

## What Stood Out In Veteran Benefits Arguments At High Court

By **Samuel Goldstein** (October 13, 2022, 3:12 PM EDT)

On Oct. 4, the U.S. Supreme Court heard oral argument in *Arellano v. McDonough*. The case involves two areas that have interested the court in recent terms — veterans' benefits and exceptions to statutory filing deadlines.

In particular, *Arellano* addresses whether the statutory deadline to apply for certain benefits can be equitably tolled — that is, extended due to some unusual circumstance that prevented a litigant from making a timely filing. Questions on the availability of equitable tolling arise in a wide variety of contexts.

The Supreme Court's eventual decision in *Arellano* thus may have broader implications beyond the veterans' benefits area.



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### Background

By statute, Congress has authorized the U.S. Department of Veterans Affairs to award compensation to veterans who suffered injuries as a result of their service. Under Title 38 of the U.S. Code, Section 5110(a)(1), the effective date for such an award generally cannot be earlier than the date the VA receives the veteran's benefits application.[1]

The statute provides several exceptions to that default rule. As relevant here, under Section 5110(b)(1), if the VA receives an application within one year after the veteran's discharge from service, the award will be retroactive to the day after the veteran's discharge.[2]

In *Arellano*, Navy veteran Adolfo Arellano filed an application for disability benefits nearly 30 years after his discharge from active service. The VA granted disability benefits effective as of the date the agency received Arellano's application.

Arellano appealed that determination, seeking to make his award retroactive to the day after his discharge under Section 5110(b)(1). Although Arellano did not file within that provision's one-year period, he contended that the period should be equitably tolled because his mental illness prevented him from filing his claim earlier.

The Board of Veterans' Appeals and the U.S. Court of Appeals for Veterans Claims rejected Arellano's equitable tolling claim based on *Andrews v. Principi*, a 2003 decision from the U.S. Court of Appeals for the Federal Circuit holding that Section 5110(b)(1)'s one-year deadline is not subject to equitable

tolling.[3]

After a Federal Circuit panel heard oral argument in *Arellano* — but before the panel issued a decision — the Federal Circuit sua sponte decided to hear the case en banc. Among other issues, the en banc court asked the parties to brief whether *Andrews* should be overruled.[4]

In its en banc decision, however, the Federal Circuit equally divided on that question, leaving *Andrews* in place. But the en banc court unanimously determined that equitable tolling was not available to *Arellano*.<sup>[5]</sup>

In an opinion authored by Chief Circuit Judge Kimberly Ann Moore, six judges agreed with the conclusion in *Andrews* that Section 5110(b)(1) is not amenable to equitable tolling. They reasoned that the one-year deadline is not a statute of limitations that operates to bar a veteran's benefits claim altogether. Rather, it establishes "one of many elements" of a benefits award — namely, its effective date.<sup>[6]</sup>

In an opinion written by Circuit Judge Timothy Dyk, six other judges would have overruled *Andrews* and held that Section 5110(b)(1) is a statute of limitations and is subject to equitable tolling.<sup>[7]</sup> Yet those judges would have rejected equitable tolling on the facts of *Arellano's* case, as he had a caregiver who could have filed a benefits application on his behalf sometime earlier in the 30-year period after his discharge.<sup>[8]</sup>

The Supreme Court granted *Arellano's* certiorari petition, which asked the court to decide whether Section 5110(b)(1)'s one-year deadline is amenable to equitable tolling.

### **The Parties' Arguments**

Much of the parties' briefing in the Supreme Court focuses on how to interpret and apply the Supreme Court's 1990 decision in *Irwin v. Department of Veterans Affairs*.<sup>[9]</sup>

In *Irwin*, the Supreme Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."<sup>[10]</sup>

"Once Congress has made such a waiver," the court reasoned, "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."<sup>[11]</sup>

So in *Arellano*, the main disputes between the parties are (1) whether Section 5110(b)(1)'s one-year period is a statute of limitations subject to *Irwin's* rebuttable presumption of equitable tolling, and (2) if so, whether the presumption has been rebutted.

### ***Arellano's Arguments***

As *Arellano* reads *Irwin* and later cases, the presumption of equitable tolling is not limited to traditional statutes of limitations. The relevant inquiry is not whether the filing deadline is a statute of limitations, but whether it functions like one.

In *Arellano's* view, Section 5110(b)(1) functions as a statute of limitations because it bars a veteran's claim for retroactive disability benefits if filed more than one year after discharge. And Section 5110(b)(1) serves the main goal of statutes of limitations: encouraging parties to bring their claims

promptly.

Arellano also invokes the pro-veteran canon. Under that interpretive canon, as the Supreme Court explained in its 2011 *Henderson v. Shinseki* ruling, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."<sup>[12]</sup> So any doubt on whether Irwin's presumption applies to Section 5110(b)(1) should be resolved in favor of veterans and permitting equitable tolling.

According to Arellano, nothing in the statute or its history rebuts the presumption of equitable tolling.

The statute's default rule, Section 5110(a)(1), provides that the effective date of an award "shall not be earlier than" the application date "[u]nless specifically provided otherwise in this chapter."<sup>[13]</sup> But Arellano argues that even such mandatory language is insufficient to show that Congress intended to foreclose equitable tolling. And he contends that Congress' failure to amend Section 5110(b)(1) since the Federal Circuit's *Andrews* decision in 2003 should not be viewed as an endorsement of that holding.

Further, Arellano raises several policy arguments. He points out that other government benefits programs, like disability benefits for civil service employees, have filing deadlines that have been deemed subject to equitable tolling. Arellano considers it unlikely that Congress would have intended to treat veterans worse than similarly situated civilian litigants.

In a similar vein, Arellano argues that a rule foreclosing equitable tolling would disadvantage the neediest veterans — those suffering from such severe mental or physical disabilities that they cannot file a claim for disability benefits within the one-year deadline.

### ***Government's Arguments***

Unsurprisingly, the government disagrees with Arellano on both steps of the Irwin analysis. It reads the Supreme Court's equitable tolling cases more narrowly as holding that the presumption of equitable tolling applies only to statutes of limitations as traditionally understood.

And in the government's view, Section 5110(b)(1) is not such a statute of limitations. It does not establish a deadline by which a veteran must bring a claim. Nor does it bar claims after the one-year period has expired. The provision merely governs the effective date — and thus the amount — of any benefits awarded.

Even if Irwin's presumption applied to Section 5110(b)(1), the government contends, the presumption would be rebutted. It stresses the text of the statute's default rule: "Unless specifically provided otherwise in this chapter, the effective date of an award ... shall not be earlier than the date of receipt of application therefor."<sup>[14]</sup> According to the government, this emphatic and mandatory language makes clear that Congress intended the enumerated exceptions to be exclusive.

The government also contends that equitable tolling would be inconsistent with Section 5110's structure. After setting out the default effective-date rule, Section 5110 lists 16 specific, detailed exceptions under which a benefits award will have an earlier effective date. That shows Congress already identified the "equitable" concerns that it believes warrant a departure from the default rule.

In addition, the government discusses the "practical problems" that it contends would result if Section 5110(b)(1) were subject to equitable tolling. It emphasizes the importance of bright-line timing rules for

large administrative programs like the veterans' benefits system, which processes more than 1 million disability benefits claims each year. The government argues that equitable tolling would require individualized and fact-intensive inquiries, further delaying the already backlogged system.

Finally, the government contends that the pro-veteran canon does not apply here because there is no "interpretive doubt" for the canon to resolve. It argues that Section 5110(b)(1) is unambiguously not a statute of limitations for purposes of Irwin's presumption. And the statutory text and structure would unambiguously rebut that presumption in any event.

### **Oral Argument**

The parties' presentations at oral argument reflected the major themes in their briefing. Arellano's counsel advocated for a functional approach to when Irwin's presumption of equitable tolling applies. By contrast, the government asked the court to take a more formalistic approach to that question.

As the government's counsel put it, if the provision does not "walk and quack like a statute of limitations," Congress did not intend to invoke the common-law tradition of equitable tolling for statutes of limitations. And both sides argued that Section 5110's text and structure favor their respective positions.

Among the more notable exchanges, Justice Ketanji Brown Jackson questioned both sides about the practicalities of a rule permitting equitable tolling. She asked whether the VA or a court would decide equitable tolling requests — and if the agency, whether it would have to promulgate a regulation implementing the court's decision.

Both sides agreed that the VA would need to make tolling determinations in the first instance. According to the government, that prospect counseled against reading Section 5110(b)(1) to permit equitable tolling, as tolling is generally decided by courts rather than agencies. That led to colloquies where Justices Sonia Sotomayor and Neil Gorsuch seemed to reject a categorical rule against tolling of agency deadlines.

Justice Brett Kavanaugh asked Arellano's counsel to respond to the government's concerns that equitable tolling would create practical problems for the agency. Arellano's counsel responded that VA regulations already give the agency discretion to extend certain other deadlines, and that has not resulted in a "floodgate problem" for the agency.

On the other side of the ledger, Chief Justice John Roberts pushed back on the government's argument that the large number of enumerated exceptions in Section 5110 militates against equitable tolling. Under Irwin's reasoning, he proposed, those numerous exceptions suggest that Congress was broadly waiving its sovereign immunity. And the Roberts got some laughs with his comment that the government "may not have had a very good lawyer in Irwin"; that lawyer was him.

Justice Samuel Alito also asked the government about an amicus brief describing the Edgewood veterans — Army veterans who were subjected to experiments involving dangerous chemicals but were forced to sign nondisclosure agreements. They could not file timely benefits applications, since the evidence they needed to substantiate their disability claims remained secret.

The government's counsel responded that VA regulations and guidance create special procedures for disability claims involving classified records. Regardless, he stated, such a problem would be for

Congress to solve, not the court.

## Predictions

It was difficult to predict how Arellano might come out based on oral argument. The justices asked fewer questions than usual — perhaps in part because the session followed a nearly 2-hour-long argument in a significant Voting Rights Act case.

The court's recent decisions generally, though not uniformly, have construed statutory filing requirements as flexible claims-processing rules rather than strict mandates.<sup>[15]</sup> So if that trend continues, one might expect Arellano to prevail. But both sides faced some challenging questions, and no clear resolution had emerged by the time the argument concluded.

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[1] 38 U.S.C. §5110(a)(1).

[2] *Id.* §5110(b)(1).

[3] *Andrews v. Principi*, 351 F.3d 1134, 1137-38 (Fed. Cir. 2003).

[4] *Arellano v. Wilkie*, 970 F.3d 1362, 1363 (Fed. Cir. 2020).

[5] *Arellano v. McDonough*, 1 F.4th 1059, 1060 (Fed. Cir. 2021).

[6] *Id.* at 1067 (Moore, C.J., concurring in the judgment).

[7] *Id.* at 1092 (Dyk, J., concurring in the judgment).

[8] *Id.* at 1099.

[9] *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89 (1990).

[10] *Id.* at 95-96.

[11] *Id.* at 95.

[12] *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). (quoting *King v. St. Vincent's Hopsital*, 502 U.S. 215, 220-21 n.9 (1991)).

[13] 38 U.S.C. §5110(a)(1).

[14] *Id.*

[15] Compare, e.g., *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1501 (2022) (statutory deadline to petition Tax Court for review of certain determination is non-jurisdictional and subject to equitable tolling), and *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1852 (2019) (Title VII's charge-filing requirement is non-jurisdictional), with *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019) (deadline to petition for review of class-certification order under Rule 23(f) is not subject to equitable tolling).