17-2307

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PFIZER INC. and SUBSIDIARIES,
Plaintiff-Appellant,

vs.

UNITED STATES of AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York, Docket No. 1:16-cv-1870 (Lorna G. Schofield, J.)

AMICUS BRIEF OF HARVARD FEDERAL TAX CLINIC IN SUPPORT OF THE APPELLANT

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AMICUS BRIEF OF HARVARD FEDERAL TAX CLINIC IN SUPPORT OF NEITHER PARTY

INTEREST OF THE AMICUS[1]

The Harvard Federal Tax Clinic ("the Clinic") was formed in 2015 to represent low-income taxpayers before the Internal Revenue Service and in tax matters before the courts. Most of the tax matters in which the Clinic is

[1] Pursuant to FRAP 29(a)(4)(E), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only person who contributed money that was intended to fund preparing or submitting this brief is Harvard University, which operates the Harvard Federal Tax Clinic as part of the Legal Services Center of Harvard Law School. The views expressed herein are those of the Clinic, not Harvard University.

involved are audit or collection matters. A smaller number are tax refund matters that can be pursued only in the district courts or the Court of Federal Claims.

The Clinic has never had a client or been consulted concerning an overpayment interest suit. However, the Clinic's clients or individuals seeking its advice often have filed something late with the IRS or the courts. So, the Clinic regularly advises clients or prospective clients concerning the statutes of limitations that apply for bringing Tax Court actions, for filing administrative refund claims at § 6511[2] (including, especially, the financial disability tolling provision at § 6511(h)), and for bringing tax refund suits in the district courts or the Court of Federal Claims at § 6532(a)(1). The Clinic also advises clients concerning the possibility of overcoming untimely filing problems through judicial doctrines.

In a series of cases, the Clinic has argued that the filing deadlines in §§ 6015(e)(1)(A) and 6330(d)(1) to file Tax Court innocent spouse and Collection Due Process petitions, respectively, are not jurisdictional and are subject to equitable tolling under recent Supreme Court case law that has narrowed the use of the word "jurisdictional" generally to exclude filing deadlines. In the innocent spouse cases of *Rubel v. Commissioner*, 856 F.3d

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), these arguments were recently rejected. The Clinic's arguments were also rejected by the Tax Court in the Collection Due Process case of *Guralnik v. Commissioner*, 146 T.C. 230, 235-238 (2016).

The Clinic is continuing to litigate the issues of the jurisdictional nature of the filing deadlines in §§ 6015(e)(1)(A) and 6330(d)(1). The Clinic is currently making the argument that § 6330(d)(1)'s filing deadline is not jurisdictional in Cunningham v. Commissioner, Fourth Circuit Docket No. 17-1433, and Duggan v. Commissioner, Ninth Circuit Docket No. 15-73819 (as am amicus in the Duggan case). Briefing is completed in both of these cases, and oral arguments therein are scheduled for December 5 and 7, 2017, respectively. The Clinic is making the argument that § 6015(e)(1)(A)'s timing period is not jurisdictional in Nauflett v. Commissioner, Fourth Circuit Docket No. 17-1986, and Vu v. Commissioner, Tax Court Docket No. 21661-14S (notice of appeal filed Sept. 11, 2017), where the Tenth Circuit docket number is not yet available.. The briefing in those last two cases is just beginning.

The Clinic's purpose in filing this brief is to request that this Court hold that compliance with the filing deadline in § 6532(a)(1) is not a jurisdictional predicate to a tax refund suit. Such a ruling may be of aid to

low-income taxpayers because, in that event, any noncompliance with the filing deadline would become an affirmative defense that the government could waive or would forfeit (if the government did not raise the argument early enough in the litigation). Other such taxpayers who, for equitable reasons, missed the refund suit filing deadline might also benefit.

ARGUMENT

This appeal presents a number of issues, including whether the district court had jurisdiction under 28 U.S.C. § 1346(a)(1) and the appropriate statute of limitations if the court did have jurisdiction. The court below held that it would have had jurisdiction under 28 U.S.C. § 1346(a)(1), but it lacked jurisdiction because the correct filing deadline was § 6532(a)(1), and Pfizer failed to file its complaint within the period set forth therein. The Clinic takes no position on which is the correct statute of limitations for the instant action. However, if § 6532(a)(1) is the correct statute of limitations, then it is clear under current Supreme Court case law that any failure by Pfizer to timely file was not a jurisdictional defect because the time period in § 6532(a)(1) is not one of those rare time limits that is jurisdictional anymore. The time limit is simply a nonjurisdictional claims processing rule. Accordingly, at the very least, the district court's dismissal of this action for lack of jurisdiction on the grounds of untimely filing cannot stand.

I. Section 6532(a)(1)'s Filing Deadline is Not Jurisdictional Under Current Supreme Court Case Law.

Whether a statutory deadline is "jurisdictional" is an important initial determination for a court to make. "The expiration of a 'jurisdictional' deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons." *Dolan v. United States*, 560 U.S. 605, 610 (2010) (citation omitted).

Beginning in 2004, the Supreme Court observed that it and other courts had been too careless in using the word "jurisdictional"

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'" can be confounding. *Carlisle* [*v. United States*], 517 U.S. [416] at 434 [(1996)] (Ginsburg, J., concurring). Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

A. Section 6532(a)(1) Does Not Contain a Clear Statement that Its Filing Deadline is Jurisdictional.

Since *Kontrick*, the Supreme Court has held that time periods in which to act are almost never jurisdictional. *United States v. Wong*, 135 S. Ct. 1625 (2015). However, the Court acknowledges that time periods still can

be jurisdictional if Congress makes a "clear statement" to that effect. *Id*. at 1632. The Court has stated:

> [I]n applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. *See, e.g.*, [*Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S.] at 154 [(2013)] (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see Auburn Regional*. 568 U.S., at 154; *Scarborough v. Principi*, 541 U.S. 401, 413 (2004). That is so, contrary to the dissent's suggestion, *see post,* at ___, ___ - ___, 191 L. Ed. 2d, at 551, 554-555, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be. *Henderson*, 562 U.S., at 439 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

Id.

In *Wong*, the Court also wrote:

> This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. *See Henderson*, 562 U.S., at 439-440; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164-165 [(2010)]; *Arbaugh* [*v. Y & H Corp.*], 546 U.S. [500], at 515 [(2006)]; *Zipes* [*v. T.W.A.*], 455 U.S. [385], at 393-394 [(1982)].

Id. at 1633.

Three Supreme Court opinions issued after *Kontrick* have held filing deadlines nonjurisdictional because (1) there were no clear statements

otherwise from Congress within the statute and (2) actual jurisdictional grants were located far away from the stated filing deadline in the United States Code. *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Wong*, *supra*; *Henderson v. Shinseki*, 562 U.S. 428 (2011). The Supreme Court has also held a filing deadline not jurisdictional, even where the jurisdictional grant was in the same sentence containing that filing deadline. *Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S. 145 (2013).

The Court has never yet held, following *Kontrick*, that statutory words clearly stated Congress' intent that a filing deadline be jurisdictional. This makes it especially difficult for lower courts to hold filing deadlines jurisdictional under the clear statement rule, since there are no such examples provided by the Supreme Court to consider at this time.

The 2-year period in § 6532(a)(1) is most certainly not a jurisdictional requirement of a suit under the clear statement rule.

Before looking at the language of § 6532(a)(1), one should look at its placement in the Internal Revenue Code. *Henderson*, *supra*, at 439 (a filing deadline's placement in a subchapter captioned "Procedure", as opposed to another captioned "Jurisdiction; finality of decisions", indicates that Congress intended the filing deadline to be a nonjurisdictional claims processing rule).

Chapter 66 of the Internal Revenue Code is captioned "Limitations on Assessment and Collection" and comprises all of the Code sections from 6501 to 6533. With the exception of § 6512 (whose subsection (b) grants the Tax Court certain overpayment jurisdiction), no Code section in Chapter 66 uses the word "jurisdiction" or speaks in jurisdictional terms. For example, § 6511, which provides the statutes of limitations for the administrative claims that must precede tax refund suits, does not include the word "jurisdiction" or speak in jurisdictional terms. Subchapter D of Chapter 66, captioned "Periods of Limitation in Judicial Proceedings", comprises §§ 6531, 6532, and 6533 (the latter merely containing cross-references). Section 6531 is captioned "Periods of Limitations on Criminal Prosecutions". Section 6532 is captioned "Periods of Limitations on Suits".

Section 6532 contains three subsections, each of which provides a period of limitations for a civil suit, where a court's jurisdiction to hear such suit is set out elsewhere in the United States Code.

Section 6532(b) provides periods of limitations for civil suits brought by the government for recovery of erroneous refunds. Such suits are authorized by § 7405.

Section 6532(c) provides a period of limitations for non-taxpayers to bring suits for wrongful levy. Other rules for bringing such actions are set

out at § 7426. 28 U.S.C. § 1346(e) gives district courts jurisdiction to hear such suits.

Section 6532(a) provides periods of limitations for taxpayers to bring refund suits. Section 7422(a) provides one requirement of such a suit – that that an administrative claim be filed before such a suit is brought. But, 28 U.S.C. § 1346(a)(1) gives district courts and the Court of Federal Claims jurisdiction to hear such suits. 28 U.S.C. § 1346(a)(1) is located in a Chapter of the Judiciary Code captioned "District Courts; Jurisdiction".

Section 6532(a) provides, in relevant part:

> (a) Suits by taxpayers for refund.
>
> (1) General rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

The district court below ruled that Pfizer's suit had not been filed within the 2-year period stated in § 6532(a)(1), so the court lacked jurisdiction to hear the suit. But, clearly, § 6532(a)(1) does not use the word "jurisdiction", otherwise speak in jurisdictional terms, or constitute anything other than an exception-free filing deadline. Congress has done nothing

special to tag that filing deadline as jurisdictional under the clear statement rule. Moreover, § 6532(a)(1)'s placement in a subchapter captioned "Periods of Limitation in Judicial Proceedings", rather than one captioned "District Courts; Jurisdiction", indicates that Congress did not consider its filing deadline jurisdictional.

Further, *Wong* supports the interpretation that the 2-year time period in § 6532(a)(1) is not jurisdictional. In *Wong*, the Supreme Court held that the exception-free deadlines in 28 U.S.C. § 2401(b) in which both to file an administrative claim and bring a district court suit under the Federal Tort Claims Act (FTCA) were not jurisdictional under the clear statement exception – despite even more-mandatory-sounding language ("a tort claim against the United States shall be forever barred unless . . . .") – because the jurisdictional grant was elsewhere (at 28 U.S.C. § 1346(b)(1)). *Wong*, *supra*, at 1633.

Only a few months before the Supreme Court issued its opinion in *Wong*, the Ninth Circuit held that, based on the Supreme Court's post-*Kontrick* jurisdictional rules, the 9-month deadline in § 6532(c) to bring a wrongful levy suit is not jurisdictional, writing:

> The Supreme Court's recent cases require a clear statement from Congress before a procedural rule will be treated as jurisdictional. *Auburn*, 133 S. Ct. at 824; *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). We find no such clear statement here.

> Section 6532(c) does not cast its filing deadline in "jurisdictional" terms any more than the statute at issue in *Henderson* did—a statute the Court held to be nonjurisdictional. *See Henderson*, 131 S. Ct. at 1204-05. Congress signaled the non-jurisdictional nature of § 6532(c) by placing it in a subtitle of the Internal Revenue Code labeled "Procedure and Administration," while at the same time enacting a separate jurisdiction-conferring provision (28 U.S.C. § 1346(e)) and placing that provision in a chapter titled "District Courts; Jurisdiction." Congress' placement decision indicates that it viewed § 6532(c)'s limitations period as a mere "claim-processing rule" rather than a jurisdictional command. *See Henderson*, 131 S. Ct. at 1205.

Volpicelli v. United States, 777 F.3d 1042 (9th Cir. 2015). The Ninth Circuit in that case also went on to hold the filing deadline subject to equitable tolling under the presumption in favor of tolling against the government announced in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990).[3]

Volpicelli is not the only recent opinion to find a tax filing deadline nonjurisdictional in light of the new rules on what is jurisdictional. In *Keohane v. United States*, 669 F.3d 325, 330 (D.C. Cir. 2012), the D.C. Circuit, citing *Henderson* and other recent Supreme Court opinions, held that the 2-year deadline in § 7433(d)(3) in which a taxpayer may bring a district court action for damages from wrongful IRS collection actions is nonjurisdictional. Notably, the D.C. Circuit decided this issue of whether

[3] In contrast to *Volpicelli*, long before *Kontrick*, this Court had held that the wrongful levy suit filing deadline in § 6532(c) is jurisdictional and not subject to estoppel. *Williams v. United States*, 947 F.2d 37, 40 (2d Cir. 1991). Oddly, *Williams* does not cite or discuss *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974), where this Court held that the refund suit filing deadline in § 6532(a)(1) is subject to estoppel.

the filing deadline was jurisdictional, even though it made no difference in the case. The D.C. Circuit clearly did not want anyone to cite its affirmance of the district court's dismissal as evidence that the D.C. Circuit considered the filing deadline jurisdictional. For similar reasons, this Court should decide the jurisdictional issue in this case, as well.

Three recent opinions of courts of appeals that have held deadlines to file certain Tax Court petitions jurisdictional under the recent Supreme Court case law are easily distinguishable.

Rubel v. Commissioner, 856 F.3d 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), concerned the 90-day deadline in which to file an "innocent spouse" petition in the Tax Court under § 6015(e)(1)(A). Innocent spouse relief is available, under certain condition set out in § 6015(b), (c), or (f), if a taxpayer files an election or request to be relieved from joint and several liability from a joint income tax return. If the IRS sends out a notice of determination denying the election or request, the taxpayer has 90 days to file a petition contesting the denial in the Tax Court. Unlike the case of § 6532(a)(1) (where the filing deadline is not even in the same Title of the United States Code as the jurisdictional grant), the sentence in § 6015(e)(1)(A) that contains the 90-day filing deadline also contains the jurisdictional grant.

In *Rubel* and *Matuszak* (cases litigated by the Clinic), the courts relied on the clear statement exception to find that the 90-day filing deadline is jurisdictional. *See, e.g.*, *Matuszak* at 196 ("Not only did Congress place the grant of jurisdiction and the time limitation in the same sentence and subsection, it expressly conditioned the Tax Court's jurisdiction on the timely filing of a petition: 'the Tax Court shall have jurisdiction . . . *if* [the] petition is filed" within the specified period.'") (citation and footnote omitted; emphasis in original). The courts rejected the Clinic's argument that the wording of the 90-day filing deadline was not materially different from the wording of the sentence in *Auburn* that gave Medicare reimbursement boards the right to hear cases and that conditioned the grant with a final phrase saying "if" the appeal was brought in certain time periods. In *Auburn*, the Court did not dispute that part of the sentence was jurisdictional, but still held that the filing deadline within the sentence was not. *Rubel* and *Matuszak* distinguished *Auburn*'s statutory sentence from the one in § 6015(e)(1)(A) because the innocent spouse sentence, unlike the Medicare sentence, contains the words "shall have jurisdiction".

Rubel and *Matuszak* also focused on an injunctive power in § 6015(e)(1)(B)(ii) given to the Tax Court to enforce a prohibition on collection while an innocent spouse election or request was pending before

the IRS or the courts. The provision states that "the Tax Court shall have no [injunctive] jurisdiction . . . unless a timely petition has been filed under subparagraph A". "Read alongside § 6015(e)(1)(B), the ninety-day deadline in § 6015(e)(1)(A) represents '[t]he most obvious example' of a jurisdictional rule, because Congress clearly and repeatedly expressed that it imposes a jurisdictional limit on the Tax Court's authority." *Matuszak* at 197 (citation omitted). Understandably, there is no parallel injunctive jurisdiction given to district courts in connection with refund suits.

Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017) (in which the Clinic was not involved), concerned the 90- (or 150-) day deadline in the first sentence of § 6213(a) in which a taxpayer may petition the Tax Court to redetermine a deficiency in tax. *Tilden* also found that period to be jurisdictional under the clear statement exception, noting that later sentences in the subsection provide a similar prohibition on collection while the Tax Court case is pending and a similarly-phrased jurisdictional grant to the Tax Court to enjoin premature collection only if a "timely petition has been filed". *Tilden* observed that the word "jurisdiction" in the fourth sentence of § 6213(a) was a "magic word". *Id*. at 886. By contrast, § 6532(a)(1) does not contain the "magic word" jurisdiction, so *Tilden* is likewise completely distinguishable as a clear statement exception ruling.

B. The *Stare Decisis* Exception to Current Supreme Court Rules Making Filing Deadlines Nonjurisdictional Does Not Apply in this Case.

Since *Kontrick*, there have been only two Supreme Court opinions holding that a filing deadline is jurisdictional. However, those holdings were predicated not on the clear statement exception, but only on *stare decisis*, since for over 100 years, the Supreme Court had held those filing deadlines jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

The Supreme Court has never ruled one way or the other on whether the filing deadline in § 6532(a)(1) is jurisdictional. Accordingly, this *stare decisis* exception cannot apply here.

Because the Clinic expects the government in this case to point to a few appellate court opinions (discussed *infra*) that have previously held that the filing deadline in § 6532(a)(1) is jurisdictional, the Clinic initially observes that the *stare decisis* exception does not apply to give deference to opinions of courts below the Supreme Court. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-174 (2010) (Ginsburg, J, concurring, joined by Stevens and Breyer, JJ.) ("[I]n *Bowles* and *John R. Sand & Gravel Co. . . .* we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.' *Amicus* cites well over 200 opinions that

characterize § 411(a) as jurisdictional, but not one is from this Court. . . .”; emphasis in original; citations omitted).

When the taxpayer in *Matuszak* made this identical observation and also cited to Justice Ginsburg’s concurrence in *Reed Elsevier* for support, in its answering brief, the government wrote (p. 27 n.10) that the taxpayer was “incorrect, because the unanimous Supreme Court, in an opinion by Justice Ginsburg, has stated that extensive “‘precedent and practice in American courts’” generally can render a statutory requirement jurisdictional. *Auburn Reg’l*, 133 S. Ct. at 825 (quoting *Bowles*, 551 U.S. at 209 n.2).” In response, the Clinic wrote that the government’s quote indirectly from *Bowles* was taken out of context, since the precedent and practice in American courts referred to in *Bowles* there included a number of prior Supreme Court opinions stretching back over about 100 years. So, anticipating a similar government argument in this case, in the attached footnote, the Clinic provides more evidence that the *stare decisis* exception applies only in the event that there is a long line of Supreme Court opinions holding the particular time period at issue in the case jurisdictional.[4]

[4] “[R]elying on a long line of *this Court's decisions* left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a).” ***Union Pac. R.R. v. Bhd. of*** *Locomotive Eng’rs & Trainmen Gen. Comm. of*

Perhaps in an attempt to qualify for the *stare decisis* exception, in its *Matuszak* answering brief (at p.22), the government also wrote:

Adjustment, 558 U.S. 67, 82 (2009) (citing *John R. Sand* and *Bowles*; emphasis added).

"*Bowles* stands for the proposition that context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 559 U.S. at 168 (emphasis added).

> "[C]ontext, including *this Court's interpretation* of similar provisions in many years past, is relevant." *Reed Elsevier, supra*, at 168. When "a long line of *this Court's decisions* left undisturbed by Congress," *Union Pacific*, *supra*, at 82, has treated a similar requirement as "jurisdictional," we will presume that Congress intended to follow that course.

Henderson v. Shinseki, supra, 562 U.S. at 436 (citing *John R. Sand* and *Bowles*; emphasis added).

> We have also held that "context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010). Here, however, even though the requirement of a COA (or its predecessor, the certificate of probable cause (CPC)) dates back to 1908, Congress did not enact the indication requirement until 1996. There is thus no "long line of *this Court's decisions* left undisturbed by Congress" on which to rely. *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. Of Adjustment*, 558 U.S. 67, 82 (2009).

Gonzalez v. Thaler, 565 U.S. 134, 142 n.3 (2012) (emphasis added).

"What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from *this Court's prior rulings*, not from Congress's choice of wording." *Wong, supra*, 135 S. Ct. at 1636 (emphasis added).

> At th[e] time [Congress enacted § 6015(e)(1)(A) – i.e., 1998], recent Supreme Court cases uniformly indicated that time limits relating to tax litigation were jurisdictional and not subject to tolling. *See Brockamp*, 519 U.S. at 349-54 (time for filing refund claim in I.R.C. § 6511(a) not subject to equitable tolling); *Comm'r v. Lundy*, 516 U.S. 235, 245 (1996) (failure to satisfy two-year look-back period in I.R.C. § 6513(b)(3)(B) deprives Tax Court of jurisdiction); *United States v. Dalm*, 494 U.S. 596, 608 (1990) (time limit in I.R.C. § 6511(a) jurisdictional).

This was a great overstatement – and a misleading one:

United States v. Dalm, 494 U.S. 596 (1990) – involving equitable recoupment – states that "[f]or the District Court to have jurisdiction over her suit for refund, Dalm was required to file a claim for refund of the tax within three years of the time the gift tax return was filed or two years of the time the tax was paid, whichever period expires later. *See* §§ 6511(a), 7422(a)"; *id*. at 609 (footnote omitted).[5] One problem in *Dalm* was that the administrative claim was filed late under § 6511, not that suit was brought late under § 6532(a) (a provision not even mentioned in the opinion). The Court also wrote in *Dalm* (*id*. at 608) (citations and internal quotation marks omitted):

> Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's

[5] Prior to *Dalm*, this Court had held that the filing of a timely refund claim under § 6511 is a jurisdictional requirement of a refund suit. *Rosenbluth Trading, Inc. v. United States*, 736 F.2d 43, 47 (2d Cir. 1984). Whether this holding can survive *Kontrick* and its progeny is seriously in doubt.

> jurisdiction to entertain the suit. A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms.

The only non-district court opinion that was cited in Pfizer's case by the government (in its motion to dismiss) or the court below (in its order of dismissal) was *Dalm*.[6] Yet, a few months after *Dalm*, the Court in *Irwin* rejected the idea that waivers of sovereign immunity always preclude equitable tolling. And since *Kontrick*, the Court has clearly held that statutes of limitations running against the government may not be jurisdictional conditions of suits – indeed, are only rarely jurisdictional conditions. *See Henderson*; *Auburn*; *Wong*; *Musacchio*. Thus, the indented quote above from *Dalm* is simply no longer good law. See *Gillespie v. United States*, 670 Fed. Appx. 393, 395 (7th Cir. 2016) (not deciding issue, but noting that current Supreme Court case law on the distinction between subject matter jurisdiction and mere claims processing rules "may cast doubt on the line of cases suggesting that § 7422(a) is jurisdictional", including *Dalm*.).

[6] The government and the court below also cited a few district court opinions that specifically addressed § 6532(a) and that relied on *Dalm* or other district court opinions, or, in one instance, the opinion in *Oatman v. Dept. of Treas. – IRS*, 34 F.3d 787, 789 (9th Cir. 1994). *Oatman* will be discussed *infra*. Of course, district court opinions are not precedential for appellate courts. And the cited district court opinions did not discuss the application of *Kontrick* or its progeny to § 6532(a)'s filing deadline.

Commissioner v. Lundy, 516 U.S. 235 (1996), involved whether the Tax Court – in a case where it had already acquired deficiency jurisdiction – also had jurisdiction to find an overpayment with respect to certain taxes where a refund claim had not been filed. The Court wrote: "Unlike the provisions governing refund suits in United States District Court or the United States Court of Federal Claims, which make timely filing of a refund claim a jurisdictional prerequisite to bringing suit . . . ." *Id*. at 240 (citation to appellate court opinion omitted). This was pure dicta in the case.

In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court held that if the *Irwin* presumption in favor of equitable tolling against the government of statutes of limitations applied to the refund claim statute of limitations at § 6511, the presumption would be rebutted because (1) of the many exceptions that Congress had already put into the statute (none of which specifically provided for equitable tolling), (2) § 6511(b) sets out an amount limitation (a feature unlike any other statute of limitation previously held subject to equitable tolling), and (3) of the potential administrative nightmare of applying equitable tolling to the routine processing of administrative refund claims (the Court citing IRS statistics showing that for the fiscal year ended September 30, 1994, over 200 million tax returns were filed and over 90 million refunds were issued).

The Supreme Court has recently pointed out that the *Irwin* presumption only applies to a nonjurisdicitonal statute of limitations and that a jurisdictional one cannot be subject to equitable or other (e.g., regulatory) exceptions. *Auburn*, *supra*, at 154.

Further, notably, *Brockamp* did not call the § 6511 time limit "jurisdictional". Indeed, the opinion does not even contain the words "jurisdiction" or "jurisdictional". Thus, *Brockamp* provides no guidance for deciding whether the § 6532(a)(1) filing deadline is jurisdictional.

Moreover, *Brockamp* completely ignored both *Dalm* and *Lundy*, not even citing those opinions. Had the Court in *Brockamp* really still believed in the above-quoted passages from *Dalm* and *Lundy*, the Court could have written a one-sentence opinion: "Because jurisdictional filing deadlines are not subject to equitable tolling, and in *Dalm* and *Lundy* we stated that the refund claim filing deadline of § 6511(a) is jurisdictional, the § 6511(a) filing deadline is not subject to equitable tolling." Yet, the Court instead wrote its lengthy opinion.

It is not surprising that *Brockamp* ignored the earlier statements in *Dalm* and *Lundy* that the filing deadlines for an administrative tax refund claims is jurisdictional. To the extent that those statements were not dicta, they were what the Court in the very next year after *Brockamp* called "drive-

by jurisdictional rulings", entitled to no precedential weight. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) (emphasis in original; citations omitted), the Court wrote:

> It is also the case that the *Gwaltney* opinion does not display the slightest awareness that anything *turned upon* whether the existence of a cause of action for past violations was technically jurisdictional -- as indeed nothing of substance did. The District Court had statutory jurisdiction over the suit in any event, since continuing violations were also alleged. . . . [T]he jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect.

As the Supreme Court more recently observed in *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006) (citations and internal quotation marks omitted) (the opinion enunciating the clear statement exception to the Court's *Kontrick* holding that claims processing rules generally have no jurisdictional import), the Court wrote:

> On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief -- a merits-related determination. Judicial opinions . . . often obscure the issue by stating that the court is dismissing for lack of jurisdiction when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim. We have described such unrefined dispositions as drive-by jurisdictional rulings that should be

> accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit.

Finally, even if had been true that, in *Dalm* and *Lundy*, the Supreme Court had made precedential statements that the filing deadline in § 6511 is jurisdictional, that would not be a holding governing the issue of whether § 6532(a)(1)'s filing deadline is jurisdictional under the *stare decisis* exception to the current rules on jurisdiction. In *Wong*, the government argued that because in *John R. Sand* the Court had held the Tucker Act filing deadline at 28 U.S.C. § 2501 is jurisdictional, and the FTCA filing deadline language at 28 U.S.C. § 2401(b) used similar language to the Tucker Act filing deadline, the FTCA filing deadline should be held jurisdictional. The Court rejected such an argument, writing: "[N]othing . . . supports the Government's claim that Congress, when enacting the FTCA, wanted to incorporate this Court's view of the Tucker Act's time bar—much less that Congress expressed that purported intent with the needed clear statement." *Wong*, *supra*, at 1636.

Likewise, nothing suggests that Congress intended § 6532(a)(1) to incorporate any view the Court might have first expressed in *Dalm* and *Lundy* in the 1990s that the filing deadline in § 6511 is jurisdictional. Section 6532(a)(1) is the successor to statutes with similar language adopted decades prior to the 1990s. *See, e.g.*, Revenue Act of 1924, ch. 234, §

1014(a), amending Revised Statutes § 3226 (containing the same 2-year refund suit filing deadline).

Finally, Congress was greatly upset with the *Brockamp* holding that § 6511 was not subject to equitable tolling, so the next year, in 1998, Congress added a new subsection (h) to § 6511, providing for tolling during periods of financial disability. The Conference Committee report adopting this new subsection described it as providing for "equitable tolling". H. Rep. 105-599 at 255. This Court should not interpret § 6532(a)(1) to be jurisdictional, as it might similarly simply provoke Congress into statutorily overruling the holding.

II. Controlling Precedent of This Court is Consistent With § 6532(a)(1)'s Filing Deadline Being Nonjurisdictional.

The Clinic has been unable to locate any precedential opinion of this Court discussing whether or not § 6532(a)(1)'s filing deadline is jurisdictional. However, there is one controlling precedent of this Court that is only consistent with a holding that § 6532(a)(1)'s filing deadline is nonjurisdictional.

In *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974), the taxpayers signed a form waiving the right to receive a notification of tax refund claim disallowance. Under § 6532(a)(3), that waiver commenced a 2-year period in which to bring a refund suit. By mistake, the IRS, sometime later, issued

a now-unnecessary notification of claim disallowance, stating that it commenced a different 2-year period to bring a refund suit (i.e., the one under § 6532(a)(1)). The taxpayer filed a suit that was timely under § 6532(a)(1), but not timely under § 6532(a)(3). This Court wrote:

> [G]iven that the relevant statute of limitations is by its very terms rather flexible, that there is no suggestion that anyone in the Service acted in collusion with the taxpayers to defraud the federal fisc, and that the taxpayers' reliance on the erroneously issued disallowance notice was not unreasonable, we conclude that the government is estopped from raising the earlier deadline as a bar to this action.

500 F.2d at 1011.

The only other opinion of this Court worth noting is *Mullings v. Commissioner*, 1997 U.S. App. LEXIS 9849, 112 F.3d 504 (table) (2d Cir. 1999). There, in a nonprecedential opinion, this Court affirmed a district court dismissal for lack of jurisdiction of a refund suit brought untimely under § 6532(a)(3). But, the opinion does not even consider the issue of whether that filing deadline is jurisdictional or not. Thus, even if it were precedential, it would constitute a non-binding drive-by jurisdictional ruling.

III. Holdings of Several Other Circuits that the Filing Deadline in § 6532(a)(1) is Jurisdictional Are Unpersuasive, Since They Predate or Do Not Discuss Current Supreme Court Case Law on Jurisdiction.

Prior to *Kontrick*'s narrowing the use of the word "jurisdictional" in 2004 generally to exclude filing deadlines, a few courts of appeals had, in

precedential opinions, addressed the issue of whether the various 2-year filing deadlines in § 6532(a) are jurisdictional conditions of a tax refund suit. Most of those courts held that the filing deadlines are jurisdictional or stated so in dicta or in drive-by jurisdictional rulings. *Kaffenberger v. United States*, 314 F.3d 944, 950-951 (8th Cir. 2003); *Marcinkowsky v. United States*, 206 F.3d 1419, 1421-1422 (Fed. Cir. 2000); *Hull v. United States*, 146 F.3d 235 (4th Cir. 1998) (drive-by ruling not even discussing the same Circuit's earlier *Dalton* opinion, discussed *infra*); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998); *Oatman v. Dept. of Treas. – IRS*, 34 F.3d 787, 789 (9th Cir. 1994) (drive-by ruling); *Ohio Nat. Life Ins. Co. v. United States*, 922 F.3d 320, 324 (6th Cir. 1990) (taxpayer agreed that filing period is jurisdictional; court held that taxpayer timely filed, so statement was arguably dicta); *Smith v. United States*, 478 F.2d 398 (5th Cir. 1973) (drive-by affirmance of district court's dismissal for lack of jurisdiction); *Daniel v. United States*, 454 F.2d 1166 (6th Cir. 1972) (same). In contrast, in *Dalton v. United States*, 800 F.2d 1316, 1319 (4th Cir. 1986), the court, in dicta, cited this Court's *Miller* opinion favorably for considering § 6532(a)'s filing deadlines statutes of limitations subject to estoppel, while it held the 30-day period to file suit in § 6703(c)(2) similarly to be nonjurisdictional and subject to estoppel.

To the extent that the appellate courts stating that § 6532(a)'s filing deadlines are jurisdictional gave any reasoning for their holdings or statements, they reasoned that all procedural conditions of bringing tax refund suits are part of the waiver of sovereign immunity, so filing deadlines have to be treated as jurisdictional. Of course, that reasoning is completely undermined by *Kontrick* and its progeny.

RHI Holdings and *Marcinkowsky* also cite *Brockamp* for the Federal Circuit's holdings that § 6532(a)'s filing deadlines are not subject to equitable exceptions. In so holding, the *RHI Holdings* court, at least, improperly conflated the inquiry of whether a filing deadline is jurisdictional with the separate inquiry of whether a nonjurisdictional statute of limitations is subject to equitable tolling under the factors examined in *Brockamp*. *See Auburn*, *supra* (clearly separating the two inquiries). The Clinic strongly disagrees with the analysis of these opinions as to whether the *Irwin* presumption would allow equitable tolling of the § 6532(a) filing deadlines. The § 6532(a) filing deadlines are much more like the simple, almost-exception-free filing deadlines held subject to equitable tolling in *Holland v. Florida*, 560 U.S. 631 (2010), and *Wong* many years later. And, in contrast to the almost 100 million refund claims filed annually at the time of *Brockamp* (a number that the Supreme Court worried could have created

huge administrative problems in processing tax returns if equitable tolling were to apply to the § 6511 filing deadline), the number of tax refund suits brought annually is orders of magnitude smaller – 194 in the fiscal year ended September 30, 2016, according to the IRS Data Book, 2016 (available on the IRS website) at p. 62 (Table 27). Department of Justice attorneys responding to the very few tax refund suits filed late are equipped by training to decide legal issues like whether equitable facts might justify estoppel or tolling in the even fewer late-filed suits where favorable facts for the taxpayer might be present. However, it is not the purpose of the Clinic here to ask this Court to rule on whether § 6532(a)(1)'s filing deadline is subject to equitable tolling – just that such filing deadline is not jurisdictional.

The Clinic has been unable to locate any precedential court of appeals opinions discussing whether any § 6532(a) filing deadline is jurisdictional since *Kontrick* was issued in 2004. Further, the Clinic could find no discussion in any appellate court opinion (precedential or not) of how the post-*Kontrick* use of the word "jurisdiction" applies to the filing deadlines in § 6532(a). But, a few courts have begun to wonder whether those few older opinions that called the § 6532(a) deadlines jurisdictional are still correct. *See Wu v. United States*, 835 F.3d 711, 714 (7th Cir. 2016); *Drake v. United*

States, 2011 U.S. Dist. LEXIS 22563 (D. AZ. 2011) (doubting but not deciding whether the 2-year filing deadline in § 6532(a)(1) is still jurisdictional in light of *Kontrick* and its progeny); *Hessler v. United States*, 2016 U.S. Dist. LEXIS 1210 at *12 n.5 (E.D. Cal. 2016) (noting that, in light of the reasoning in *Volpicelli*, it "remains an open question" whether the 2-year filing deadline in § 6532(a)(1) is subject to equitable tolling).

In sum, what little precedential appellate authority that exists in support of the conclusion that the filing deadline in § 6532(a)(1) is jurisdictional is unpersuasive, since it predates *Kontrick* and relies on outmoded views of what conditions are jurisdictional.

CONCLUSION

For the reasons stated above, this Court should hold that, if the applicable filing deadline in this case is in § 6532(a)(1), then any dismissal for untimely filing in this case should not be for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this amicus brief was served on counsel for the appellant, Robert S. Walton and Charles Cummings, Esqs., by filing it with the CM/ECF system on October 16, 2017, of which they are both members. This is to certify that a copy of this amicus brief was served on counsel for the appellee, Elizabeth M. Tulis, Benjamin H. Torrance , and Christine S. Poscablo, Esqs., by filing it with the CM/ECF system on October 16, 2017, of which they are both members. All counsel in the case are members of the CM/ECF system.

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