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).

On the other hand, the Supreme Court has recognized at least one exception to *Irwin*'s rebuttable presumption. In *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013) ("*Auburn*"), the Court held that the *Irwin* presumption did not

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reinstated by the Supreme Court's reversal of *Henderson I* in *Henderson v. Shinseki*, 562 U.S. 428 (2011) ("*Henderson II*").

[4] The Court in *Scarborough* applied *Irwin* to hold that the equitable "relation-back" doctrine was available to resolve the appellant's late amendment to its EAJA application. *Scarborough*, 541 U.S. at 418-19.

apply to a regulation promulgated by the Department of Health and Human Services ("HHS") governing the time for medical providers to appeal from the initial determination of Medicare reimbursement for inpatient services. *Id.* at 158-59 (citing *Irwin*, 498 U.S. at 95). The Court described this provision as "an agency's internal appeal deadline" and explained that the implementing statute's legislative history and sophisticated audience indicated that equitable tolling was likely not a "realistic assessment of legislative intent." *Id.* at 158-60 (quoting *Irwin*, 498 U.S. at 95). The Court distinguished the HHS regulation from tollable remedial statutes that are aimed at protecting claimants:

> [U]nlike the remedial statutes at issue in many of this Court's equitable-tolling decisions, see *Irwin*, 498 U.S., at 91 . . . ; *Bowen v. City of New York*, 476 U.S. 467, 480 . . . (1986); *Zipes* [*v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)], the statutory scheme before us is not designed to be "'unusually protective' of claimants." *Bowen*, 476 U.S., at 480 . . . . Nor is it one "in which laymen, unassisted by trained lawyers, initiate the process." *Zipes*, 455 U.S., at 397 . . . (internal quotation marks omitted). The Medicare payment system in question applies to "sophisticated" institutional providers assisted by legal counsel . . . .

Auburn, 568 U.S. at 159-60 (citation omitted).

This case is easily distinguishable from *Auburn*, where the rule in question was an internal agency deadline aimed at "'sophisticated' institutional providers assisted by legal counsel." *Id.* (quoting *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456 (1999)). Here, in contrast, the filing deadline in

§ 5110(b)(1) is precisely of the type *Auburn* distinguished, i.e., one "in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 160 (quoting *Zipes*, 455 U.S. at 397). Moreover, unlike the HHS provider-reimbursement system at issue in *Auburn*, the veterans' benefit system is paternalistic and "uniquely pro-claimant." *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000); *see also Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting Congress's recognition of the "strongly and uniquely pro-claimant system of awarding benefits to veterans" (citations omitted)).

Like the statutes at issue in *Kwai Fun Wong*, *Holland*, *Scarborough*, and *Bailey*, the statute at issue here, 38 U.S.C. § 5110(b)(1), benefits from *Irwin*'s rebuttable presumption that equitable tolling applies. First, there is no question that § 5110(b)(1) appears in a statute (U.S. Code title 38, "Veterans' Benefits") in which Congress has waived sovereign immunity to allow suits against the government. *See Bailey*, 160 F.3d at 1362 ("[T]he United States effected a waiver of its sovereign immunity through 38 U.S.C. § 7252, where it has vested jurisdiction to consider a claim in the Court of Veterans Appeals." (citing *Wick v. Brown*, 40 F.3d 367, 370-73 (Fed. Cir. 1994))); *see also 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."). The disability-compensation program created by this

statute arises from the government's unique relationship with its military veterans, and, as the Supreme Court recognized in *Scarborough*, "matters such as the administration of benefit programs" can be subject to *Irwin*'s presumption. 541 U.S. at 422.

Second, § 5110(b)(1) clearly contains a filing deadline that affects a veteran's ability to seek compensation in a claim against the government. If a veteran fails to file an application for disability benefits within the one-year statutory deadline of § 5110(b)(1), he or she loses the right to claim disability benefits from the date of his or her discharge from service. This type of statutory filing deadline fits squarely within the broad category of "[t]ime requirements" and "statutory time limits" that the Supreme Court spoke of in promulgating its "general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95; *see also Bailey*, 160 F.3d at 1364 ("Because *Irwin* states a rule of general applicability for equitable tolling in suits against the United States, we have no reason to assume that the general rule is applicable to some, but not other, time limits that govern suits against the United States.").

Third, although *Irwin* does not require a "precise private analogue," *Scarborough*, 541 U.S. at 422, it is nevertheless the case that § 5110(b)(1) is similar to other statutory deadlines in the private-litigation context that have been found to be amenable to equitable tolling. For instance, the copyright damages statute,

17 U.S.C. § 507(b), contains a backwards-facing statute of limitations that continuously measures the accrual of damages for up to three years prior to the date a claim for infringement is filed. Like the statute at issue here, 17 U.S.C. § 507(b) addresses the question of when damages begin to accrue, not whether a claimant is entitled to damages at all. *Cf. Andrews*, 351 F.3d at 1138 (noting that § 5110(b)(1) "addresses the question of when benefits begin to accrue, not whether a veteran is entitled to benefits at all"). Section 507(b) of the copyright statute has long been understood to be subject to equitable tolling for circumstances such as the legal disability of an injured party. *See, e.g.*, *Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 264 (5th Cir. 2014) (per curiam) (applying equitable tolling to 17 U.S.C. § 507(b)); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 339-40 (5th Cir. 1971) (analyzing the three-year limitations period in the copyright statute and concluding that "the intent of the drafters was that the limitations period would affect the remedy only, not the substantive right, and that equitable considerations would therefore apply to suspend the running of the statute"); *see generally* David E. Harrell, *Difficulty Counting Backwards from Three*, 48 SMU L. REV. 669, 672-73 (1995) (citing S. REP. NO. 1014, 85th Cong., 1st Sess. 2-3 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961, 1962-63).

For all these reasons, the rebuttable presumption of *Irwin* clearly applies to § 5110(b)(1), and the next question that must be asked (per Question B of the en banc

Order) is whether the government can rebut the *Irwin* presumption in order to render § 5110(b)(1) immune from equitable tolling in all circumstances, as the Veterans Court held in this case.

2. To Prevent Future Confusion, This Court Should Overrule or Clarify *Andrews* to Make Clear That Equitable Tolling Is Not Precluded in All Cases Involving § 5110(b)(1)

As explained above, the Veterans Court's interpretation of *Andrews* in this case as establishing an *absolute bar* to applying equitable tolling to § 5110(b)(1) cannot be squared with *Irwin* and its progeny. Although it is possible and reasonable to interpret *Andrews* as limited to its unique facts so as not to run afoul of *Irwin*, *see Butler*, 603 F.3d at 926-27 (Newman, J., concurring in the result), given the current en banc posture of this appeal and the continuing confusion regarding *Andrews*, the better course would be to expressly overrule or clarify *Andrews* to make clear that it does not impose an absolute bar to applying equitable tolling to § 5110(b)(1) in every case.

The reasoning in *Andrews* illustrates precisely why the Veteran's Court's bright-line interpretation is incorrect. In crafting the careful conclusion that the "principles of equitable tolling, *as claimed by Andrews*, are not applicable to the time period in § 5110(b)(1)," the Court implicitly acknowledged the limits of its analysis. *Andrews*, 351 F.3d at 1137-38 (emphasis added). The claimant in *Andrews* based her request for equitable tolling solely on the VA's failure to provide notice of her

eligibility for benefits under 38 U.S.C. § 7722(b) and (c)(1). *See id.* at 1136. The Court considered *only* this potential basis for equitable tolling and concluded that "the VA's failure to notify under § 7722(b) and (c)(1) may not serve as the basis for awarding an effective date in contravention of the statute." *Id.* at 1137. The Court noted that, "[a]t most, this may be 'a garden variety claim of excusable neglect,' to which equitable tolling does not apply." *Id.* at 1138 (quoting *Irwin*, 498 U.S. at 96).

The *Andrews* Court did not grapple with the Supreme Court's jurisprudence on the deeper question of whether *Irwin*'s presumption can be rebutted to preclude the application of equitable tolling to § 5110 under *all* circumstances. The absence of this analysis in *Andrews* supports Judge Newman's concurring opinion in *Butler* that it is an "incorrect interpretation" of *Andrews* to find that it "bars the availability of equitable tolling or extension of the § 5110(b)(1) one-year retroactivity period, whatever the circumstances." *Butler*, 603 F.3d at 926 (Newman, J., concurring in the result). As Judge Newman noted, the correct framework for analyzing the general availability of equitable tolling to § 5110(b)(1) includes inquiries—notably absent from *Andrews*—such as whether the time limit is jurisdictional. *Id.* at 926-27.

The portion of *Andrews* that the VA contends imposes a categorical prohibition on applying equitable tolling to § 5110(b)(1) is its discussion of whether § 5110 contains a statute of limitations. *Andrews*, 351 F.3d at 1137-38. The

Andrews Court concluded that "§ 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.* The Court contrasted this with the situation in *Jaquay,* where the Court "equitably tolled a *true* statute of limitations—the statutory period for filing a notice of appeal at the Court of Appeals for Veterans Claims." *Id.* (emphasis added) (citing *Jaquay*, 304 F.3d at 1283-84). The Court concluded that the situation in *Jaquay* "is unlike the case presently before us, which instead relates to a statute establishing an effective date for payment of benefits, not a statute of limitations." *Id.*

Under *Irwin*, however, applicability of equitable tolling is not limited to statutes of limitations. Indeed, in *Bailey*, this Court noted that the rebuttable presumption of *Irwin* "does 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." *Bailey*, 160 F.3d at 1364. As the en banc Court explained: "Because *Irwin* states a rule of general applicability for equitable tolling in suits against the United States, we have no reason to assume that the general rule is applicable to some, but not other, time limits that govern suits against the United States." *Id.*

The Court also noted in *Bailey* that the *Irwin* presumption does not draw a bright line between statutes of limitations and other types of time limits and deadlines that may be found in statutes involving claims against the government:

> We recognize that language in *Stone* [*v. INS*, 514 U.S. 386 (1995),] and *Missouri v. Jenkins*[, 495 U.S. 33 (1990),] can be read to draw a bright line which would place statutes of limitation on one side of the Irwin presumption and statutes of timing of review on the other. We are not comfortable drawing that line, because the language of *Irwin* admits of no such distinctions, and for the reasons set forth above. . . . If the Supreme Court had meant to shield statutes specifying the time for review from the *Irwin* presumption, we would have expected the distinction to be drawn in *Irwin*.

Bailey, 160 F.3d at 1367.

This reasoning survives this Court's own overruling of *Bailey* in *Henderson I*, and *Bailey*'s subsequent reinstatement in *Henderson II*. In *Henderson I*, this Court opined:

> [W]hereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, in *Bowles* [*v. Russell*, 551 U.S. 205 (2007),] the Court reached the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides. Thus, in light of *Bowles*, we are compelled to draw the bright line between statutes of limitations and time of review provisions that the *Bailey* court declined to draw.

589 F.3d at 1216 (citations omitted).

The Supreme Court reversed *Henderson I* as an overreaction to *Bowles* and an inflexible application of the equitable tolling doctrine. *Henderson II*, 562 U.S. at 436-38. The Supreme Court explained that bright-line tests are inappropriate when determining if a statute is tollable and that legislative intent, as usual, is the appropriate inquiry:

> [*Bowles* and its progeny] involved review by Article III courts. This case, by contrast, involves review by an Article I tribunal as part of a unique administrative scheme. Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress' intent regarding the particular type of review at issue in this case.

Id. at 437-38. In other words, simply grouping statutes under the same umbrella as similar statutes found tollable or not tollable and applying the same result is insufficient. *Id.* at 436 ("We reject the major premise of this syllogism. *Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional."). The inquiry instead requires a careful analysis that turns not on a statutory time bar's classification as a statute of limitations or otherwise, but on whether equitable exceptions realistically reflect the legislative intent of the particular statute at issue. *See Kwai Fun Wong*, 575 U.S. at 412-20 (analyzing legislative intent to determine that the two-year filing deadline of the Federal Tort Claims Act is subject to equitable tolling).

On remand from the Supreme Court, this Court vacated its *Henderson I* decision, *see Henderson v. Shinseki*, 417 F. App'x 982 (Fed. Cir. 2011) (en banc), and subsequent cases have recognized that *Bailey* has accordingly been reinstated. *See, e.g.*, *Sneed*, 737 F.3d at 723-26 (recognizing *Bailey* as controlling precedent); *James v. Wilkie*, 917 F.3d 1368, 1373 (Fed. Cir. 2019) (same).

In short, to the extent the 2003 panel decision in *Andrews* ever served as controlling authority for the proposition that § 5110(b)(1) categorically cannot be equitably tolled because it is not a "true" statute of limitations—which is doubtful because that would have directly contradicted the then-prevailing en banc holding of *Bailey*—that portion of *Andrews* was abrogated by the Supreme Court's decision in *Henderson II* and should be overruled.

A major thrust of *Irwin* and its progeny has been the Supreme Court's desire to move away from the ad hoc patchwork of case-specific rules and exceptions that had developed in the years preceding *Irwin* and instead "adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95. Thus, the VA's assertion that *Andrews* imposes a categorical rule that says that *only* statutes of limitations are amenable to equitable tolling in suits against the government is simply incompatible with *Irwin* and its progeny. *See Bailey*, 160 F.3d at 1367 (refusing to draw a bright line between statutes of

limitations and other timing provisions because "*Irwin* admits of no such distinctions").

B. Response to Question B of the En Banc Order

1. The Government Cannot Rebut the Presumption Under *Irwin* 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 suit against the United States?" *Bailey*, 160 F.3d at 1364 (quoting *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. *Brockamp*, 519 U.S. at 352; *United States v. Beggerly*, 524 U.S. 38, 48 (1998). 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. 38 U.S.C. § 5110(b)(1) Is Not Jurisdictional

The one-year retroactivity deadline contained within § 5110(b)(1) is, as Judge Newman opined in *Butler*, "not an implementation of a statutory time limit that is 'jurisdictional.'" 603 F.3d at 927 (Newman, J., concurring in the result) (citing *Bowles*, 551 U.S. 205). When a time bar at issue *is* jurisdictional, a claimant's failure to comply with that bar deprives a court of its authority to adjudicate the claim. Aware of these "harsh consequences," the Supreme Court has "repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has 'clearly state[d]' as much." *Kwai Fun Wong*, 575 U.S. at 409 (alteration in original) (citation omitted). "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional . . . .'" *Auburn*, 568 U.S. at 153 (citation omitted).

The Supreme 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). "Time and again, [the Supreme Court has] described filing deadlines as 'quintessential claim-processing rules.'" *Id.* (quoting *Henderson*

II, 562 U.S. at 435). That is so "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Id.*

Section 5110 has been referred to by this Court as an "unequivocal command . . . that the effective date of benefits cannot be earlier than the filing of an application therefor." *Rodriguez*, 189 F.3d at 1355. But mandatory framing "is true of most . . . statutes," and the Supreme Court has "consistently found it of no consequence." *Kwai Fun Wong*, 575 U.S. at 410-11 (finding even "emphatic" language directing that a claim be "forever barred" if not timely brought to be nonjurisdictional (citations omitted)). What matters instead is that the statute "does not speak in jurisdictional terms." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006) (quoting *Zipes*, 455 U.S. at 394).

Nothing in § 5110 speaks in jurisdictional terms. Section 5110(a)(1) sets the general timing requirements for the filing of a disability claim:

> 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).

Subsection (b)(1) then includes a retroactive allowance with a one-year filing deadline from the date of discharge for veterans to receive retroactive disability compensation to cover the period between discharge and filing:

> 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) (emphasis added).

These provisions do not "refer in any way to the jurisdiction of the [Veterans Court]." *Henderson II*, 562 U.S. at 438 (alteration in original) (quoting *Zipes*, 455 U.S. at 394). They do not, for instance, say that the Veterans Court "may not extend the time" contained within the provision. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019) (quoting Fed. R. App. P. 26(b)(1)); *Carlisle v. United States*, 517 U.S. 416, 421 (1996) (quoting this same language in Fed. R. Crim. P. 45(b)). Section 5110 does not define the Veterans Court's jurisdiction over "claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers." *Kwai Fun Wong*, 575 U.S. at 411. While Congress could make the one-year time bar for retroactive reimbursement jurisdictional if it so chose, nothing in § 5110 directs the Veterans Court to surrender its administration of a veteran's claim if the veteran submitted that claim more than one year after his/her discharge. This Court in *Andrews* even noted that the time window in § 5110(b)(1) "merely indicates when benefits may begin" and neither robs the veteran of his/her claim nor the tribunal of the ability to hear it. *Andrews*, 351 F.3d at 1138; *cf. Prather*, 446 F.2d at 339-40 (holding that a similar backwards-looking provision in the

copyright statute was amenable to equitable tolling because "the intent of the drafters was that the limitations period would affect the remedy only, *not the substantive right*, and that equitable considerations would therefore apply to suspend the running of the statute" (emphasis added)).

Nor does § 5110's placement within title 38 suggest that Congress intended it to be jurisdictional. Its location in a subchapter titled "Effective Dates" and *not* in the subchapter titled "Organization and Jurisdiction" strongly suggests that Congress regarded the one-year deadline "as a claim-processing rule" rather than a jurisdictional provision. *Henderson II*, 562 U.S. at 439; *cf. INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). Without 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. *Henderson II*, 562 U.S. at 439; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161-62 (2010).

Given the "unfair[ness]" to disabled veterans in tying the one-year filing limit for retroactive reimbursement to subject-matter jurisdiction, the "sounder course [is] to refrain from constricting [§ 5110(b)(1)]" and to "leave the ball in Congress' court." *Arbaugh*, 546 U.S. at 515 (first alteration in original) (citations omitted). As the Supreme Court explained in *Arbaugh*:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (footnote and citation omitted).

b. No Good Reason Exists to Believe Congress Would Not Want Equitable Tolling to Apply to § 5110(b)(1)

This Court has recognized that "the 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." *Jaquay*, 304 F.3d at 1286;[5] *see United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is of long standing."). The Court's reasoning that the "non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system" supports its general applicability to veterans' provisions where "nothing in the statute or regulations at issue" suggest otherwise is equally applicable here. *See Jaquay*, 304 F.3d at 1286.

[5] Like *Bailey*, *Jaquay* was overruled by this Court's decision in *Henderson I*, which itself was reversed by the Supreme Court in *Henderson II*. The Veterans Court has since recognized that *Jaquay* remains controlling law after *Henderson II*. *See, e.g.*, *Threatt v. McDonald*, 28 Vet. App. 56, 60 (2016).

The Supreme 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. 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*, the 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 the rule, 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. Indeed, 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*, 160 F.3d at 1370 (Michel, J., concurring in the result). The resulting "special beneficence from a grateful sovereign" that runs throughout veteran's law buttresses the conclusion that Congress did not intend to categorically exclude the application of equitable tolling to § 5110(b)(1). *Id.*

Furthermore, precedent has repeatedly looked to the nature of the dispute in determining whether equitable tolling should 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*, 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 is 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 (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. *Id.*; 38 U.S.C. § 5110(b)(1).

Accordingly, no good cause can be found in the statute's text, the nature of the statutory scheme, or elsewhere in the statute to suggest that it would be a realistic assessment of legislative intent to find that equitable tolling is unavailable for § 5110(b)(1).

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

Because "Congress may reverse the usual rule" that equitable tolling applies "if it chooses," the VA can rebut the *Irwin* presumption if it presents evidence "that Congress opted to *forbid equitable tolling*" of § 5110. *Kwai Fun Wong*, 575 U.S. at 408 (emphasis added). In its briefing before the panel, the VA attempted to show this intent by relying on Congress's alleged purpose of "prevent[ing] retroactive

awards of benefits if an application for compensation is not made within one year of discharge or release from service." VA's Panel Br. (Dkt. No. 14) at 13. But this assertion conflates two different questions. The intent to limit awards—which is present for *all* time limits—is not the same thing as the intent to forbid equitable exceptions. Even if the VA shows congressional intent to "substantively limit retroactive awards," as it alleges, the inevitable result is an unrebutted *Irwin* presumption. *Id.* at 10-13. The VA's conclusion merely speaks to the plain meaning of the text, saying nothing of Congress's intent—one way or the other—regarding equitable exceptions to the textual rule. And where legislative silence on this distinct question exists, *Irwin* finds the "realistic assessment of legislative intent" to be that equitable tolling applies. 498 U.S. at 95. If one could find congressional intent to forbid equitable tolling by merely showing that Congress established a time bar that defines a limited awards period, it would effectively reverse the *Irwin* presumption and shift the burden of proof to claimants. But the Supreme Court was clear—equitable exceptions are implied unless the VA shows that Congress affirmatively acted to forbid them. "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002).

Moreover, the legislative history cited by the VA does not evidence intent with respect to the particular provision at issue here—§ 5110(b)(1)—or even of

Congress itself. *See* VA's Panel Br. 10-13 (relying on an agency interpretation of a 1942 death benefit statute); *id.* at 16-18 (relying on an agency interpretation of a 1949 wartime benefit bill). For example, the VA cites to a 1940 House Report, *id.* at 11 (citing H.R. REP. No. 76-2110, at 1-2, 5 (1940)), issued before 56 Stat. 731, which "provide[d] increases of pension payable to dependents" of veterans who died based on service-connected "injury or disease," and which became law in 1942. Act of July 30, 1942, Pub. L. No. 77-690, ch. 539, 56 Stat. 731, 731 (1942). But this legislative history relates to an entirely different area of the law that compensates dependents—not the veteran—after the veteran has passed away. *See id.* The VA leaps from an alleged intent of Congress to forbid *dependents* from claiming equitable exceptions to the death pension statute to alleged congressional intent to prevent *veterans* from doing the same to a disability compensation statute. VA's Panel Br. 10-13. The VA makes no attempt to explain why the alleged intent of a 1942 Congress behind a death benefit statute for dependents should be imputed to a 1958 Congress regarding a veteran's disability compensation statute enacted sixteen years later. *Id.*; *cf.* Act of September 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105, 1226 (1958).

Further, the VA misconstrues the content of the House Report, as it cites to a letter from the Veterans' Administration, not the report itself. VA's Panel Br. 11 (stating "[t]he language ultimately enacted was 'specific and clearly show[ed] the

intent to eliminate large payments where the claim was filed more than 1 year after the veteran's death," but quoting from page 5, which is the letter to the Chairman of the Committee on Invalid Pensions *from the Veterans' Administration*); H.R. REP. No. 76-2110, at 3-6 (letter attached to House Report). The VA then attempts to impute the *Veterans' Administration's* purported understanding of the proposed changes to Congress itself. VA's Panel Br. 11-12. And it goes one step further in concluding that "Congress's failure to alter VA's overarching understanding . . . is persuasive evidence that VA's understanding reflected congressional intent." *Id.* at 17-18 (citing *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986)). But the single case the VA cites for this proposition did not involve rebutting the *Irwin* presumption. *See Cmty. Nutrition*, 476 U.S. at 980-83 (addressing agency interpretation in the context of giving *Chevron* deference to an agency's statutory interpretation). The VA has cited no authority that congressional silence in view of an agency interpretation of legislative intent rises to the level of clarity needed to clear the "high bar" required to rebut the *Irwin* presumption. *See Kwai Fun Wong*, 575 U.S. at 409.

C. Response to Question C of the En Banc Order

1. The *Irwin* Presumption Likely Applies to Other Timing Provisions of § 5110, but Whether It Can Be Rebutted Must Be Analyzed Separately for Each Provision

Section 5110 of title 38, titled "Effective dates of awards," contains thirteen subsections, (a) through (n), dealing with various types of claims and awards applicable to veterans and their dependents or survivors.[6] Many of these provisions include a one-year filing deadline similar to § 5110(b)(1), allowing a claim for benefits to apply retroactively to a certain event if the claim is filed within one year of that event. For instance, § 5110(c) states:

> (c) The effective date of an award of disability compensation by reason of section 1151 of this title [disability caused by medical treatment or vocational rehabilitation] shall be the date such injury or aggravation was suffered *if an application therefor is received within one year from such date*.

38 U.S.C. § 5110(c) (emphasis added). If a claim for disability under § 1151 is not received within one year of the date of the injury or aggravation, then the default rule of § 5110(a)(1) applies, such that the effective date of any award "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). Thus, just like § 5110(b)(1), the one-year deadline of § 5110(c) operates as a

[6] Subsection (m) was repealed by the Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, title XII, § 1201(i)(8), 108 Stat. 4645, 4688 (1994).

limitation on the amount a veteran can recover but not the substantive right to pursue a claim. Similar one-year filing deadlines can be found in subsections (d)-(f), (h), (j)-(l), and (n) of § 5110. *See* 38 U.S.C. § 5110(d)-(f), (h), (j)-(l), (n).

In addition, § 5110(a)(2) contains several timing provisions that dictate whether a claim for benefits has been "continuously pursued" for purposes of determining the "date of receipt of application," which, in turn, controls the effective date of an award under § 5110(a)(1). 38 U.S.C. § 5110(a)(1), (2). For instance, in order to satisfy the "continuously pursued" requirement of § 5110(a)(2), a veteran must have filed one of the following within "one year after the date on which the agency of original jurisdiction issues a decision"—(A) "A request for higher-level review under section 5104B of this title"; (B) "A supplemental claim under section 5108 of this title"; or (C) "A notice of disagreement." *See* 38 U.S.C. § 5110(a)(2)(A), (B), (C).

The question of whether *Irwin*'s rebuttable presumption applies to these other timing provisions in § 5110 is answered by the same logic that is set forth above for § 5110(b)(1). First, these timing provisions appear in a statute in which Congress has clearly waived sovereign immunity to allow claims against the government. *See Bailey*, 160 F.3d at 1362; *Jaquay*, 304 F.3d at 1286. Second, these filing deadlines can significantly affect a claimant's compensation in a claim against the government. For example, an applicant for death benefits who files one day after the filing

deadline of § 5110(d) loses a year of death benefits to which he or she is otherwise entitled. This type of statutory deadline fits squarely within the broad category of "[t]ime requirements" and "statutory time limits" that the Supreme Court spoke of in promulgating its "general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95; *see also Bailey*, 160 F.3d at 1364 ("Because *Irwin* states a rule of general applicability for equitable tolling in suits against the United States, we have no reason to assume that the general rule is applicable to some, but not other, time limits that govern suits against the United States.").

Finally, these timing provisions in § 5110 are similar to other backward-looking damages limitations in civil litigation that courts have deemed amenable to equitable tolling. *See, e.g.*, *Prather*, 446 F.2d at 339-40 (finding the three-year limitations period in the copyright statute amenable to equitable tolling). The touchstone of *Irwin* is that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. Under this rationale, the one-year filing deadlines in § 5110(a)(2), (c)-(f), (h), (j)-(l), and (n) are entitled to the rebuttable *Irwin* presumption that equitable tolling is available.

On the other hand, the question of whether *Irwin*'s presumption can be rebutted for each of these other timing provisions in § 5110 requires a deeper

analysis of each individual provision. It cannot be presumed, for instance, that merely because § 5110(b)(1) is amenable to equitable tolling (i.e., because *Irwin*'s presumption applies and cannot be rebutted), the same will necessarily be true for the other timing provisions in § 5110. At the very least, each of these provisions has a unique legislative history that must be separately analyzed to determine congressional intent.

While the legislative intent behind 38 U.S.C. § 5110(b)(1) is clearly consistent with *Irwin*'s presumption, the record in this case is not sufficiently developed for this Court to make conclusive findings on the legislative intent behind § 5110's other filing deadlines, even if those limitations are *nearby* § 5110(b)(1) in the United States Code. Several of these time limitations were passed by a different Congress with potentially different intentions and concerns than the Congress that implemented § 5110(b)(1). *Compare* Act of September 2, 1958, Pub. L. No. 85-857, 72 Stat. at 1226 (enacting the original provision currently embodied in § 5110(b)(1) in 1958), *with* Act of October 15, 1962, Pub. L. No. 87-825, 76 Stat. 948, 948-50 (1962) (enacting the original provision currently embodied in § 5110(n) in 1962). It is possible, for example, that the history of § 5110(n) could reveal a congressional intent that equitable tolling should not apply to § 5110(n)'s one-year filing deadline for benefits following an annulment of marriage. If true, the *Irwin*

presumption could potentially be rebutted for § 5110(n), even though it cannot be rebutted for § 5110(b)(1).

2. It Is Unclear Whether 38 U.S.C. § 5110(a)(1) Includes a Time Period That Is Amenable to Equitable Tolling

Section 5110(a)(1) establishes the general rule that, "[u]nless specifically provided otherwise in this chapter," the effective date of a veteran's award shall be no earlier than the date the application is received:

> 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) (emphasis added). This provision differs from some of the other subsections of § 5110 because it references a specific point in time, i.e., the VA's "receipt of application" for a claim for benefits, rather than a floating time *period* such as the one-year period in § 5110(b)(1) that begins on a veteran's "date of . . . discharge or release" and continues for one year:

> 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) (emphasis added).

The concept of "tolling" a statutory time period is often analogized to stopping a clock. *See, e.g.*, *Holland*, 560 U.S. at 636 ("That filing automatically stopped the running of the [Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")] limitations period, § 2244(d)(2), with, as we have said, 12 days left on the clock."); *id.* at 638 ("At that point, the AEDPA federal habeas clock again began to tick—with 12 days left on the 1-year meter."). The Supreme Court has explained that the word "toll" in the context of statutes of limitations means "to suspend or stop temporarily," and its decisions often "employ the terms 'toll' and 'suspend' interchangeably." *Artis v. District of Columbia*, 138 S. Ct. 594, 601-02 (2018) (quoting BLACK'S LAW DICTIONARY 1488 (6th ed. 1990)). This clock concept also applies to equitable tolling. *See United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam) ("Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped."). Thus, a hallmark of a tollable time period is a defined duration (e.g., one year) that begins ticking like a clock once a certain event occurs and can be stopped and started with some degree of certainty as to how much time is left on the clock.

With respect to § 5110(b)(1), the time period to be suspended by equitable tolling is the one-year clock that begins "ticking" on the veteran's date of discharge.

Tolling this statutory deadline temporarily pauses the running of the clock, but the clock itself always measures one year. Thus, when the circumstances that justified equitable tolling abate, the clock restarts, and an accurate calculation can be made as to how many days are left on the veteran's one-year "meter." *Holland*, 560 U.S. at 636.

In contrast, a *point* in time, such as § 5110(a)(1)'s "receipt of application," does not track a time period like a clock. There is no defined time period in § 5110(a)(1) preceding the receipt of an application that could be paused and then restarted via tolling. And even if tolling could be said to apply, there would be no way to calculate how much time is left on the veteran's clock for filing an application for a claim because there *is* no clock—there is no defined time period for filing the application.

Because of this difference in how § 5110(a)(1) is drafted—particularly as compared to the clear one-year filing deadline in § 5110(b)(1)—it is not clear that § 5110(a)(1) includes a time period that can be tolled via equitable tolling.

D. Response to Question D of the En Banc Order

1. Applying *Irwin*, This Court Has Found That Equitable Tolling Is Available for 5 U.S.C. § 8337(b)

The portion of the civil service retirement statute relating to disability retirement requires that the retiree's application be filed within one year of separation from service:

> (b) A claim may be allowed under this section only if the application is filed with the Office [of Personnel Management] before the employee or Member is separated from the service or within 1 year thereafter. This time limitation may be waived by the Office for an employee or Member who at the date of separation from service or within 1 year thereafter is mentally incompetent, if the application is filed with the Office within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier.

5 U.S.C. § 8337(b). In *Winchester*, this Court found persuasive the appellant's argument that "agencies, like the courts, have equitable discretion to toll or waive a time limit, when the agencies have erroneously failed to meet the obligation to give notice of the time limit." *Winchester v. Office of Pers. Mgmt.*, 449 F. App'x 936, 937, 937 (Fed. Cir. 2011). Specifically, the claimant filed his application more than one year after his separation from service but argued that the one-year filing deadline should be equitably tolled because he did not receive the requisite notice of the possibility that he was eligible for disability retirement. *Id.* In evaluating whether § 8337(b) can be equitably tolled, this Court applied the *Irwin* framework, ultimately finding that "[t]he disability retirement statute is more like that in *Bowen* than in *Brockamp*." *Id.* at 939. The Court concluded that because the statute's plain language authorizes tolling even when notice is given in mental incompetency cases, the legislative purpose is preserved only if it can also be tolled when notice is erroneously not given. *Id.* at 938.

2. Applying *Irwin*, Courts Have Found That Equitable Tolling Is Available for 19 U.S.C. § 2273(b)(1)

In *Former Employees of Fisher & Co. Inc. v. U.S. Dep't. Labor*, 31 C.I.T. 1272 (2007), the Court of International Trade found the one-year deadline to file an application with the Department of Labor to certify benefits for trade adjustment assistance ("TAA") was amenable to equitable tolling. The statute at issue, 19 U.S.C. § 2273(b)(1), required workers who were laid off due to international trade to file their application to certify for TAA benefits within one year of being separated from their employer:

> **Workers covered by certification.** A certification under this section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 2291 of this title occurred—more than one year before the date of the petition on which such certification was granted.

19 U.S.C. § 2273(b)(1) (2002).

The claimant in *Fisher* filed an application to certify for TAA benefits outside the statutory one-year period laid out by § 2273(b)(1) and requested equitable tolling for her circumstances. *Fisher*, 31 C.I.T. at 1274-75. The Government argued that "no jurisdiction exists to equitably toll the one-year deadline for filing a petition for TAA certification contained in 19 U.S.C. § 2773(b)(1) because the one year rule is not a filing deadline that can be extended by equitable tolling, but rather a substantive

requirement for TAA benefits." *Id.* at 1276. The court applied the *Irwin* presumption to the one-year deadline and found it unrebutted. *See id.* at 1278-79.

In holding that § 2773(b)(1) was amenable to equitable tolling, the court noted that 28 U.S.C. § 1581(d)(1) granted it "exclusive jurisdiction to review the Secretary of Labor's final determinations" and 19 U.S.C. § 2394(c) permitted it to affirm or remand those determinations "in whole or in part." *Id.* at 1278. The Government relied on two cases to argue that Congress did not intend for the one-year deadline to be tollable. *Id.* (citing *Former Employees of Westmoreland Mfg. Co. v. United States*, 10 CIT 784, 650 F.Supp. 1021 (1986); *Nelson v. United States Sec'y of Labor*, 20 CIT 896, 936 F.Supp. 1026 (1996)). But the court distinguished these cases as only carving out certain *fact scenarios* (specifically, waiting for class certification) that Congress did not want to be used as a basis for tolling. The court held that these carve-outs did not categorically bar the availability of tolling under other fact patterns. *Id.* at 1278-79. Finding *Irwin*'s presumption unrebutted, the court found equitable tolling legally available for 19 U.S.C. § 2273(b)(1). *Id.* at 1279; *but see id.* at 1279-80 (still finding that "equitable tolling is not appropriate" on the claimant's particular facts).

3. Courts Have Generally Found Equitable Exceptions Unavailable for 42 U.S.C. § 423(b), but They Have Not Specifically Analyzed the Legal Availability of Tolling Under *Irwin*

The portion of the social security statute relating to disability insurance benefit payments limits retroactive benefits to one year prior to the date of a claimant's application[7]:

> **(b) Filing application**
>
> . . .
>
> An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

42 U.S.C. § 423(b). This statutory limit on retroactive benefits is reinforced in the definitions section of the title, which qualifies a claimant's filing as an application triggering benefit accrual only if it is timely filed in the one-year period:

> **(i) Disability; period of disability**
>
> . . .
>
> **(E)** Except as is otherwise provided in subparagraph (F), no application for a disability determination which is filed more than 12 months after the month prescribed by subparagraph (D) as the month in which the period of disability ends (determined without regard to

[7] The statute also provides for a five-month waiting period, which affects the earliest benefit accrual date. 42 U.S.C. § 423(a)(1)(E), (c)(2).

> subparagraph (B) and this subparagraph) shall be accepted as an application for purposes of this paragraph.

42 U.S.C. § 416(i)(2)(E). Courts have yet to analyze the availability of equitable tolling for 42 U.S.C. § 423(b) under the framework established by *Irwin* and its progeny. Instead, courts have applied pre-*Irwin* standards to § 423(b) by citing to cases from before 1990 to deny general equitable relief (including estoppel) for untimely claims.

For example, in *Howard*, the claimant was disabled in 1997, but was awarded benefits back to only 2001, a year before her application date. *Howard v. Barnhart*, No. 04 Civ. 3737(GEL), 2006 WL 305464, at *1 (S.D.N.Y. Feb. 7, 2006). She sought an "equitable exception" to § 423(b)'s one-year filing deadline because her application filing was delayed "due to the length of time it took the worker's compensation board to collect information and render a decision." *Id.* at *2. The district court declined to provide the requested exception, noting that the "court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." *Id.* (citing *Schweiker v. Hansen*, 450 U.S. 786, 790 (1981). The district court did not discuss "tolling" specifically, nor did it address the Supreme Court's instruction to *avoid* inferring a legislative intent to bar tolling from statutory text which "speaks only to a claim's timeliness, not to a court's power." *Kwai Fun Wong*, 575 U.S. at 410.

Because "Congress has provided for additional retroactive remedies in certain situations, such as when a claimant for survivorship insurance benefits failed to apply for benefits due to misinformation provided by an employee of the Social Security Administration," the *Howard* court next reasoned that "if Congress had intended to provide for statutory exceptions such as the one raised by Howard, it could have." *Id.* But because tolling is now the "general rule" for filing deadlines in claims against the government under *Irwin*, Congress needs to act—not remain silent—when it "intends" to cabin a court's equitable tolling powers. *Arbaugh*, 546 U.S. 502 ("the ball [is] in Congress' court.").

The *Howard* court concluded by citing to several pre-*Irwin* cases which declined to enlarge the retroactivity period in §§ 416(i)(2)(E). *Id.* at *3. For example, in *Yeiter*, the claimant argued that "Congress did not intend the one-year limit on retroactive benefits to apply where the failure to file for benefits arises from the disability itself." *Yeiter By & Through Yeiter v. Sec'y of Health & Human Servs.*, 818 F.2d 8, 9 (6th Cir. 1987). In denying her request for "benefits from the date of her disability," the court noted that Congress amended the social security statute in 1958 to replace the prior lack of retroactive benefits with a specified twelve-month period. *Id.* Because *Yeiter* was decided pre-*Irwin*, the court did not address how § 423(b) "define[s] a federal court's jurisdiction over [social security] claims generally, address[es] its authority to hear untimely suits, or in any way cabin[s] its

usual equitable powers." *Kwai Fun Wong*, 575 U.S. at 411 (citing *Arbaugh*, 546 U.S., at 515).

In *Henry*, a social security claimant requested equitable relief, alleging a filing delay because an employee of the Social Security Administration misinformed him of the required filing date. *Henry v. Comm'r of Soc. Sec.*, No. 2:09-CV-206, 2010 WL 11523750, at *2 (D. Vt. July 26, 2010), aff'd sub nom. *Henry v. Soc. Sec. Admin., Comm'r*, 456 F. App'x 13 (2d Cir. 2011). The district court in *Henry* briefly considered whether § 423(b) should be tolled on the *facts* of the case, which implies that the court believed § 423(b) is *amenable* to tolling. *Id.* at *8. But the court noted "that equitable tolling of limitations periods is granted only in rare and exceptional circumstance[s]." *Id.* (citations omitted). The court then noted that the statute provides an avenue for receiving retroactive benefits on the claimant's very specific alleged facts (i.e. misinformation) and that the claimant simply failed to follow the prescribed procedure. *Id.* at *5. *See also Levy v. Astrue*, No. CV 07-6412-JWJ, 2009 WL 2163512, at *7 (C.D. Cal. July 16, 2009) (remanding for consideration of whether claimant's facts justify an earlier "protective filing date" enlarging his retroactive reward under 20 C.F.R. § 416.351).

None of these cases addressed whether 42 U.S.C. § 423(b) is amenable to tolling under *Irwin* or its progeny, and none applied *Irwin*'s rebuttable presumption that equitable tolling applies to statutory filing deadlines in suits against the

government. Thus, it is unclear whether the same outcome would be reached if these courts had undertaken a complete *Irwin* analysis.

VI. CONCLUSION

For the reasons explained above, this Court should reverse the decision below, find that equitable tolling is available for § 5110(b)(1), and remand for further proceedings to determine if the facts in Mr. Arellano's case warrant equitably tolling § 5110(b)(1). The Court should also take this en banc opportunity to overturn or clarify the *Andrews* decision to make clear that *Andrews* does not categorically preclude equitable tolling in all cases involving § 5110.

Respectfully submitted,

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September 21, 2020

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

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