2020-1073

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ADOLFO R. ARELLANO,

Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Appellee.

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

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

James R. Barney
Kelly S. Horn
Alexander E. Harding
FINNEGAN, HENDERSON,
FARABOW, GARRETT &
DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000

Attorneys for Appellant
Adolfo R. Arellano

December 7, 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: December 7, 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.
☐ None/Not Applicable	☐ None/Not Applicable	☒ None/Not Applicable
Adolfo R. Arellano	Adolfo R. Arellano	

☐ Additional pages attached

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).

☐ None/Not Applicable ☐ Additional pages attached

Ronald L. Smith Thomas E. Sullivan David T. Landers Finnegan, Henderson, Farabow, Garrett & Dunner, LLP		

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).

☒ None/Not Applicable ☐ Additional pages attached

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The VA has failed to show why *Irwin*'s rebuttable presumption in favor of equitable tolling should not apply to the one-year filing deadline set forth in 38 U.S.C. § 5110(b)(1), which requires military veterans—freshly discharged from service, unrepresented by counsel, and potentially suffering from physical and/or psychological injuries—to file any ripe disability claims they may have within one year of discharge *or forever lose their rights to recover disability benefits* for this period.

II. ARGUMENT IN REPLY

A. The *Irwin* Presumption Applies to § 5110(b)(1)

1. The *Irwin* Presumption Is Not Limited to Statutes of Limitations

In *Irwin*, the Supreme Court announced a new, "more general rule" to determine when equitable tolling is available in suits against the Government. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). In doing so, the Court intentionally chose broad language to describe the timing provisions to which this new rule would apply, including "statutory time limit[s]," "statutory filing deadline[s]," "time limits in suits against the Government," and "[t]ime requirements." *Id.* at 94-95. The VA concedes that *Irwin* "variously uses" these broad terms. VA-Br. 14-15. In fact, nowhere does *Irwin* state that its new, "more

general rule" regarding equitable tolling was intended to apply *only* to statutes of limitations, as the VA now asserts.

The VA's attempt to divine a "historical presumption" for such a limitation in *Irwin* falls short. *Id.* The VA relies on just one case, *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989), for its understanding of the "historical presumption invoked" in *Irwin*'s holding. VA-Br. 14-15. But *Irwin* cites *several* Supreme Court decisions as informative, including *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). *See Irwin*, 498 U.S. at 95 n.2. Taken together, these background cases do not support the VA's attempt to limit *Irwin*'s presumption to traditional statutes of limitations.

Zipes—expressly relied upon in *Irwin* but ignored by the VA—involved a 180-day timing requirement for lodging a charge of workplace discrimination under Title VII of the Civil Rights Act. 455 U.S. at 388-89 (citing 42 U.S.C. § 2000e-5(e)). In deciding whether failure to satisfy this provision constituted a nonwaivable impediment to maintaining a federal lawsuit, the Court applied the traditional distinction between jurisdictional and nonjurisdictional timing requirements. *Id.* at 392 (formulating the question as "whether the timely filing of an EEOC [Equal Employment Opportunity Commission] charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel"). The Court concluded that "filing a timely charge of

discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, *like* a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (emphasis added). The word "like" indicates that the Supreme Court considered the EEOC deadline to be *similar* to a statute of limitations, in the sense that it is nonjurisdictional and waivable, but nevertheless distinct. Other courts have described the EEOC filing deadline as an "exhaustion of remedies" requirement rather than a statute of limitations. *See, e.g.*, *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489-90 (2d Cir. 2018) (holding that "the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement" (citation omitted)).

Hallstrom likewise fails to support the VA's position. The VA relies on *Hallstrom*'s observation that the EEOC filing requirement in *Zipes* "operated as a statute of limitations," whereas the sixty-day waiting period at issue in *Hallstrom* was "[u]nlike a statute of limitations" and therefore did not benefit from the Court's precedent that "[t]he running of such statutes is traditionally subject to equitable tolling." 493 U.S. at 27. This holding does not support the VA's assertion that, pre-*Irwin*, there was a bright-line distinction between statutes of limitations and *all other statutory timing provisions*, with equitable tolling only applicable to the former. Indeed, the Supreme Court's observation that the filing deadline in *Zipes* "operated

as" a statute of limitations suggests that timing provisions that serve the same purposes as a statute of limitations, but are nevertheless distinct, can still be amenable to equitable tolling. *Id*.

The VA also cites *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014), in support of its bright-line statute-of-limitations argument. VA-Br. 16-17. But *Lozano* is not as clear-cut as the VA suggests. First, *Lozano* did not address whether *Irwin*'s presumption should apply because the timing provision in *Lozano* appeared in an international treaty, not a U.S. statute. *Lozano*, 572 U.S. at 12-14. Moreover, although the *Lozano* Court performed an alternative analysis beginning with the premise that "[w]e have only applied th[e] presumption [of equitable tolling] to statutes of limitations," *id.* at 13-14, the Court was clearly employing an expansive, functional understanding of what constitutes a "statute of limitations" rather than a formulaic or label-focused definition as the VA seems to be asserting here.

For instance, the Court in *Lozano* rejected an argument that the treaty's one-year filing deadline should be considered a statute of limitations merely because the U.S. delegation that negotiated the treaty labeled it as such. *Id.* at 15 n.6. As the Court explained, "[b]ecause the determination whether the 1-year period is a statute of limitations depends on its functional characteristics, it is not significant that the delegation used that label." *Id.* This functional view of what constitutes a statute of limitations is consistent with the Court's earlier decision in *Hallstrom*—relied upon

by *Lozano*, *see id.* at 13-14 (citing *Hallstrom*, 493 U.S. at 27)—which acknowledged that a presuit agency deadline that "*operated as*" a statute of limitations was amenable to equitable tolling. *Hallstrom*, 493 U.S. at 27 (emphasis added).

Lozano's functional approach is also evident from its reliance on the "three-year lookback period" in *Young* as an example of a statute of limitations amenable to equitable tolling. *Lozano*, 572 U.S. at 14 (citing *Young v. United States*, 535 U.S. 43, 47 (2002)). As explained in Mr. Arellano's panel briefing (and below), *Young* involved a timing provision that was not a traditional statute of limitations in the sense that it did not preclude the IRS from bringing a claim but merely limited the number of years it could "look back" in asserting priority to certain bankruptcy assets. *See* Arellano Panel Reply Br. 9-14 (Dkt. No. 21). The Court in *Young* nevertheless held that this "three-year lookback period is a limitations period subject to traditional principles of equitable tolling." 535 U.S. at 47. The *Lozano* Court's reliance on *Young* underscores that its understanding of what constitutes a "statute of limitations" for purposes of determining if equitable tolling is available is much broader than the VA's narrow view here. *Cf. CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8, 13 (2014) (noting that, in a formal sense, "a statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued,'" but "it must be acknowledged that the term 'statute of limitations' is sometimes used in a

less formal way" that "can refer to any provision restricting the time in which a plaintiff must bring suit" (citations omitted)).

2. Even if the *Irwin* Presumption Is Limited to Statutes of Limitations, § 5110(b) Functions as a Statute of Limitations and Is Therefore Subject to the *Irwin* Presumption

The VA contends (for the first time in this appeal) that the *Irwin* presumption in favor of equitable tolling cannot apply here because § 5110(b)(1) "is not a statute of limitations."[1] VA-Br. 22. Putting aside that there is no such bright-line rule, *see supra* Section II.A.1, the Supreme Court has made clear that timing provisions like § 5110(b)(1) that *function* as statutes of limitations are subject to the *Irwin* presumption.

In determining whether a timing provision functions as a statute of limitations, the Supreme Court considers the provision's "functional characteristics," i.e., whether it serves the policies of a statute of limitations. *Lozano*, 572 U.S. at 14-15 & n.6. Statutes of limitations encourage "plaintiffs to pursue 'diligent prosecution of known claims,'" *CTS*, 573 U.S. at 8 (citation omitted), and thereby "protect

[1] The VA criticizes Mr. Arellano because he allegedly "does not make any discernible attempt to argue that the discharge rule functions as a statute of limitations." VA-Br. 24. This criticism is unfair because the VA *did not raise this argument* in its briefing before the merits panel. Instead, the VA raised its statute-of-limitations argument for the first time in its brief to the en banc Court, to which Mr. Arellano now responds.

defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Thus, in determining whether a timing provision functions as a statute of limitations, courts focus on whether the provision serves "the main goal of a statute of limitations: encouraging plaintiffs to prosecute their actions promptly or risk losing rights." *In re Neff*, 824 F.3d 1181, 1185 (9th Cir. 2016).

In *Young*, the Supreme Court considered the three-year "lookback" period in 11 U.S.C. § 507(a)(8)(A)(i), which provides that a claim by the IRS for tax liabilities owed by a bankrupt taxpayer is nondischargeable if the tax return was due within three years before the bankruptcy petition was filed. 535 U.S. at 46. The Supreme Court agreed with the IRS that "[t]he three-year lookback period is a limitations period subject to traditional principles of equitable tolling." *Id.* at 47. The Court acknowledged that, "unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim (viz., priority and nondischargeability in bankruptcy)." *Id.* at 47-48 (footnote omitted). But it nevertheless serves the same "basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* (alteration in original) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The Court reasoned that this "makes it a more limited statute of limitations, but a statute of limitations nonetheless." *Id.*

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

The VA argues that, "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.'" VA-Br. 24 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011)). This ignores, however, that a veteran faces *the loss of significant disability benefits* if they do not file their claim within one year of their discharge from service. Moreover, the VA ignores the holding in *Young* that a limitations period that "bars only *some*, and not *all*, legal remedies" simply means it is "a more limited statute of limitations, but a statute of limitations nonetheless." 535 U.S. at 47-48.

The VA also contends that § 5110(b)(1) is not aimed at encouraging "diligent prosecution of known claims" but, instead, is actually intended "to do the opposite." VA-Br. 23 (citation omitted). In support of this theory, the VA notes that § 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." *Id.* (citations omitted). But the same could be said of *any* statute of limitations. Every statute of limitations provides some grace period in which to bring a claim, but that does not change "the main goal of a statute of limitations: encouraging plaintiffs to prosecute their actions promptly or risk losing rights." *In re Neff*, 824 F.3d at 1185.

Next, the VA argues that § 5110(b)(1) cannot be a statute of limitations because it offers no repose to the VA. According to the VA, "[d]uring 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 . . . outside the Government's control and outside its ability to predict." VA-Br. 24. There are several flaws with this argument. First, as the VA concedes, if a veteran fails to file a claim within the one-year period of § 5110(b)(1), the VA escapes *any liability* predating the veteran's actual application for benefits, whenever that may be. VA-Br. 3-4; 38 U.S.C. § 5110(a)(1). This is not an insignificant degree of repose for the Government, and it fits easily into the Supreme Court's observation that a

"limited statute of limitations" is "a statute of limitations nonetheless." *Young*, 535 U.S. at 47-48.

Second, the VA's acknowledgement that a veteran's claim may be based on the emergence of a "new 'present disability'" shows precisely why § 5110(b)(1) falls into the same category as other statutes of limitation that limit claimants' *damages* but not their ability to seek redress for an ongoing or newly arising injury. VA-Br. 24. For instance, the patent damages statute, 35 U.S.C. § 286, provides that "no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action."

In *SCA Hygiene*, the Supreme Court held that § 286 is indistinguishable from the copyright statute of limitations addressed in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014)—which it described as "a three-year look-back limitations period"—and thus functions as a statute of limitations for purposes of determining if a laches defense can be asserted during the six-year lookback period. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961-62 (2017) (quoting *Petrella*, 572 U.S. at 670). In *Petrella*, the Supreme Court affirmed that copyright infringement (like patent infringement) is subject to the "separate-accrual rule," under which "each infringing act starts a new limitations period." 572 U.S. at 671 (citing *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992)).

Just as the patent damages statute functions as a statute of limitations while still allowing claims for ongoing injury, so too does § 5110(b)(1). The mere fact that a veteran may have a *future* claim for disability benefits against the Government based on a "new 'present disability'" does not alter the fact that § 5110(b)(1) operates as a statute of limitations for claims that are ripe during the first year after the veteran's discharge from service.

The VA cites *Lozano* as an example of a timing provision that was found not to be a statute of limitations, VA-Br. 16-17, but *Lozano* is easily distinguishable. In *Lozano*, the Supreme Court considered a treaty provision—not a federal statute—providing that when a parent abducts a child and flees to another country and "a court receives a petition for return within one year after the child's wrongful removal, the court 'shall order the return of the child forthwith.'" 572 U.S. at 4-5 (citing Art. 12 of the Hague Convention on the Civil Aspects of International Child Abduction [hereinafter "Hague Convention"]). Importantly, the expiration of the one-year period did not cut off any rights held by the left-behind parent; it merely allowed a court to consider the child's interests along with those of the parent. *Id.* at 14-15. Because "[t]he continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent," the Court held that the one-year period was not a statute of limitations. *Id.* at 15.

Unlike the treaty provision in *Lozano*, the one-year deadline in § 5110(b)(1) does *not* provide a veteran with the "continued availability" of a remedy to recover benefits owed during her first year after service. If the veteran fails to file a claim during the one-year period set forth in § 5110(b)(1), she forfeits any disability award she otherwise would have been entitled to during that year. That she might have a *future* claim that can be adjudicated for a *future* time period simply means that § 5110(b)(1) operates as a "limited statute of limitations, but a statute of limitations nonetheless." *Young*, 535 U.S. at 47-48.

Thus, even under the VA's restrictive view of the law, the *Irwin* presumption applies to § 5110(b)(1). Although Mr. Arellano disagrees that the *Irwin* presumption is applicable only to statutes of limitations, § 5110(b)(1) nevertheless *functions* as a statute of limitations because it encourages veterans with ripe disability claims after leaving service to "prosecute their actions promptly or risk losing rights." *In re Neff*, 824 F.3d at 1185.

3. The VA's "Background Principles of Law" Argument Lacks Merit

a. *Irwin* Does Not Require a "Well-Established Practice" of Applying Equitable Tolling to a Statute That Is "Functionally Similar" to § 5110(b)(1)

The VA proposes that, "[u]nder *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 tolling to functionally similar statutes." VA-Br. 25 (emphasis added). This is incorrect; *Irwin* requires no such historical showing. Indeed, the Government made a similar argument in *Scarborough v. Principi*, 541 U.S. 401 (2004), and was roundly rebuffed by the Supreme Court.

In *Scarborough*, the Supreme Court considered whether the *Irwin* presumption should apply to 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). *Id.* at 420-22. Just as the VA attempts to argue here, the Government in *Scarborough* argued that *Irwin* could not apply to the EAJA statute because there was no analogue to it in private litigation. *Id.* at 421-22. The Court specifically rejected the argument that "*Irwin* demands a precise private analogue," observing that, since many statutes that create claims for relief against the United States 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.

Thus, the VA's central premise—that this Court must find a "functionally similar" analogue to § 5110(b)(1) with a "well established" history of equitable tolling—is simply not the law. VA-Br. 25; *Scarborough*, 541 U.S. at 422; *see also Henderson*, 562 U.S. at 440 ("The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic.").

The VA ignores *Scarborough* and instead relies on *Lozano* for the proposition that the *Irwin* presumption cannot apply "[i]n the absence of a 'common-law adjudicatory principle[]' allowing equitable tolling of similar provisions." VA-Br. 29 (second alteration in original) (quoting *Lozano*, 572 U.S. at 10-11). Again, that is not the law, nor is it the holding of *Lozano*. The Court in *Lozano* merely noted that the *Irwin* presumption is based on "the understanding that Congress 'legislate[s] against a background of common-law adjudicatory principles.'" 572 U.S. at 10 (alteration in original) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). One of those common-law principles is that "limitations periods are 'customarily subject to "equitable tolling,"' unless tolling would be 'inconsistent with the text of the relevant statute.'" *Young*, 535 U.S. at 49-50 (citations omitted). Nowhere does *Lozano* say it is further necessary to find a

common-law history of applying equitable tolling to a "functionally similar" analogue before *Irwin* can be applied to a timing provision in a federal benefits statute. The *Lozano* Court's discussion of "common-law adjudicatory principles" was meant only to distinguish the Hague Convention treaty at issue there with federal statutes like the one at issue in *Irwin*. *See* 572 U.S. at 10-11 ("Unlike federal statutes of limitations, the [Hague] Convention was not adopted against a shared background of equitable tolling.").

b. Courts Have Found Timing Provisions Functionally Similar to § 5110(b)(1) Amenable to Equitable Tolling

Although *Irwin* imposes no requirement to show an analogue of § 5110(b)(1) in private litigation, it is nevertheless the case that courts have routinely applied equitable tolling to timing provisions that are functionally similar to § 5110(b)(1).

The VA incorrectly describes § 5110(b)(1) merely as a provision that "helps to establish the amount of compensation payable based on a successful claim." VA-Br. 25-26. This myopic view—which paints § 5110(b)(1) purely as a damages provision and nothing more—is presumably the VA's best-case interpretation of the statute. In other words, this view of the statute presumably gives the VA its best chance of convincing this Court that there are no "functionally similar" timing provisions in private litigation that are amenable to equitable tolling. But even under this narrow view, the VA's argument fails.

Just as the VA describes § 5110(b)(1) as a provision that "helps to establish the amount of compensation payable based on a successful claim," VA-Br. 25-26, the Supreme Court has described the copyright statute of limitations as "a three-year look-back limitations period." *Petrella*, 572 U.S. at 670. As the Court explained in *Petrella*, the copyright statute of limitations, "coupled [with] the separate-accrual rule," means that a copyright owner can sue *anytime* during an ongoing infringement. *Id.* at 682-83. "She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered." *Id.* at 683. Viewed this way, the copyright statute of limitations helps establish "the amount of compensation payable based on a successful claim." VA-Br. 25-26.

As explained in Mr. Arellano's opening brief, the three-year copyright statute of limitations has long been understood to be amenable to equitable tolling. *See, e.g., Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 339-40 (5th Cir. 1971). The VA does not dispute this but instead insists that the copyright statute of limitations "does not 'measure[] the accrual of damages.'" VA-Br. 26 (alteration in original) (citation omitted). As the Supreme Court explained in *Petrella*, however, because copyright infringement is subject to the separate-accrual rule, the copyright statute of limitations *does* effectively measure the accrual of damages. 572 U.S. at 671-72.

The Supreme Court's decision in *Young* likewise undercuts the VA's argument. The three-year lookback provision in *Young*, 11 U.S.C. § 507(a)(8)(A)(i), determined only the *amount* the IRS could recover against a bankrupt taxpayer, not whether it could maintain a claim at all. 535 U.S. at 44-45. Indeed, the Court specifically acknowledged that "the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim." *Id.* at 47-48. Nevertheless, the Court held that the three-year lookback period was amenable to equitable tolling. *Id.*

Of course, when the VA's myopic view of § 5110(b)(1) is put aside and the provision is properly viewed as a federal timing rule that *functions* as a statute of limitations, the VA's argument falls apart entirely. As explained above, and as even the VA will admit, courts have consistently held that timing provisions that function as statutes of limitations are amenable to equitable tolling. *See, e.g.*, *Irwin*, 498 U.S. at 95; *Zipes*, 455 U.S. at 393.

The VA relies heavily on the Second Circuit's decision in *Garcia Ramos*, which found a provision in an employee benefits plan not amenable to equitable tolling. VA-Br. 19, 30-31 (citing *Garcia Ramos v. 1199 Health Care Emps. Pension Fund*, 413 F.3d 234, 238 (2d Cir. 2005)). The timing provision in *Garcia Ramos*, however, was not a federal statute but rather part of a private employer's ERISA-compliant employee benefit plan. 413 F.3d at 235-36. Accordingly, the *Irwin* presumption (which applies only to federal statutes) was neither considered nor

applied. Nevertheless, the VA urges this Court to extend the holding of *Garcia Ramos* to the veterans' benefits statute to find that equitable tolling is categorically unavailable for 38 U.S.C. § 5110(b)(1). This Court should *not* do so because *Garcia Ramos* is clearly inconsistent with Supreme Court precedent.

The employee-benefits plan in *Garcia Ramos* specified that the "payment commencement date" for a disability pension benefit shall 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 the Disability Pension Benefit with the Fund Office." *Id.* at 236. Relying on this Court's decision in *Andrews v. Principi*, 351 F.3d 1134, 1137-38 (Fed. Cir. 2003), the Second Circuit reasoned that this two-year lookback provision was not amenable to equitable tolling because the applicant "is not seeking relief from a limitations period or some other procedural provision *that poses a complete bar to benefits or to review.*" *Garcia Ramos*, 413 F.3d at 238 (emphasis added). But this "complete bar" rationale is irreconcilable with the Supreme Court's holdings in *Young* and *SCA Hygiene.*

In *Young*—just as in *Garcia Ramos*—the lookback period in question was not a "complete bar" to the IRS's ability to recover unpaid taxes from a bankrupt taxpayer. *Young*, 535 U.S. at 47-48. Nevertheless, the Supreme Court concluded that the provision was amenable to equitable tolling. *Id.* As the Court explained, the mere

fact that the lookback period was not a complete bar to recovery simply meant it was "a more limited statute of limitations, but a statute of limitations nonetheless." *Id.* Similarly, in *SCA Hygiene*, the Supreme Court held that the six-year lookback period in the patent damages statute functions as a statute of limitations, notwithstanding that it does not completely bar a plaintiff from maintaining a claim for patent infringement and recovering damages. *SCA Hygiene*, 137 S. Ct. at 961-62; *accord Petrella*, 572 U.S. at 667.

B. The VA Cannot Rebut the *Irwin* Presumption

1. The Language of § 5110(a)(1) Does Not Create an "Express Prohibition" Against Equitable Tolling

The VA first attempts to rebut *Irwin* by arguing that the statutory language of § 5110(a)(1) "expressly prohibits" the application of equitable tolling throughout § 5110. VA-Br. 39-41. It points to § 5110(a)(1)'s text, which instructs that a day-of-receipt effective date applies "[u]nless specifically provided otherwise in this chapter." VA-Br. 40 (emphasis omitted) (quoting § 5110(a)(1)). According to the VA, this "[u]nless" clause is an "express prohibition of precisely the outcome that would result from the application of equitable tolling" and "easily rebut[s] any presumption in favor of tolling." VA-Br. 40-41.

The VA avoids using the word "jurisdictional," yet this "express prohibition" reasoning is fundamentally a jurisdictional argument—i.e., that Congress *forbade* equitable tolling. *See John R. Sand*, 552 U.S. at 134 (referring to "jurisdictional" as

a "convenient shorthand" for absolute time limits that forbid equitable tolling (citation omitted)); *see also United States v. Kwai Fun Wong*, 575 U.S. 402, 408 n.2 (2015) (resolving the argument that 28 U.S.C. § 2401(b) "prohibits" equitable tolling under the same analysis used to determine whether § 2401(b) is jurisdictional). The VA must therefore show that the language of § 5110(b)(1) meets the "high bar" of showing that Congress made a "clear statement" towards such a prohibition. *Kwai Fun Wong*, 575 U.S. at 409-10. It cannot do so.

As the Supreme Court has explained, many limitations periods are framed in language far more emphatic and mandatory than § 5110(a)(1). *See Gonzalez v. Thaler*, 565 U.S. 134, 144 (2012). The Federal Tort Claims Act (FTCA) is one such example. Like § 5110(a)(1), it employs an "unless" clause to forbid a tort claim against the United States "unless" certain criteria are met: "A tort claim against the United States *shall be forever barred* ***unless*** it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b) (emphasis added). Despite the FTCA's emphatic "forever barred" language, the Supreme Court found it to be "of no consequence" to the *Irwin* presumption. *Kwai Fun Wong*, 575 U.S. at 410-13.

Of course, express statutory language *can* rebut the *Irwin* presumption if it speaks "in jurisdictional terms." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (citation omitted). But the VA has already conceded that § 5110 is not

jurisdictional. VA-Br. 57-60. Express statutory language can also overcome *Irwin* if the statute itself "effectively allow[s] for equitable tolling." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). But *nothing* in § 5110 can be used to toll § 5110(b)(1). Accordingly, the VA's "express prohibition" argument must be dismissed.

2. Section 5110(b)(1) Enumerates No Exceptions to Its One-Year Limitations Period, and Whether There Are Exceptions to § 5110(a)(1) Is Irrelevant

The VA next attempts to rebut *Irwin* by branding § 5110(a)(1) as the "general rule" that controls the effective dates for various VA benefits and characterizing § 5110(b)-(n) as "exceptions to that rule." VA-Br. 4, 39. The VA then relies on *TRW* to argue that, because Congress enumerated exceptions to § 5110(a)(1), it must have intended to bar implied exceptions *anywhere* in § 5110 that touches on effective dates, including § 5110(b)(1). VA-Br. 39-42 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)). In doing so, the VA ignores the nexus element of *TRW*—i.e., that the enumerated exceptions affect the specific limitations period at issue.

The *TRW* Court held that an implied general discovery rule in the Fair Credit Reporting Act (FCRA) was not applicable in calculating the FCRA's limitations period because the statute's text and structure established a two-year limitations period and *in the same sentence* provided a limited exception for cases of willful misrepresentation. *See TRW*, 534 U.S. at 28-31. The Court reasoned that a judicially

recognized general discovery rule under the FCRA would render the narrower statutory misrepresentation rule "insignificant, if not wholly superfluous." *Id*. at 28 (citation omitted); *see also id.* at 31 ("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.").

No explicit exception exists for § 5110(b)(1)'s one year deadline. Section 5110 generally lists additional limitations periods to receive retroactive coverage for *other types* of VA benefits such as disability pension or death compensation. *See* § 5110(b)(3)-(n). These have no nexus with § 5110(b)(1) and can *never* stop or slow its one-year clock. The provision for death compensation, for example, would hardly be rendered "insignificant" or "wholly superfluous" if equitable tolling were available for discharge-based disability compensation under § 5110(b)(1). *TRW*, 534 U.S. at 31 (citation omitted); *compare* 38 U.S.C. § 5110(d), *with* 38 U.S.C. § 5110(b)(1) (defining separate benefits).

The Government has presented stronger "exceptions in the air" arguments in other equitable-tolling cases and has been consistently rebuffed. For example, the FTCA contains a "savings clause" exception to its two-year limitations period wherein a plaintiff who erroneously files an FTCA claim with the wrong agency will still be considered to have timely filed. *Santos ex rel. Beato v. United States*, 559 F.3d 189, 193 (3d Cir. 2009); *see* 28 U.S.C. §§ 2679(d)(5), 2401(b). In *Santos*, the

Government cited *TRW* to argue that this express exception to the FTCA's limitations period evinced a congressional intent to bar any implied exceptions to the same period. 559 F.3d at 195-96.

In a decision later ratified by the Supreme Court in *Kwai Fun Wong*, 575 U.S. at 409-13, the Third Circuit rejected the Government's argument and found 28 U.S.C. § 2401(b) amenable to tolling. *Santos*, 559 F.3d at 195-96. Noting that Congress placed the FTCA's savings clause in a section distinct from the limitations provision, the court found that its placement "does not suggest that Congress intended it to preclude equitable tolling, . . . *particularly in an area of law where equitable concerns may be greater* [than the FRCA]." *Id.* (emphasis added) (citations omitted).

Here, the VA cites no case in which enumerated exceptions to one provision (e.g., § 5110(a)(1)) were sufficient to bar the equitable tolling of an entirely different provision (e.g., § 5110(b)(1)). Even if § 5110(b)(3)-(n) *could* provide any exception to § 5110(b)(1)'s one-year limitations period, their placement in "separate statutory . . . provision[s]" would weigh against a finding that Congress intended to bar equitable tolling of § 5110(b)(1). *Id.* at 194-96.

To the extent the VA argues that § 5110 incorporates "equitable concerns" for other benefits but is silent on the specific question of tolling for § 5110(b)(1), VA-Br 41-46, that fact "*supplements* rather than displaces principles of equitable

tolling." *Young*, 535 U.S. at 52-53 (finding that an "express tolling provision" found for a first limitations period in a given subsection only "demonstrate[d] that the Bankruptcy Code *incorporates* traditional equitable principles" and did not evince a congressional intent to bar tolling for a second limitations period). As it stands, Congress placed *zero* enumerated exceptions to § 5110(b)(1) in the text of § 5110 or any other statute. This is exactly what Congress would do if it *wanted* § 5110(b)(1)'s one-year limitations period to be subject to *Irwin*'s general rule.

3. *Young* Forecloses the VA's Argument That § 5110(b)(1) is a Nontollable "Limitation Upon the Amount of Recovery"

The VA next asserts that § 5110(b)(1)'s limitations period is a "substantive limitation[] on the amount of recovery" instead of a tollable "procedural limitation[]." VA-Br. 48 (quoting *United States v. Brockamp*, 519 U.S. 347, 352 (1997)). As Mr. Arellano pointed out at the panel stage—and as the VA still refuses to address—the Supreme Court dispelled this taxonomy between "procedural" and "substantive" limitations in *Young*. *See* Arellano Panel Reply Br. 8-13 (citing *Young*, 535 U.S. at 48). There, the Court explained that "*all* limitations periods are 'substantive': They *define* a subset of claims eligible for certain remedies." *Young*, 535 U.S. at 48-49 (rejecting the argument that 11 U.S.C. § 507(a)(8)(A)(i) is a "substantive component of the Bankruptcy Code" instead of a "procedural limitations period" to find it amenable to equitable tolling). Thus, the Supreme Court

has clarified, subsequent to *Brockamp*, that the hypothetical distinction between a "substantive" and "procedural" limitation is illusory.

4. Equitable Tolling of 5110(b)(1) Is Consistent with the Statutory Scheme Governing Veterans' Benefits

a. The Veterans Court Has the Power to Equitably Toll Deadlines

The VA contends § 5110(b)(1) cannot be equitably tolled because this would require "the VA to exercise the equitable powers of a court," a proposition the VA calls "dubious." VA-Br. 49. This is wrong for at least two reasons.

First, the issue in this appeal is whether the *Veterans Court* erred in finding equitable tolling categorically unavailable for § 5110(b)(1) and in refusing to apply the *Irwin* presumption. The VA cannot realistically argue that the Veterans Court lacks the power to equitably toll statutory timing provisions since this Court has already ruled that the Veterans Court may equitably toll the 120-day period set forth in 38 U.S.C. § 7266(a). *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc); *cf. Young*, 535 U.S. at 49-53 (recognizing a bankruptcy court's power to equitably toll deadlines); *Former Emps. of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1298 (Fed. Cir. 2004) (recognizing the Court of International Trade's power to equitably toll deadlines); *Myers v. Comm'r*, 928 F.3d 1025, 1036-37 (D.C. Cir. 2019) (recognizing the U.S. Tax Court's power to equitably toll deadlines).

Second, this Court has held that equitable-tolling principles should apply "liberally" during the nonadversarial phase of a veteran's disability claim before the VA. *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."); *accord Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 162 (2013) (Sotomayor, J. concurring) ("[W]e have never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines." (citing *Henderson*, 562 U.S. at 442 n.4; *Brockamp*, 519 U.S. at 350-53)).

b. The VA's Desire for "Ease of Administration" and "Bright-Line Rules" Cannot Outweigh *Irwin*'s Presumption in Favor of Equitable Tolling

As a fallback, the VA requests that this Court deny veterans the same opportunity to seek equitable tolling that other litigants enjoy on the ground that allowing *veterans* to do so would "add even more complexity to an already overburdened administrative system." VA-Br. 55; *see also* VA-Br. 52-54 (emphasizing the VA's desire for "ease of administration" and "[b]right-line rules"). This argument should be dismissed as speculative and not grounded in law. *Cf. Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("[t]he government's interest in veteran's cases is . . . that justice shall be done, that all veterans so entitled receive the benefits due to them.").

In 1998, this Court first held that the 120-day deadline in 38 U.S.C. § 7266(a) is amenable to equitable tolling. *Bailey*, 160 F.3d at 1368. Except for a two-year period when *Bailey* was temporarily overruled and then reinstated in *Henderson*, this type of equitable tolling has been available to veterans for more than twenty years. Yet the VA provides no evidence that *Bailey* and its progeny have wreaked havoc on the system or hindered the VA's ability to process veterans' claims.

Similarly, it has been more than thirty years since the Supreme Court first ruled that administrative deadlines applicable to Title VII claims are nonjurisdictional and amenable to equitable tolling. *Zipes*, 455 U.S. at 392-98; *Irwin*, 498 U.S. at 95-96. Since then, courts have repeatedly applied this ruling in various contexts. *See, e.g.*, *Francis v. City of New York*, 235 F.3d 763, 767 (2d Cir. 2000); *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365, 1375-76 (D.C. Cir. 2008). Again, there is no evidence that this expansion of equitable tolling to EEOC exhaustion and other administrative timing requirements has wreaked havoc on the federal system for adjudicating employment discrimination claims.

There is a well-developed body of law regarding the standards for applying equitable tolling to veterans' claims. *See, e.g.*, *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014) ("In order to benefit from equitable tolling, . . . a claimant [must] demonstrate three elements: (1) extraordinary circumstance[s]; (2) due diligence; and (3) causation."). There is no reason to believe that the Veterans Court

would not be able to apply these well-developed standards to the facts of individual cases to determine whether equitable tolling should apply to § 5110(b)(1) when the question arises. Moreover, as explained by amici, the VA is already required by statute to develop the same facts that would inform equitable tolling. *See* MVA-Br. 19-20; 38 U.S.C. § 5103A.

5. The History of § 5110(b)(1) Does Not Weigh Against Equitable Tolling

The VA argues that because Congress did not react to *Andrews* by specifically amending § 5110(b)(1), it must have intended to bar tolling for its one-year limitations period. *See* VA-Br. 55-56. In support, the VA asserts that *Andrews* held that "principles of equitable tolling . . . are not applicable to the time period in § 5110(b)(1)." *Id.* (quoting *Andrews*, 351 F.3d at 1137). But the actual holding of the case was that "principles of equitable tolling, *as claimed by Andrews*, are not applicable to the time period in § 5110(b)(1)." *Andrews*, 351 F.3d at 1137 (emphasis added). That holding, which is arguably fact-specific, has been the subject of some confusion. *See, e.g.*, *Butler v. Shinseki*, 603 F.3d 922, 926-28 (Fed. Cir. 2010) (Newman, J., concurring in the result).

The VA appears to assume that Congress would naturally read *Andrews* as *not* limited to its facts and therefore would have revised § 5110(b)(1) if it were unhappy with that result. VA-Br. 56. But the VA provides no evidence that Congress shares its reading of *Andrews*, nor does it point to a single instance of Congress ever

amending a statute to allow tolling in response to a contrary court decision. Several of the Supreme Court cases cited in this appeal expanded equitable tolling for limitations periods that courts held to be ineligible for tolling for decades, even though Congress did nothing to amend the relevant statute. *Compare Kwai Fun Wong*, 575 U.S. at 420-21 (finding 28 U.S.C. § 2401(b) subject to equitable tolling), *with Berti v. V.A. Hosp.*, 860 F.2d 338, 340 (9th Cir. 1988) (finding § 2401(b) "subject neither to estoppel principles nor to equitable considerations").

C. Applying the *Irwin* Presumption to § 5110(b)(1) Would Not Result in an Unwarranted Expansion of Equitable Tolling

The VA and Mr. Arellano appear to agree that a ruling in favor of Mr. Arellano may extend the *Irwin* presumption to at least some of the other timing provisions in § 5110, but *not* to the default rule of § 5110(a)(1). As the VA agrees, § 5110(a)(1) "does not describe a 'defined time period . . . that could be paused and then restarted via tolling.'" VA-Br. 38 (quoting Arellano-Br. 41).

The VA nevertheless contends, without evidence, that extending the *Irwin* presumption to other timing provisions in § 5110 would be inconsistent "with congressional intent, as reflected in the carefully drawn system of effective-date rules codified in section 5110." *Id.* The VA fails to reconcile this assertion, however, with the Supreme Court's rulings in *Irwin* and other cases, which have found equitable tolling applicable to other "carefully drawn" systems enacted by Congress.

III. 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).

Respectfully submitted,

/s/ James R. Barney

James R. Barney
Kelly S. Horn
Alexander E. Harding
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
Telephone: (202) 408-4000

December 7, 2020

Attorneys for Appellant
Adolfo R. Arellano

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

The foregoing brief complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because:

> The brief has been prepared using a proportionally spaced typeface and includes 6,984 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f) and Fed. Cir. R. 32(b).

December 7, 2020

/s/ James R. Barney
James R. Barney
Kelly S. Horn
Alexander E. Harding
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP

Attorneys for Appellant Adolfo R. Arellano