No. 17-72874

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORGANIC CANNABIS FOUNDATION, LLC,
D.B.A. ORGANICANN HEALTH CENTER,
Petitioner-Appellant,

vs.

COMMISSIONER of INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court
Docket No. 10593-15 (Cary Douglas Pugh, J.)

AMICUS BRIEF IN SUPPORT OF THE APPELLANT BY THE FEDERAL TAX CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL

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INTEREST OF THE AMICUS[1]

The Federal Tax Clinic at the Legal Services Center of Harvard Law School ("the Clinic") was formed in 2015 to represent low-income taxpayers

[1] The parties have consented to the filing of this brief. 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 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.

before the Internal Revenue Service and in tax matters before the courts. 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 and prospective clients concerning the deadlines that apply for bringing Tax Court and district court tax actions and the possibility of overcoming untimely filing problems through judicial doctrines.

In a series of recent cases, the Clinic has argued that the deadlines in §§ 6015(e)(1)(A) and 6330(d)(1)[2] for filing Tax Court innocent spouse and Collection Due Process ("CDP") 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 301 (3d Cir. 2017), and *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), the courts held the filing deadlines to be jurisdictional. In the more-recent CDP case of *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), where the Clinic was an amicus, this Court held the filing deadline to be jurisdictional. Days later, in *Cunningham v. Commissioner*, 2018 U.S. App. LEXIS 1183, ___ Fed. Appx. ___ (4th Cir. 2018), the Fourth Circuit declined to opine on whether

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

the CDP filing period is jurisdictional or subject to equitable tolling – finding that the facts presented would not justify equitable tolling, in any event.

The Clinic is continuing to litigate the issue of the jurisdictional nature of the innocent spouse filing deadline in § 6015(e)(1)(A) in Nauflett v. Commissioner, Fourth Circuit Docket No. 17-1986. Briefing is complete in Nauflett, but the court has not yet decided whether oral argument will be held.

As an amicus, the Clinic has also filed a brief in Pfizer v. United States, Second Circuit Docket No. 17-2307, arguing that the deadline in § 6532(a) in which to bring a district court tax refund suit is not jurisdictional. Oral argument was held in Pfizer on February 13.

As an amicus in *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015), Carlton Smith (pro bono counsel to the Clinic, who was, in 2013, the Director of the tax clinic at Cardozo School of Law), as an amicus, helped persuade this Court to hold that the filing deadline in § 6532(c) in which to bring a district court wrongful levy suit is not jurisdictional and is subject to equitable tolling.

The Clinic's purpose in filing this brief is to request that this Court hold that the deadline in § 6213(a) in which to file a Tax Court deficiency

suit is not jurisdictional and is subject to equitable tolling. Such a nonjurisdictional 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 filing deadline might also benefit.

ARGUMENT

This appeal presents a number of issues, but the Clinic limits its brief to whether the 90-day period in section § 6213(a) is jurisdictional or subject to equitable tolling. This brief will not address the particular facts of the case.

I. Section 6213(a)'s Filing Deadline is Not Jurisdictional Under Current Supreme Court Case Law.

Beginning in 2004, the Supreme Court observed that it and other courts had been too careless in using the word "jurisdictional". It held that, henceforth, claims processing rules (which include filing deadlines) should usually not be considered jurisdictional. Rather, the word "jurisdictional" should be reserved only for subject matter and personal jurisdiction. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

The Tax Court is an Article I court of limited jurisdiction that currently has about 20 jurisdictions. They are almost all enumerated in Tax Court Rule 13(c), adopted before 2004, which states: "In all cases, the jurisdiction of the Court also depends on the timely filing of a petition." This has been the historic position of the Tax Court since its predecessor, the Board of Tax Appeals, was established in 1924. In the fiscal year ended September 30, 2016, taxpayers commenced 29,748 cases in the Tax Court. 2016 IRS Data Book at p. 62 (Table 27), available on www.irs.gov. Although statistics are not published by the Tax Court, it is widely understood that about 90% of the petitions filed in it seek redetermination of deficiencies (the jurisdiction involved in this appeal). The second most common jurisdiction is CDP. 1.369 CDP petitions were filed in the fiscal year ended September 30, 2017. National Taxpayer Advocate 2017 Annual Report to Congress, at Vol. I, p. 410 (Figure 3.4.1). Some years ago, it was reported that innocent spouse petitions under § 6015(e)(1)(A) account for about 500 cases annually. Scott Schumacher, "Innocent Spouse, Administrative Process: Time for Reform", Tax Notes Today, 2011 TNT 3-3 (Jan. 5, 2011), at n. 24. Other jurisdictions account for fewer cases.

Initially, after *Kontrick*, it is an absurd position for the Tax Court to still hold the view that all of its jurisdictions – however differently phrased –

have jurisdictional filing deadlines. It is no longer a good argument that all of its filing deadlines must be jurisdictional because the Tax Court is a court of limited jurisdiction. *See Henderson v. Shinseki*, 562 U.S. 428 (2011) (holding the filing deadline for the Article I Court of Appeals for Veterans Claims not to be jurisdictional). Even before *Kontrick*, Judge Posner observed: "The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. *All* federal courts are courts of limited jurisdiction." *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 578 (7th Cir. 1999) (involving the time period to file a § 7476 declaratory judgment petition in the Tax Court) (emphasis in original; citations omitted).

A. Section 6213(a) Does Not Contain a Clear Statement that Its Filing Deadline is Jurisdictional.

Since *Kontrick*, the Supreme Court has held that "claims processing rules" (including filing deadlines) are almost never jurisdictional. *United States v. Wong*, 135 S. Ct. 1625 (2015). However, the Court acknowledges that filing deadlines still can be jurisdictional if Congress makes a "clear statement" to that effect. *Id*. at 1632. But, "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. In an earlier opinion involving a claims processing rule contained in 28 U.S.C. § 2253(c)(3), the Court stated:

> The converse, however, is not necessarily true: Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle. In fact, § 2253(c)(3) 's proximity to §§ 2253(a), (b), and (c)(1) [which speak in jurisdictional terms] highlights the absence of clear jurisdictional terms in § 2253(c)(3).

Gonzalez v. Thaler, 565 U.S. 134, 146-147 (2012).

Three Supreme Court opinions issued after *Kontrick* have held statutory filing deadlines nonjurisdictional because (1) there were no clear statements otherwise from Congress within those statutes 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*, *supra*. 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 Supreme Court has never yet held, following *Kontrick*, that Congress clearly stated an intent that any claims processing rule is

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 90-day period in § 6213(a) is most certainly not a jurisdictional requirement of a deficiency suit under the clear statement rule. The jurisdictional grant for deficiency suits is in § 6214(a), which provides, in part, that "the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency". Section 6214(a) derives from language originally appearing in §§ 274(e) (for income tax) and 308(e) (for estate tax) of the Revenue Act of 1926, ch. 27. Section 6213(a)'s first sentence (which contains the filing deadline) does not even use the word "jurisdiction". Section 6213(a)'s first sentence derives from §§ 274(a) (for income tax) and 308(a) (for estate tax) of the Revenue Act of 1924, ch. 234.

This is a simple case, like *Gonzalez*, where, although the filing deadline is near the jurisdictional grant, the jurisdictional grant is placed elsewhere, and the filing deadline sentence does not speak in jurisdictional terms. Accordingly, the deadline is not jurisdictional.

Only a few months before the Supreme Court issued its opinion in *Wong*, this Court held that, based on the Supreme Court's post-*Kontrick*

jurisdictional rules, the then-9-month deadline in § 6532(c) to bring a district court 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). This Court in *Volpicelli* also went on to hold the wrongful levy suit 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). This Court should follow *Volpicelli* and hold that the filing deadline for Tax Court deficiency cases is also not jurisdictional and is subject to equitable tolling.

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.

Four recent opinions of courts of appeals that have held deadlines to file certain Tax Court petitions jurisdictional under 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). Section 6015 was added to the Internal Revenue Code in 1998. Unlike the much older provision at § 6213(a) (where the filing deadline is in a sentence that does not contain the word "jurisdiction"), the sentence in § 6015(e)(1)(A) that contains the jurisdictional grant also contains the 90-day filing deadline.

In *Rubel* and *Matuszak* (cases litigated by the Clinic), the courts relied on the clear statement exception to find the innocent spouse filing deadline 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). Even if these courts are correct as to the meaning of the injunctive provision enacted, in those cases, simultaneously with the sentence providing the filing deadline, similar injunctive jurisdiction language in a later sentence in § 6213(a) authorizing the Tax Court to enjoin premature collection of deficiencies was only enacted in 1988 by Pub. L. 100-647, § 6243(a) – over 60 years after the predecessors of §§ 6213(a)'s first sentence and 6214(a) appeared. A subsequent Congress' amendment adding ancillary jurisdiction to the Tax Court cannot possibly generate a clear statement that an unamended filing deadline from over 60 years earlier is intended to be jurisdictional.

Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017) (in which the Clinic was not involved), held that the filing deadline in the first sentence of § 6213(a) is jurisdictional under the clear statement exception only because the word "jurisdiction" appearing in the fourth sentence of § 6213(a) is a "magic word" and the limitation on the Tax Court's injunctive jurisdiction is to cases in which "a timely petition . . . has been filed". *Id*. at 886. *Tilden*'s ahistorical analysis proceeds in ignorance of the different years in which the multiple sentences of § 6213(a) were enacted. As noted above, the first

sentence of § 6213(a) derives from 1924 legislation; the sentence with the word "jurisdiction" in it derives from 1998 legislation.

Moreover, *Tilden* is incompatible with *Gonzalez v. Thaler*, which instructs courts not to look to adjacent provisions to determine whether a filing deadline is jurisdictional.

Tilden also wrongly applies *stare decisis* to opinions of courts below the Supreme Court.

Finally, *Tilden* sought, but failed, to create "jurisdictional" symmetry for Article I courts. While it noted the Supreme Court's holding in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), that 28 U.S.C. § 2501's filing period for some Article I Court of Federal Claims actions is jurisdictional (though, only because of *stare decisis*); 846 F.3d at 886-887; it failed to note that in *Henderson v. Shinseki*, the Supreme Court held that the filing period for Article I Court of Appeals for Veterans Claims actions is nonjurisdictional. Additionally, for tax cases, the relevant comparable time period to file a tax refund suit in the Court of Federal Claims is § 6532(a); *Detroit Trust Co. v. United States*, 131 Ct. Cl. 223 (1955); on which the Supreme Court has never made a jurisdictional ruling.

In sum, the badly-reasoned opinion in *Tilden* should not serve as precedent for cases involving the jurisdictional status of any Tax Court filing deadlines under the recent Supreme Court case law on jurisdiction.

More recently, in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), this Court held that the CDP petition filing deadline in § 6330(d)(1) (also enacted in 1998) is jurisdictional under the clear statement exception because the deadline is in the same sentence as the jurisdictional grant to the Tax Court (again, unlike §6213 (a)). (The Court wrote that "the filing deadline is given in the same breath as the grant of jurisdiction". *Id*., Slip Op. at 9-10.) Notably, though, despite the government's argument in *Duggan* that a similar Tax Court injunctive power provisions at § 6330(e)(1) contained the words "a timely appeal has been filed", this Court refused to refer to the injunctive power provisions in its opinion – casting doubt on whether any court (when interpreting whether the filing deadline under the principal jurisdiction is jurisdictional) should rely on the ancillary injunctive power provisions that attach to some (but not all) of the Tax Court's jurisdictions.

Shortly after the opinion in *Duggan*, the Fourth Circuit, in *Cunningham v. Commissioner*, 2018 U.S. App. LEXIS 1183, ___ Fed. Appx. ___ (4th Cir. 2018), completely declined to rule on the issues of

whether the CDP filing deadline is jurisdictional or subject to equitable tolling under current Supreme Court case law – holding that the facts in the case would not justify tolling in any event. The reluctance of the Fourth Circuit to decide these questions under a statute that is arguably more jurisdictional in tone than § 6213(a)'s first sentence speaks to the difficulty in finding the clear statement exception applicable to Tax Court filing deadlines.

In its briefs in *Rubel*, *Matuszak*, *Tilden*, *Duggan*, and *Cunningham*, the government made an argument that no court repeated in its opinion. Since it is expected that the government will again make a similar argument in this case, the Clinic here responds to the argument, in advance. The government contended that another reason why each filing deadlines should be jurisdictional is that, in each provision, there is a prohibition on the IRS collecting (and, in the case of deficiencies, assessing) the tax while the filing deadline is running and while any ensuing Tax Court case is pending. This restriction, the government argued, is not common to other filing deadlines considered by the Supreme Court in other areas of the law. The government contends that these Tax Court filing deadlines must be jurisdictional because the IRS must know with precision exactly when it may commence collection (and/or assessment) after it has issued a "ticket to the Tax Court". The

government says it could not function without knowing this fact down to the exact date.

Probably no court mentioned this government argument in its opinion because, as the Clinic pointed out, even under the current regime of treating all Tax Court filing deadlines as jurisdictional, the government often does not know for a long period of time when it may recommence collection. Thus, the government vastly overstates the need for precision.

There already exist in the Internal Revenue Code certain statutory extensions that apply to all filings deadlines under the Code – not just Tax Court petitions. Under § 7502, if a taxpayer sends a document by certified mail on or before the last deadline day and the date of certification by the USPS is the same date, even if the envelope arrives a year later, the petition would be deemed timely under 26 CFR 301.7502-1(a), (b)(1)(i)(3), and (c)(2). Section 7508(a) suspends filing periods when a soldier serves in a designated combat zone (or is hospitalized because of that service). Section 7508A(a) allows the IRS to specify a period of up to one year that may be disregarded for filings by taxpayers affected by Presidentially-declared disasters, terroristic acts, and military actions. Any one of these extensions may apply, and the IRS would not know it applied on the date after the filing

deadline apparently ended. Yet, the IRS has no problem currently dealing with these statutory extensions.

Further, in their over 70 years of combined practice before the Tax Court, Prof. Fogg and Mr. Smith have seen hundreds of cases where, say, a taxpayer mailed her deficiency petition near the 90th day, and so it arrived up to a week later, but was timely filed under § 7502(a), yet the IRS, in ignorance of the filing, had assessed the deficiency shortly after the 90-day period expired and started sending collection notices to the taxpayer. In such cases, the matter was easily fixed by simply pointing out to the IRS attorney in the case that a timely filing had occurred. In these cases, the IRS attorney routinely instructed other IRS employees to put a hold on further collection notices and to abate the "premature assessment". See, e.g., *Fleming v. Commissioner*, T.C. Memo. 2017-120 at *2-*3 (deficiency case). As a result, taxpayers essentially never need to invoke the Tax Court's injunctive jurisdiction.

If the IRS can easily deal with the premature assessment and collection problems in deficiency, CDP, and innocent spouse cases where the IRS did not realize there was a valid statutory extension of the Tax Court filing period because of § 7502(a), 7508(a), or 7508A(a), surely, it can deal with the premature collection problem that would occur each year in the

very few cases where a judicial extension to the period is occasioned by equitable concerns. (Indeed, in this case, the extension sought is only for one day.)

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 on the jurisdictional nature of the filing deadline in § 6213(a) or any other path into the Tax Court. Accordingly, this *stare decisis* exception cannot apply here.

Except for *Tilden*, no appellate court opinion has ever considered the effect of *Kontrick* and its progeny on the § 6213(a) filing deadline.

Because the Clinic expects the government in this case to point to decades-long uniform strings of appellate court opinions holding that the filing deadline in § 6213(a) 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). In the following six Supreme Court opinions, the *stare decisis* exception was clearly articulated only to apply to a long line of Supreme Court opinions: *Hamer v. Neighborhood Housing Servs*., 138 S. Ct. 13, 20 n.9 (2017); *Wong*, 135 S. Ct. at 1636; *Gonzalez v. Thaler*, 565 U.S. at 142 n.3; *Henderson v. Shinseki*, 562 U.S. at 436; *Reed Elsevier*, 559 U.S. at 168;*Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 82 (2009).

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.

In *Rubel*, *Matuszak*, and *Tilden* (but not this Court's opinion in *Duggan*), the courts simply erred in relying on *stare decisis* as further supports for holding the filing deadlines jurisdictional.

II. The Filing Deadline in § 6213(a) is Subject to Equitable Tolling.

A. While the *Irwin* Presumption in Favor of Equitable Tolling Does Not Apply in All Tribunals, It Should Apply in the Tax Court, Which Has Large Numbers of *Pro Se* Petitioners.

Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96 (1990), held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."

However, *Auburn* held that the *Irwin* presumption does not apply in all tribunals. In *Auburn*, the Court found the deadline for Medicare providers to file for administrative hearings not subject to equitable tolling, noting that the Court generally applied the *Irwin* presumption to filing deadlines in Federal courts and had never before applied the *Irwin* presumption to an agency's internal appeal deadline. *Auburn, supra,* 568

U.S. at 158. The Court distinguished the statute there at issue from the types of "remedial" statutory schemes where the *Irwin* presumption had been applied, including schemes which were "'unusually protective of claimants'" and schemes where "'laymen, unassisted by trained lawyers, initiate the process.'" *Id*. at 160 (citations omitted). By contrast, in *Auburn*, the statutory scheme involved "'sophisticated' institutional providers assisted by legal counsel" that were "repeat players who elect to participate in the Medicare system . . . ." *Id*. (citation omitted). The Court thus found the *Irwin* presumption inapplicable to "administrative appeals of the kind here considered." *Id*. at 161.

Auburn did not hold that *Irwin* never applied in non-Article III entities – just that *Irwin* did not apply in the particular type of administrative body where sophisticated, well-represented, repeat-playing parties elect to participate in the system. That the Court did not intend to create a broad rule is evident from *Wong*, where, in 2015, the Court held that under the Federal Tort Claim Act, the 2-year period in which to file an administrative tort claim with a Federal agency was subject to the *Irwin* presumption. *Wong*, 135 S. Ct. at 1633.

The considerations that caused the *Auburn* Court to find *Irwin*'s presumption inapplicable do not apply to the Tax Court. In 2015, Tax Court

Special Trial Judge Peter Panuthos reported that over 72% of Tax Court petitioners in pending cases were *pro se*. David van den Berg, "ABA Meeting: Low-Income Clinic Representation Levels Constant", Tax Notes Today, 2015 TNT 91-13 (May 12, 2015).

Thus, *Auburn*'s reasoning does not prevent applying the *Irwin* presumption in favor of equitable tolling to the time deadline contained in § 6213(a).

B. Section 6213(a)'s Filing Deadline is More Like the Deadline Involved in *Holland* than that Involved in *Brockamp*.

In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court considered whether the 3-year deadline in § 6511 for filing an administrative tax refund claim is subject to equitable tolling. Without discussing whether the time period is jurisdictional, the Court held that, even if the *Irwin* presumption applied to this time period, a combination of factors rebutted any presumption that equitable tolling could apply: (1) the time limits were set forth in an "unusually emphatic form," (2) the statute set forth the limitations in a "highly detailed technical manner," which could not be read as containing an implicit equitable tolling exception, and which reiterated the limitations period in multiple subsections, (3) the statute specified numerous exceptions to the filing deadline, and equitable tolling was not among such exceptions, (4) the granting of equitable tolling would

require tolling substantive limitations on the amount of recovery, for which there was no direct precedent, and (5) granting equitable tolling could create serious administrative problems by forcing the IRS to respond to large numbers of late claims. *Brockamp*, *supra*, at 350-353.

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court revisited *Brockamp* when considering whether the deadline for asking a federal district court to engage in *habeas corpus* review of a state death penalty conviction was subject to equitable tolling. The Court distinguished the *habeas* statute from § 6511, finding that the *Irwin* presumption in favor of equitable tolling was not rebutted because (1) the language of the limitations provision ("[a] 1-year period of limitation shall apply to an application for writ of habeas corpus") was not unusually emphatic, (2) the statute did not "reiterate" its time limitation, (3) the one exception the statute enunciated (tolling during state collateral review proceedings) was only a necessary procedural measure to account for exhaustion of state remedies, (4) the application of equitable tolling would not affect the substance of a *habeas* petitioner's claim, and (5) the subject matter at issue, *habeas corpus*, is an equitable area, unlike the area of tax collection. *Holland*, *supra*, at 635, 646-647. The Court also noted that, whereas already generous limitations periods may factor in overcoming the *Irwin* presumption; *see United States*

v. Beggerly, 524 U.S. 38, 48 (1998) (12-year period); the limitations period of one year was not particularly long. *Holland*, at 647.

The *Irwin* presumption is not rebutted in the instant case because § 6213(a) is more like the statute in *Holland* than the statute in *Brockamp*, since (1) the language of § 6213(a) is not unusually emphatic, as it utilizes the less directive "may" instead of the "shall" contained in the limitations periods involved in *Brockamp* and *Holland*, (2) the § 6213(a) statutory language is not "highly technical or detailed," (3) the statute does not reiterate the limitations period in other procedural or substantive sections, (4) as in *Holland*, the statute contains only one statutory exception (at § 6213(f), providing for tolling of the deadline while a bankruptcy automatic stay prohibits the filing of a deficiency petition), and (5) the limitations period has no impact on substantive recovery because the amount of the deficiency is not linked to the 90-day limitations period (unlike in *Brockamp*, where the potential recoverable refund was limited to any tax paid within a three-year look-back period at § 6511(b)).

Additionally, the short 90-day deadline in § 6213(a) favors applying the *Irwin* presumption. In stark contrast to the 12-year period which the Supreme Court found to factor against the *Irwin* presumption in *Beggerly*,

the limitations period of 90 days is far less than the1-year limitations period found short in *Holland*.

The filing deadline in § 6213(a) is quite similar to the filing deadline for wrongful levy actions in district court at § 6532(c). In *Volpicelli*, *supra*, this Court noted the "stark differences" between § 6511 (considered in *Brockamp*) and § 6532(c) and held that the then-9-month deadline[3] in § 6532(c) is subject to equitable tolling, writing:

> Section 6532(c) does not share these [*Brockamp*-enumerated § 6511] characteristics. True, its limitations period is set forth in emphatic language—"no suit or proceeding . . . shall be begun after the expiration of 9 months from the date of the levy"—but that language does not strike us as "unusually" emphatic. It seems no more emphatic than the language of the Antiterrorism and Effective Death Penalty Act's limitations period, 28 U.S.C. § 2244(d), which provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus"—language that the Court has said "reads like an ordinary, run-of-the-mill statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010). Nor is the language of § 6532(c) highly detailed or technical; in fact, it's just the opposite. *See* note 2 above. The limitations period it establishes is purely procedural and has no substantive impact on the amount of recovery. And §6532(c) does not contain numerous exceptions, as does § 6511. It has just one exception (if it can even be called that), which extends the limitations period if the plaintiff seeks administrative review before filing suit. 26 U.S.C. § 6532(c)(2).

[3] In 2017, the 9-month deadline was extended to 2 years. Pub. L. 115-97, § 11071(b).

777 F.3d at 1046. Because § 6213(a) is much more like § 6532(c) than § 6511, for similar reasons, this Court should hold the filing deadline in § 6213(a) subject to equitable tolling.

Although the *Brockamp* Court also expressed concern about the IRS managing over 90 million refund claims annually and being administratively overwhelmed if the Court allowed equitable tolling of the refund claim deadline, this is in sharp contrast to the much smaller number of Tax Court cases commenced each year (29,748 in the fiscal year ended September 30, 2016; 2016 IRS Data Book at p. 62 (Table 27)).

The Tax Court website, www.ustaxcourt.gov, allows the public to search the text of its opinions and unpublished orders. Using these search functions, the undersigned reviewed all opinions and orders issued in a recent one-month period, October 2017, that contained the words "lack of jurisdiction", looking for instances where the Tax Court dismissed a deficiency case for lack of jurisdiction because the petition was filed late. The undersigned found no such Tax Court opinions, but located 82 unpublished orders. Having reviewed each of those orders, only seven present facts that might arguably present grounds for equitable tolling. Each such order is detailed below:

One traditional ground for equitable tolling is timely filing in the wrong forum. *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002) ("We hold as a matter of law that a veteran who misfiles his or her notice of appeal at the same VARO from which the claim originated within the 120–day judicial appeal period of 38 U.S.C. § 7266, thereby actively pursues his or her judicial remedies, despite the defective filing, so as to toll the statute of limitations."). In three of the orders, it was clear that the taxpayer timely filed the petition, but, wrongly, with the IRS, not the Tax Court. See orders in *Ferguson v. Commissioner*, Tax Ct. Docket No. 16931-17S (order dated Oct. 4, 2017); *Tolf v. Commissioner*, Tax Ct. Docket No. 13478-17 (order dated Oct. 10, 2017); *Todor v. Commissioner*, Tax Ct. Docket No. 20159-16S (order dated October 2, 2017). In two other orders, the Tax Court said that the taxpayers had first filed their petitions with the IRS, not the Tax Court, but it was unclear whether the filings with the IRS were made within the 90-day deadline. See orders in *Amram v. Commissioner*, Tax Ct. Docket No. 17837-16S (order dated Oct. 31, 2017); *Tapia v. Commissioner*, Tax Ct. Docket No. 15211-17S (order dated Oct. 26, 2017). Section 7502 provides a timely mailing rule for late petitions, but only if the petition is properly addressed (i.e., to the Tax Court). So, there could be no statutory extension in these five cases.

In *Staubel v. Commissioner*, Tax Ct. Docket No. 15074-17 (order dated Oct. 4, 2017), despite the notice of deficiency showing the last date to file, the taxpayer alleged that he filed at a later date on the basis of the erroneous advice of an employee of the IRS Taxpayer Advocate Service about a permissible later filing date.

In *Padi v. Commissioner*, Tax Ct. Docket No. 17514-17S (order dated Oct. 18, 2017), the taxpayer alleged "serious medical and family circumstances", though it was not clear whether the allegation was to explain late filing or to be relieved of the underlying liability.

Given that the Tax Court is currently staffed with, according to its website, 31 judges (inclusive of senior judges and special trial judges), a few equitable tolling allegations a month would hardly constitute a large burden on the IRS or the court.

C. *Irwin*'s Presumption Applies Even without a Private Party Suit Analogue.

This Court, relying on dicta in *Brockamp* at 349-350, has required a private party suit analogue before imposing equitable tolling on the government. *See Rouse v. United States Dept. of State*, 567 F.3d 408, 416 (9th Cir. 2009); *Volipicelli*, *supra*, at 1045. However, in *Scarborough v. Principi*, 541 U.S. 401 (2004), which neither *Rouse* nor *Volpicelli* discusses, the Supreme Court declined to require the existence of a private party suit

analogue before the *Irwin* presumption could apply against the government, writing:

> [I]t is hardly clear that *Irwin* demands a precise private analogue. Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government's engagements with private persons – matters such as the administration of benefit programs. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.

Id. at 422. In *Holland* and *Wong*, the Supreme Court later applied the *Irwin* presumption to a *habeas* statute and the time period in which to file a Federal Tort Claims Act claim with a federal agency – all without discussing any requirement (or the possible existence of) any private party suit analogue.

Accordingly, it is of no moment that the taxpayer can identify no private party suit analogue to a Tax Court suit to redetermine a deficiency.

D. The Fact that § 6213(a) is Found in the Tax Code Does Not Preclude Equitable Tolling.

In *Brockamp*, the Supreme Court also made a general comment that can be read as disfavoring equitable tolling in the Tax Code: "Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." *Brockamp*, at 352. Although the government routinely argues, since *Brockamp*, that there can be no equitable tolling in

the Tax Code, the Supreme Court in *Holland* impliedly rejected this argument, and this Court and the Seventh Circuit have rejected it explicitly.

In *Holland*, the Court noted that the presence of the *habeas* deadline in an area of law familiar with equitable relief "reinforced" the *Irwin* presumption, but did not state that such was a dispositive factor. *Holland*, at 647. Moreover, the Supreme Court did not say in *Holland* that there was no *Irwin* presumption in a non-equitable area. Implicit in the "reinforced" *Irwin* presumption for an equitable area is just a regular *Irwin* presumption for an area that is not equitable. Therefore, even if the presence of § 6213(a) in the Tax Code does not reinforce the *Irwin* presumption, it does not abolish the presumption, either.

In *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572 (7th Cir. 1999) (involving the deadline to file a Tax Court § 7476 declaratory judgment petition), Judge Posner, in dicta, contended that the government was incorrectly asking him to broaden the narrow, statute-specific conclusion reached by *Brockamp* to exclude all time periods in the Tax Code from equitable tolling. *Flight Attendants*, at 577. However, Judge Posner stated that *Brockamp* was not so broadly written, and instead, he interpreted *Brockamp* as based upon specific emphatic statutory language in § 6511 and the potential administrative complexities that would ensue from

equitable tolling of that particular statute of limitations. *Flight Attendants*, at 577.

Similarly, in *Volpicelli* (involving the deadline to file a district court wrongful levy suit), this Court explicitly (i.e., not in dicta) rejected the government's argument that there is no equitable tolling in the Tax Code, writing:

> The Court may in time decide that Congress did not intend equitable tolling to be available with respect to any tax-related statute of limitations. But that's not what the Court held in *Brockamp*. It instead engaged in a statute-specific analysis of the factors that indicated Congress did not want equitable tolling to be available under § 6511. The Court later made clear in *Holland* that the "'underlying subject matter'" of § 6511—tax law—was only one of those factors. 560 U.S. at 646, 130 S. Ct. 2549 (quoting *Brockamp*, 519 U.S. at 352). As we have explained, the other factors on which the Court relied are not a close enough fit with § 6532(c) to render *Brockamp* controlling here.

Id. at 1046.

Thus, the mere fact that § 6213(a) is found in the Tax Code does not mean that its filing deadline cannot be equitably tolled.

CONCLUSION

For the reasons stated above, this Court should hold that the filing deadline in § 6213(a) is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

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Dated: February 13, 2018

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 and Fed. R. App. P. 29(a)(5) (for amicus briefs). The brief is 6,945 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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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, Douglas L. Youmans and Matther D. Carlson, Esqs., by filing it with the CM/ECF system on February 13, 2018, of which they are both members. This is to certify that a copy of this amicus brief was served on counsel for the appellee, Gilbert S. Rothenberg and Patrick J. Urda, Esqs., by filing it with the CM/ECF system on February 13, 2018, of which they are both members. All counsel in the case are members of the CM/ECF system.

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