No. 21-1721

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GEORGE P. BROWN AND RUTH HUNT-BROWN,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims
Docket No. 19-848 (Loren A. Smith, Senior Judge)

***AMICUS* BRIEF OF THE CENTER FOR TAXPAYER RIGHTS IN SUPPORT OF THE APPELLANTS**

Professor T. Keith Fogg
Counsel for Amicus
Director, Tax Clinic of the
Legal Services Center of
Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2532
kfogg@law.harvard.edu

Carlton M. Smith, Esq.
Counsel for Amicus
255 W. 23rd Street, Apt. 4AW
New York, New York 10011
(646) 230-1776
carltonsmth@aol.com

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-1721

Short Case Caption Brown v. United States

Filing Party/Entity The Center for Taxpayer Rights

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

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

Date: 05/12/2021

Signature: /s/ Carlton M. Smith

Name: Carlton M. Smith

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
The Center for Taxpayer Rights		

☐ Additional pages attached

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

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

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

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INTEREST OF THE *AMICUS*[1]

The Center for Taxpayer Rights ("the Center") is a § 501(c)(3)[2] non-profit organization dedicated to furthering taxpayers' awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of taxation. The Executive Director of the Center is Nina E. Olson, who from 2001 through 2019, served as the IRS National Taxpayer Advocate, appointed under § 7803(c)(1)(B).

Counsel for the Center is the Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic"), which represents low-income taxpayers before the IRS and in the courts. As part of its duties, the Clinic advises taxpayers on the requirements to file refund claims and bring refund suits.

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[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 non-party who contributed monetarily to this brief is Harvard University, which paid the costs of printing. The Tax Clinic at the Legal Services Center is a component of Harvard University. The parties have consented to the filing of this brief.

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

Low-income taxpayers often make errors with regard to refund claims – either failing to file claims or when preparing claims themselves. The Center believes that, in light of recent Supreme Court case law, courts should recognize that all of the requirement to file such claims before brining suit are non-jurisdictional claim-processing rules subject to waiver and forfeiture.

SUMMARY OF ARGUMENT

This case was dismissed for lack of jurisdiction on the ground that the Browns did not sign their refund claims and no agent with authority otherwise signed those claims. The Browns argued that the government had waived being able to raise this procedural defect as an objection. The court below concluded that the signature and related verification-under-penalties-of-perjury requirements are non-waivable statutory requirements that must be complied with for the court to have jurisdiction. Thus, the court made no finding on whether the government, by considering and denying the refund claims on the merits, had in fact waived the defects in the claims.

The court below was wrong to treat the signature and verification requirements as jurisdictional and not subject to waiver, whether or not the court was correct to conclude that the requirements are statutory and not regulatory. The entire requirement to file a predicate refund claim before

bringing suit is a mandatory statutory administrative exhaustion requirement of § 7422(a). In recent years, the Supreme Court has held that, with only two exceptions, mandatory claim-processing rules like these – even statutory ones – are not jurisdictional and are subject to waiver and forfeiture. The two exceptions are (1) if Congress, in a statute, has made a clear statement that the requirement is jurisdictional or (2) if the Supreme Court (not lower courts) had, for over 100 years and in multiple opinions, consistently treated the requirement as jurisdictional. Neither exception applies here. First, § 7422(a) does not speak in jurisdictional terms. Second, over the last 100 years, the Supreme Court has made inconsistent statements (mostly in *dicta* or in drive-by jurisdictional rulings) about whether § 7422(a)'s requirement is jurisdictional. Further, the origin of the claim-filing requirement in an 1866 statute indicates that the requirement has nothing to do with establishing the court's jurisdiction.

As a result, this Court's precedent that the claim-filing requirement is jurisdictional no longer represents good law and must be overruled. The requirements at issue in this case are not jurisdictional and are subject to waiver and forfeiture, and this case should be remanded for a determination of whether, in fact, the government waived or forfeited its usual ability to complain about any defects in signing or verifying the underlying claims.

ARGUMENT

Section 7422(a) provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

This Court has long held that a taxpayer's failure to comply with § 7422(a)'s requirement to file a predicate administrative refund claim is a jurisdictional defect to a Court of Federal Claims refund suit. *See, e.g.*, *Stephens v. United States*, 884 F.3d 1151, 1156 (Fed. Cir. 2018); *Waltner v. Unites States*, 679 F.3d 1329, 1333 (Fed. Cir. 2012).

In this case, Judge Smith similarly concluded that, although this Court has no specific precedent on the issue, failures to properly sign and verify tax refund claims are non-waivable defects under § 7422(a) that deprive the Court of Federal Claims of jurisdiction. In his opinion, he also cited *Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945), where the Supreme Court stated that, by examining the merits of a refund claim and taking action on it, the IRS could waive the regulatory specificity requirement under a Revenue Act of 1936 predecessor to § 7422(a). Judge Smith did not think *Angelus* stood for the proposition that the signature and verification requirements are also waivable. He noted that in *Angelus*, the Supreme

Court explicitly differentiated between regulatory and statutory requirements, stating that waiver can only happen with respect to regulatory requirements, not statutory requirements. *Id*. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials."). The Browns unsuccessfully argued that the statutory signature and verification requirements for filing tax returns (and similar documents like refund claims) at §§ 6061 and 6065 do not explicitly mandate that taxpayers must sign and verify those documents; rather, those sections delegate to the IRS the issue of who must sign and verify the documents.

The Center's position is broader than what the Browns initially argued. The Center believes that, based on more recent Supreme Court case law, it does not matter anymore whether the signature or verifications requirements are statutory or regulatory, since today, even statutory claim-processing rules are, with certain exceptions, not jurisdictional and are subject to waiver and forfeiture. Accordingly, this Court should overrule its prior precedent and hold that any refund claim filing requirement under § 7422(a) (whether statutory or regulatory) is not jurisdictional and is subject to waiver or forfeiture – including the requirements to sign and verify the claim properly.

The Supreme Court has clarified that jurisdictional requirements cannot be subject to waiver, forfeiture, or the equitable exceptions of estoppel or equitable tolling. *Dolan v. United States*, 560 U.S. 605, 610 (2010). Conversely, non-jurisdictional "[m]andatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited." *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (citation omitted).[3]

The change in Supreme Court case law had been brewing in its opinions for some years, but was first laid out as a rule in *Kontrick v. Ryan*, 540 U.S. 443 (2004), where the Court observed that it and other courts had been too careless in using the word "jurisdictional":

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[3] The parties in this case (and even Supreme Court opinions, such as *Angelus*) inaccurately describe the issue as whether inaction by the government in raising a refund claim defect produces waiver. However, "[t]he terms waiver and forfeiture – though often used interchangeably by jurists and litigants – are not synonymous. Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Hamer* at 17 n.1 (cleaned up). In fact, the appropriate doctrine at issue herein is forfeiture.

By contrast to waiver and forfeiture, whether a non-jurisdictional claim-processing rule is subject to equitable exceptions is dependent on the particular statute. *See, e.g., Sebelius v. Auburn Regional Med. Center*, 568 U.S. 145 (2012) (filing deadline was not jurisdictional, but was still not subject to equitable tolling).

> "[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.

Id. at 455. The Supreme Court later made all mandatory claim-processing rules (not just filing deadlines) henceforth presumptively non-jurisdictional.

In *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843 (2019), the Supreme Court recently held that the statutory requirement for a plaintiff bringing a Title VII discrimination suit to have previously filed a charge with the EEOC is not a jurisdictional issue for the court because the statute did not specifically speak of this requirement in jurisdictional terms. Thus, by waiting too long in the case to raise the issue, the defendant forfeited its usual right to raise as a defect the failure to file a predicate EEOC charge. *Fort Bend* summarizes the recent Supreme Court case law as follows:

> The Court has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules, which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). A claim-processing rule may be "mandatory" in the sense that a court must enforce the rule if a party "properly raise[s]" it. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (*per curiam*). But an objection based on a mandatory claim-processing rule may be forfeited "if the party asserting the rule waits too long to raise the point." *Id*., at 15 (quoting *Kontrick*, 540 U.S., at 456).

> The Court has characterized as nonjurisdictional an array of mandatory claim-processing rules and other preconditions to relief. These include: the Copyright Act's requirement that parties register their copyrights (or receive a denial of registration from the Copyright Register) before commencing an infringement action, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010); the Railway Labor Act's direction that, before arbitrating, parties to certain railroad labor disputes "attempt settlement 'in conference,'" *Union Pacific*, 558 U.S., at 82 (quoting 45 U.S.C. § 152); the Clean Air Act's instruction that, to maintain an objection in court on certain issues, one must first raise the objection "with reasonable specificity" during agency rulemaking, *EPA v. EME Homer City Generation*, L.P., 572 U.S. 489, 511-512 (2014) (quoting 42 U.S.C. § 7607(d)(7)(B)); the Antiterrorism and Effective Death Penalty Act's requirement that a certificate of appealability "indicate [the] specific issue" warranting issuance of the certificate, *Gonzalez*, 565 U.S., at 137 (quoting 28 U.S.C. § 2253(c)(3)); Title VII's limitation of covered "employer[s]" to those with 15 or more employees, *Arbaugh v. Y & H Corp*., 546 U.S. 500, 503-504 (2006) (quoting 42 U.S.C. § 2000e(b)); Title VII's time limit for filing a charge with the EEOC, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); and several other time prescriptions for procedural steps in judicial or agency forums. *See, e.g.*, *Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U.S. __, __, 138 S. Ct. 13 (2017); *Musacchio v. United States*, 577 U.S. __, __, 136 S. Ct. 709 (2016); *Kwai Fun Wong*, 575 U.S., at __, 135 S. Ct. 1625; *Auburn*, 568 U.S., at 149; *Henderson*, 562 U.S., at 431; *Eberhart*, 546 U.S., at 13; *Scarborough v. Principi*, 541 U.S.401, 414 (2004); *Kontrick*, 540 U.S., at 447.

Id. at 1849-1850 (footnotes omitted). Notably, with the exception of *Kontrick* (involving a bankruptcy court rule), *Eberhart v. United States*, 546 U.S. 12 (2005) (involving a provision of the Federal Rules of Criminal Procedure), and *Hamer* (involving a provision of the Federal Rules of Appellate Procedure), all of the opinions cited in the last sentence of this

Fort Bend passage involved mandatory statutory requirements, not mere regulatory requirements.

There are two exceptions to the current rule treating mandatory claim-processing rules as not jurisdictional. A claim-processing rule is still jurisdictional if either (1) Congress in a statute made a "clear statement" that the rule is jurisdictional or (2) the Supreme Court has for over 100 years in multiple opinions consistently treated the rule as jurisdictional (a *stare decisis* exception). As will be discussed below, neither exception applies to the § 7422(a) claim filing requirement, so that requirement, even though statutory, is not jurisdictional and is subject to waiver and forfeiture.

I. Congress Did Not Make a Clear Statement in § 7422(a) that the Claim Filing Requirement is a Jurisdictional Requirement of a Tax Refund Suit.

The Supreme Court has articulated the "clear statement" exception as follows: A rule is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515 (2006). But if "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Id*. at 516.

Turning simply to the language of § 7422(a), while the provision articulates a mandatory requirement to taxpayers to file a tax refund claim

before bringing a refund suit, it does not use the word "jurisdiction", nor does it otherwise speak in jurisdictional terms addressed to the court. Sections 6061 and 6065, which contain the signature and verification requirements applicable to a number of IRS documents, including refund claims, do not speak in jurisdictional terms, either. Thus, the requirements of those three sections are mere non-jurisdictional claim-processing rules.

II. The Separate Evolutions of the Claim Filing Requirement and Refund Suit Jurisdiction Demonstrate that Congress Did Not View the Claim Filing Requirement as Jurisdictional.

"In characterizing certain requirements as nonjurisdictional, [the Supreme Court] ha[s] on occasion observed their "'separat[ion]'" from jurisdictional provisions. *E.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 162 (2010); *Arbaugh*, 546 U.S. at 515." *Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012). This observation is particularly important here, since the jurisdictional basis for a tax refund suit is at 28 U.S.C. § 1346(a)(1), which is not even in the same Title as § 7422(a). *See Volpicelli v. United States*, 777 F.3d 1042, 1044 (9th Cir. 2015) (finding the deadline to file a wrongful levy suit at § 6532(c) not jurisdictional under current Supreme Court case law, in part, because the jurisdictional grant is far away at 28 U.S.C. § 1346(e)).

The separate legislative histories of §§ 7422(a) and 1346(a)(1) underscore that neither § 7422(a) nor its predecessors were ever intended to affect the courts' jurisdiction over tax refund suits.

The following is a condensed history of both § 7422(a) and the jurisdictional basis for refund suits. This history is set forth in greater detail in both *Flora v. United States*, 362 U.S. 145, 151-156 (1960), and Bryan T. Camp, "New Thinking About Jurisdictional Time Periods in the Tax Code", 73 *Tax Lawyer* 1, 48-59 (2019). While Professor Camp's article mostly focuses on filing deadlines for Tax Court suits in light of the recent Supreme Court case law on what is jurisdictional, in his discussion of the filing deadline for refund suits at § 6532(a), he gives an extensive historical background of the origins of jurisdiction for tax refund suits and argues that the refund suit filing deadline, which was originally attached to the refund claim filing requirement in 1866, should not be treated as a jurisdictional filing deadline under current Supreme Court case law.[4]

[4] Prof. Camp's analysis calls into question another precedent of this Court. In *RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir. 1998), this Court held that the filing deadline at § 6532(a) is jurisdictional and not subject to estoppel or equitable tolling. However, that pre-*Kontrick* precedent need not be addressed at this time, since the Browns' refund suit was not filed late.

Prior to the Civil War, suits essentially for refund were brought as suits personally against Collectors grounded on assumpsit, or, after 1845, on statute.

> [B]ecause of the Act of February 26, 1845, c. 22, 5 Stat. 727, which restored the right of action against the Collector after this Court had held that it had been implicitly eliminated by other legislation, 12/ the Court no longer regarded the suit as a common-law action, but rather as a statutory remedy which "in its nature [was] a remedy against the Government." *Curtis's Administratrix v. Fiedler*, 2 Black 461, 479.
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> 12. *See Cary v. Curtis*, 3 How. 236.

Flora, 362 U.S. at 153.

Professor Camp describes the jurisdictional basis of such suits as follows:

> [Generally,] courts needed to find their jurisdictional mojo in the diversity statute. Because taxpayers were often from the same state as the Collectors, federal courts could not exercise subject-matter jurisdiction as an original matter.232/ Collectors, however, argued that the federal courts had removal jurisdiction under the same authority that permitted Collectors of customs to remove, the Force Act of 1833.233/
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> [F]ederal district courts could not even hear refund suits until after taxpayers first sued in state courts and Collectors then used the removal provisions in the various Revenue Acts. Nor could taxpayers sue in the contemporaneously created Court of Claims.239/ By 1882, however, the Supreme Court decided that the Court of Claims could exercise jurisdiction in certain cases but not others. It all depended, thought the Court, on how the taxpayer's claim for refund was

> handled administratively[. *United States v. Real Estate Savings Bank*, 104 U.S. 728, 734 (1882).] . . .
>
> Slowly, courts began to accept that the Court of Claims had jurisdiction over all refund suits, helped by the expansion of jurisdiction in the Tucker Act in 1877, which gave the Court of Claims exclusive jurisdiction over claims greater than $1,000 "founded upon the Constitution of the United States or any law of Congress . . . ."241/ District courts were given concurrent jurisdiction over claims less than $1,000.242/ By 1915, Justice Holmes was able to explain: "However gradually the result may have been approached in the earlier cases, it now has become accepted law that [tax refund] claims like the present are 'founded upon' the revenue law."243/ As a result, taxpayers could file suit for refund in either a federal district court (for claims of $10,000 or less) or the Court of Claims (for claims greater than $10,000).
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> 232. The only basis for original federal court jurisdiction at that time was diversity of parties under the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Congress did not create federal question subject matter jurisdiction until 1875. *See generally* James H. Chadbourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 *U. Pa. L. Rev.* 639 (1942) (detailing the history of what is now 28 U.S.C. § 1331).
> 233. Force Act of 1833, ch. 57, §§ 2–3, 4 Stat. 632, 632–34. Unlike the removal provisions now codified at 28 U.S.C. section 1441, the Force Act did not require that the case could have been heard as an original matter in federal court.
> 241. Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505, 505.
> 242. *Id*., § 2, 24 Stat. at 505. Both of the $1,000 limits were raised to $10,000 in Act of Mar. 3, 1911, Pub. L. No. 61-475, § 24(20), 36 Stat. 1087, 1093.
> 243. *United States v. Emery, Bird, Thayer Realty Co*., 237 U.S. 28, 32 (1915).

Camp, *op. cit*. at 56-58.

In the meantime, in 1866, Congress enacted what is the predecessor of the current § 7422(a) (creating the administrative refund claim filing

requirement) and § 6532(a) (the judicial suit filing deadline) in § 19 of the Revenue Act of 1866, ch. 184, 14 Stat. 152, which provided:

> That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal.

This provision eventually became R.S. § 3226 (1878).

By contrast, in *Flora*, with respect to the jurisdictional grant for tax refund suits, the Supreme Court stated:

> The precursor of § 1346(a)(1) was § 1310(c) of the Revenue Act of 1921,7/ in which the language with which we are here concerned appeared for the first time in a jurisdictional statute. Section 1310(c) had an overt purpose unrelated to the question whether full payment of an assessed tax was a jurisdictional prerequisite to a suit for refund. . . . Prior to 1921, tax refund suits against the United States could be maintained in the District Courts under the authority of the Tucker Act, which had been passed in 1887.8/ Where the claim exceeded $ 10,000, however, such a suit could not be brought, and in such a situation the taxpayer's remedy in District Court was against the Collector. But because the Collector had to be sued personally, no District Court action was available if he was deceased. The 1921 provision, which was an amendment to the Tucker Act, was explicitly designed to permit taxpayers to sue the United States in the District Courts for sums exceeding $10,000 where the Collector had died.

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7. 42 Stat. 311.

8. 24 Stat. 505, as amended, 28 U.S.C. §§ 1346, 1491. *See United States v. Emery, Bird, Thayer Realty Co*., 237 U.S. 28.
9. *Smietanka v. Indiana Steel Co*., 257 U.S. 1.

362 U.S. at 151-152 (some footnotes omitted).

28 U.S.C. § 1346(a)(1) currently provides, in relevant part:

> **(a)** The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> > **(1)** Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .

III. Inconsistent Comments from the Supreme Court on Whether the Claim Filing Requirement is Jurisdictional Do Not Justify Making a *Stare Decisis* Exception the Usual Rule that Mandatory Claim-Processing Rules are Not Jurisdictional.

There is a second exception to the Supreme Court's current rule that statutory or regulatory claim-processing rules are not jurisdictional anymore:

Here is the most recent statement of that exception:

> In addition, the Court has stated it would treat a requirement as "jurisdictional" when "a long line of [Supreme] Cour[t] decisions left undisturbed by Congress" attached a jurisdictional label to the prescription. *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82 (2009) (citing *Bowles v. Russell*, 551 U.S. 205, 209-211 (2007)). *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008).

Fort Bend, 139 S. Ct. at 1849.

It was Justice Ginsburg, the author of the unanimous opinion in *Fort Bend*, who put the brackets in the above quote, just to make clear that only a long line of Supreme Court opinions was entitled to this exception, not a long line of opinions from lower courts. Indeed, in addition to in *Fort Bend* and *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82 (2009), on six other occasions the Court has articulated this exception as applying only to a long line of Supreme Court opinions: *Hamer v. Neighborhood Housing Servs.*, 138 S. Ct. at 20 n.9; *United States v. Kwai Fun Wong*, 575 U.S. 402, 416 (2015); *Sibelius v. Auburn Reginal Medical Center*, 568 U.S. 145, 153-154 (2012); *Gonzalez v. Thaler*, 565 U.S. at 142 n. 3; *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010).

Since *Kontrick*, only two Supreme Court opinions have held that a claim-processing rule is jurisdictional because of *stare decisis*. In both cases, for over 100 years, the Supreme Court had consistently held the filing deadlines involved to be jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

When an *amicus* in *Reed Elsevir* attempted to cite a long line of lower court opinions to the Court to qualify for the *stare decisis* exception, Justice Ginsburg, in a concurrence joined by two other Justices, wrote: "[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. . . ." 559 U.S. at 174 (emphasis in original; citations omitted).

Thus, for purposes of the *stare decisis* exception, it is of no moment that this and other Circuit courts may have long treated the refund claim filing requirements of § 7422(a) as jurisdictional.

Space limitations prevent a discussion of all Supreme Court opinions that have directly, indirectly, or in *dicta* described the nature of the refund claim filing requirement of § 7422(a) or its predecessors. However, what follows is a discussion, in chronological order, of some principal opinions. Those opinions show inconsistent statements of the Supreme Court on whether the claim filing requirement is jurisdictional.

In 1945, in *Angelus* (an opinion discussed by Judge Smith below), the Court stated that, by examining the merits of a refund claim and taking action on it, the government could waive certain regulatory requirements under a Revenue Act of 1936 predecessor to § 7422(a). In the case, the Tax Court had treated the refund claim filing requirements as jurisdictional, yet

conceded that the IRS could waive certain formal requirements.[5] The Tax Court concluded, however, that there had been no waiver under the facts, and it dismissed the case for lack of jurisdiction. The Supreme Court affirmed the Tax Court's holding that there had been no waiver under the facts of the case, without discussing whether the filing requirements were jurisdictional or just mandatory claim-processing rules. The Supreme Court explicitly differentiated between regulatory and statutory requirements, holding that the waiver doctrine only applies to regulatory requirements, not statutory requirements. *Id*. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials."). In affirming the Tax Court's dismissal for lack of jurisdiction without mentioning the word "jurisdiction" in its opinion, *Angelus* is what today's Supreme Court would call a "drive-by jurisdictional ruling" entitled to no weight.[6]

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[5] The Center will not provide the long explanation of why the Tax Court had jurisdiction of the particular refund action. The Tax Court generally does not have jurisdiction of pure refund suits.

[6] In *Arbaugh v. Y & H Corp*., *supra*, 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

In *Flora*, in 1960, the Court stated:

> The ancestry of the language of § 1346(a)(1) [(i.e., "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws")] is no more enlightening than is the legislative history of the 1921 provision. This language, which, as we have stated, appeared in substantially its present form in the 1921 amendment, was apparently taken from R.S. § 3226 (1878). *But § 3226 was not a jurisdictional statute at all*; it simply specified that suits for recovery of taxes, penalties, or sums could not be maintained until after a claim for refund had been submitted to the Commissioner.11/
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> 11. . . . . The successor of R.S. § 3226 is I.R.C. (1954), § 7422(a), 68A Stat. 876.

Id., 362 U.S. at 152 (emphasis added). It appears the quoted statements are *dicta*, since the issue in the case was whether the jurisdictional grant at 28 U.S.C. § 1346(a)(1) required full payment of the tax as a predicate to a refund suit. The only reason the Court discussed R.S. § 3226 was to examine the Court's case law under that provision, primarily, *Cheatham v.*

> 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.

546 U.S. at 511 (citations and internal quotation marks omitted).

United States, 92 U.S. 85 (1875), which the Court did not find dispositive in finding § 1346(a)(1) to require full payment.

United States v. Dalm, 494 U.S. 596 (1990), is the opinion of the Supreme Court that, today, lower courts most frequently cite for the proposition that both the filing requirement of § 7422(a) and the timely filing requirement of § 6511(a) are jurisdictional requirements of a refund suit.[7] *Dalm* – 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). One problem in *Dalm* was that the administrative claim was filed late under § 6511(a), not that suit was brought without the taxpayer having first filed a refund claim under § 7422(a). Thus, arguably, the Court's statement as to whether the claim filing requirement of § 7422(a) is itself jurisdictional is *dicta*. The Court also wrote in *Dalm* (*id*. at 608) (cleaned up):

> Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and

[7] Section 6511(b) provides look-back amount limitations on the claims that are filed. Interestingly, without discussing recent Supreme Court case law on what is jurisdictional, this Court has held that the amount limitations are not jurisdictional to a refund suit. *Boeri v. United States*, 724 F.3d 1367, 1369 (Fed. Cir. 2013).

> the terms of its consent to be sued in any court define that court's 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.

Yet, a few months after *Dalm*, the Court in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), rejected the idea that waivers of sovereign immunity always preclude equitable tolling. And since *Kontrick*, the Court has clearly held that limitations periods running against the government that are set forth in statutes may not be jurisdictional conditions of suits – indeed, are only rarely jurisdictional conditions. *See Henderson*; *Auburn*; *Kwai Fun Wong*, 575 U.S. at 420 ("[I]t makes no difference that a time bar conditions a waiver of sovereign immunity, even if the Congress enacted the measure when different interpretive conventions applied . . . ."); *Musacchio v. United States*, 577 U.S. 237 (2016). Thus, the indented quote above from *Dalm* is simply no longer good law.

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. And, in any case, it may be that the Court was referring only to the timely filing requirement of § 6511(a) being jurisdictional and not the claim filing requirement of § 7422(a) being jurisdictional.

In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court held that the *Irwin* presumption in favor of equitable tolling against the government of statutes of limitations, as applied to the refund claim statute of limitations at § 6511(a), was rebutted. Notably, *Brockamp* did not call the § 6511(a) filing deadline "jurisdictional". Indeed, the opinion does not even contain the words "jurisdiction" or "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 deadline 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 (1998), 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.

Id. at 91 (emphasis in original; citations omitted),

Finally, in *United States v. Clintwood Elkhorn Mining Co*., 553 U.S. 1 (2008), the Supreme Court held that, where three companies brought suit for refund without having filed predicate refund claims under § 7422(a), they could not prevail. Both the Court of Federal Claims and this Court had thought that there was an independent grant of jurisdiction to hear the case in the Export Clause and the Tucker Act (28 U.S.C. § 1491(a)(1)). Both lower courts held the suits timely under the six-year statute of limitations at 28 U.S.C. § 2501. The Supreme Court held that the Export Clause could not provide jurisdiction and that the companies were seeking tax refunds. The

Court noted that the companies had neither filed § 7422(a)-required refund claims nor even brought their action within the § 6511(a) statute of limitations for filing refund claims. While the Court reversed the Federal Circuit, it did not say whether the reversal and dismissal was for lack of jurisdiction or for failure to state a claim. The opinion sheds no light on whether the Court thought the two requirements jurisdictional to a tax refund suit.

In sum, Supreme Court case law over nearly the past 100 years has not been consistent in calling the § 7422(a) filing requirement jurisdictional. Indeed, in the most careful discussion of the matter, in *Flora*, the Court called the predecessor of that statute not jurisdictional. Based on this collection of Supreme Court statements, some of which statements were *dicta* and some of which arguably involved drive-by jurisdictional rulings, it is not possible for a court to hold that there has been a long line of Supreme Court opinions consistently holding the filing requirement jurisdictional. Thus, the *stare decisis* exception to the current rule that claim-processing rules are not jurisdictional cannot apply to any of the filing requirements of § 7422(a), including the requirements to sign and verify the claims at §§ 6061 and 6065.

IV. Panels in Two Circuits Have Recently Questioned Whether the Claim Filing Requirement is Jurisdictional in Light of Recent Supreme Court Case Law.

The argument made by the Center herein has twice in recent years been raised *sua sponte* by panels of Circuit court judges where it was not necessary to decide the issue – thus giving judicial weight (though not precedent) to the argument. Although the Browns' brief cites and quotes from both of these opinions, it may be helpful to give the context of those opinions.

First, subsequent to *Clintwood Elkhorn*, in *Gillespie v. United States*, 670 Fed. Appx. 393 (7th Cir. 2016), a panel of the Seventh Circuit had to decide whether *pro se* taxpayers had filed a predicate tax refund claim. They had filed a claim, but the district court found it frivolous and not in compliance with § 7422(a). The district court rejected the government's argument, however, that the claim-filing requirement of § 7422(a) is jurisdictional. The Circuit panel affirmed the district court, but did not feel it necessary to decide whether the filing requirement is still jurisdictional. However, the panel wrote, in *dicta*:

> The Gillespies do not respond to the government's renewed argument that § 7422(a) is jurisdictional, though we note that the Supreme Court's most recent discussion of § 7422(a) does not describe it in this manner, *see United States v. Clintwood Elkhorn Mining Co*., 553 U.S. 1, 4-5, 11-12 (2008). And other recent decisions by the Court construe similar prerequisites as claims-processing rules rather than

> jurisdictional requirements, *see, e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015) (concluding that administrative exhaustion requirement of Federal Tort Claims Act is not jurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (concluding that Copyright Act's registration requirement is not jurisdictional); *Arbaugh v. Y & H Corp*., 546 U.S. 500, 504 (2006) (concluding that statutory minimum of 50 workers for employer to be subject to Title VII of Civil Rights Act of 1964 is not jurisdictional). *These developments may cast doubt on the line of cases suggesting that § 7422(a) is jurisdictional*. *See, e.g.*, *United States v. Dalm*, 494 U.S. 596, 601-02 (1990); *Green-Thapedi v. United States*, 549 F.3d 530, 532-33 (7th Cir. 2008); *Nick's Cigarette City, Inc. v. United States*, 531 F.3d 516, 520-21 (7th Cir. 2008).

Id. at 394-395 (emphasis added).

Second, in *Walby v. United States*, 957 F.3d 1295 (Fed. Cir. 2020), a taxpayer filed refund claims for four taxable years. For the first taxable year, 2014, the refund claim was untimely under § 6511(a). She later brought a refund suit *pro se* in the Court of Federal Claims for all four taxable years. With respect to the 2014 year, the Court of Federal Claims, *sua sponte*, dismissed the year for lack of jurisdiction because the refund claim was untimely. On appeal of all four years, the taxpayer did not argue that her 2014 refund claim was timely, so a panel of this Court held that such a potential argument was waived. Although it did not make a difference in the case whether the dismissal for 2014 was properly for failure to state a claim or for lack of jurisdiction, the panel wrote that, in light of recent Supreme Court case law on what is jurisdictional, it might be time to

reexamine this Court's precedent holding the filing requirement of § 7422(a) to be jurisdictional. *Id*. at 1299. Because the Browns' brief quotes the lengthy reasoning of *Walby*, this brief will not repeat it.

Just six days before the opinion in *Walby* was issued, two judges of this Court who were not on the *Walby* panel also noted this Court's precedent holding the refund claim filing requirement and deadline jurisdictional. The judges upheld the dismissal of a partnership-level refund suit for lack of jurisdiction when claims were filed late. However, *sua sponte*, the judges observed that neither party had questioned this precedent, "so that question is not presented in this case". *General Mills, Inc. v. United States*, 957 F.3d 1275, 1283 n.6 (Fed. Cir. 2020). This implies the judges also had doubts about the requirements' continued jurisdictional natures.

CONCLUSION

This Court should (1) reverse the Court of Federal Claims, (2) hold the refund claim filing requirements of § 7422(a) not jurisdictional (including the signature and verification requirements) and subject to waiver and forfeiture, and (3) remand this case for that court to determine whether the IRS waived or forfeited the right to complain about improper signing or verification of the refund claims.

Respectfully submitted,

s/ T. Keith Fogg
Professor T. Keith Fogg
Counsel for Amicus
Director, Tax Clinic of the
Legal Services Center of
Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2532
kfogg@law.harvard.edu

s/Carlton M. Smith
Carlton M. Smith, Esq.
Counsel for Amicus
255 W. 23rd Street, Apt. 4AW
New York, New York 10011
(646) 230-1776
carltonsmth@aol.com

Dated : May 14, 2021

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

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because the filing has been prepared using a proportionally-spaced typeface and includes 6,935 words.

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Amicus

Dated: May 14, 2021

CERTIFICATE OF SERVICE

This is to certify that a copy of this amicus brief was served on counsel for the appellant and appellee through filing the same with the CM/ECF system on May 14, 2021. All parties in the case are represented, and all counsel in the case are registered with the CM/ECF system.

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Amicus

Dated: May 14, 2021