No. 11-1231

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

AUBURN REGIONAL MEDICAL CENTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the D.C. Circuit correctly applied this Court's precedents concerning the presumptive availability of equitable tolling to the statutory limitations period governing challenges to Medicare program payments for hospital services.

RULE 29.6 STATEMENT

Respondents are the public or private non-profit organizations identified below along with their parent entities.

Group I	
Hospital Name	**Parent Corporation**
Doctors Hospital of Staten Island (merged into Staten Island University Hospital)	North Shore – Long Island Jewish Health System
Forest Hills Hospital	North Shore – Long Island Jewish Health System
Franklin Hospital	North Shore – Long Island Jewish Health System
Hackensack University Medical Center	Hillcrest Health Service System, Inc.
Long Island Jewish Medical Center	North Shore – Long Island Jewish Health System
Staten Island University Hospital	North Shore – Long Island Jewish Health System
Southside Hospital	North Shore – Long Island Jewish Health System

Group II	
Hospital Name	**Parent Corporation is Publicly-Traded Company**
Auburn Regional Medical Center	Universal Health Services, Inc.
Chalmette Medical Center	Universal Health Services, Inc.
Edinburg Regional Medical Center	Universal Health Services, Inc.
Inland Valley Regional Medical Center	Universal Health Services, Inc.
McAllen Medical Center	Universal Health Services, Inc.
Northern Nevada Medical Center	Universal Health Services, Inc.
River Parishes Hospital	Universal Health Services, Inc.
UHS of New Orleans	Universal Health Services, Inc.
Universal Health Services, Inc.	None
Wellington Regional Medical Center	Universal Health Services, Inc.

Group III	
Hospital Name	**Publicly-Traded Companies that have 10 Percent or More Ownership Interest**
Valley Hospital Medical Center	Universal Health Services, Inc. and Community Health Systems, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
Continued

STATUTES

REGULATIONS

TABLE OF AUTHORITIES
Continued

OTHER

INTRODUCTION

The petition for certiorari filed on behalf of the Secretary of Health and Human Services (the "Secretary") arises in the context of the Respondent hospitals' ("the Hospitals"') efforts to obtain payment statutorily due for services provided to patients under the Medicare program. The petition presents no issue of moment justifying this Court's intervention, reflecting a straightforward application of this Court's precedents holding that principles of equitable tolling are presumptively applicable to federal limitations periods. The Secretary does not, of course, challenge those precedents. But they are, in truth, the ultimate source of the Secretary's unhappiness, because those precedents potentially preserve a claimant's right to be paid what the Government owes where the claimant "has been induced or tricked by [the Government's] misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1996).

The decision of the court below does little more than reaffirm the general principles announced by this Court on the presumptive availability of equitable tolling in connection with any federal statutory limitations period, and then apply them comfortably to the statutory limitations period at issue. The Secretary offers no textual basis to suggest that equitable tolling does not apply in the context of a provider's effort to recover what is owed for services rendered under the Medicare program. The Secretary concedes that there is no directly contrary precedent on the issue. The Secretary's labored effort to manufacture a "conflict" among the Circuits on some conceptual basis is, at best, illogical but, in any event, stale. And the suggestion that

even in the absence of some textual (or historical) basis for overcoming the presumption in favor of equitable tolling, courts should create categorical exceptions for "big" programs, where the rule potentially would have large impacts, makes little legal sense and did not prevent this Court from applying equitable tolling in a case involving Social Security, a program larger Medicare. *Bowen v. City of New York*, 476 U.S. 467 (1986).

More specifically, the Secretary's ultimate contention is that the sheer size of the Medicare program, and the potential financial consequences of allowing equitable tolling to redress the loss of rights as a result of government misconduct, should warrant a categorical exclusion of the Medicare program from equitable tolling principles. However, the Secretary's own regulations authorize reopening "at any time" of Medicare payment determinations that were "procured by fraud or similar fault," which the Secretary has defined to include "deliberate concealment of information" -- the very government misconduct that the Hospitals allege occurred here.

Moreover, while the Secretary raises the spectre of large numbers of baseless claims being asserted by hospitals that have slept on their rights, the record here is entirely undeveloped, and the precise nature of the potentially-burdensome equitable tolling claims unexplored in the record. Further, as shown below, the spectre of masses of meritless claims being asserted on the basis of the decision below is a chimera. The Secretary fails to acknowledge that equitable tolling is a narrow doctrine, properly invoked (as this Court has said) "only sparingly," in response to government misconduct, and only by a claimant that has itself

exercised due diligence. *Irwin,* 498 U.S. at 96. And, even though the Secretary identifies no court that has ever barred the application of equitable tolling to Medicare cases, the doctrine is rarely invoked. Thus, the primary answer to the Secretary's suggestion that the doctrine will be too generously applied, and too frequently invoked, lies in the well-established, historic limitations on the doctrine's reach. Those limitations are left unaddressed on this record and in the petition.

The truth is that the general availability of the doctrine creates no administrative burden because the circumstances under which the doctrine may be invoked under a program like Medicare – where there is a clear duty of diligence on hospitals to pursue factual issues within their ken or control – have been rare, despite the fact that at least one district court explicitly applied it in an unappealed decision more than a decade ago. The doctrine is limited to the improper withholding of information within the control of the Government. Moreover, while the Secretary complains that the doctrine, if left unconstrained, may subject her to large numbers of meritless, but burdensome, reimbursement petitioners, the Secretary fails even to consider her ability to implement regulations that might limit or channel the inquiry whether equitable tolling is proper in particular cases. Of course, the Secretary can avoid the doctrine entirely by operating the Medicare program with transparency, as required by long-standing Executive Orders.[1]

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[1] For example, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 requires that (continued…)

Indeed, the Secretary's own argument about the burden of allowing equitable tolling to be invoked in the context of Medicare reimbursement decisions is internally inconsistent. On the one hand, the Secretary argues in favor of interlocutory consideration of the ruling below by invoking the administrative burdens of some wave of requests for hearings that might follow if the D.C. Circuit precedent is allowed to stand. Pet. 27-30. But at the same time, the Secretary notes that if indeed some large number of hospitals are affected by the Secretary's improper withholding of information that has prevented the hospitals from knowing that they were being shortchanged -- the allegation here -- they typically join together in group appeals to present their common claims and, as here, hold later-filed cases in abeyance while a lead case pursues the issue. Pet. 28. The routine use of a lead case, and group joinder of claims, to allow common issues to be conclusively resolved together, undermines the alleged administrative burden of addressing some large number of claims affected by government misconduct. Ultimately, however, the mere burden on the Government of complying with the law does not render a case certworthy when it is otherwise undeserving of this Court's attention.

(continued)
once a rule is published, the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget, must make available to the public "all documents exchanged between OIRA and the agency during the review by OIRA." Exec. Order No. 12,866, at § 6(b)(4)(D). This should put hospitals on notice of issues that need to be appealed, thereby limiting the availability of an equitable tolling claim.

The issue is, therefore, not ultimately one of administrative burden, but rather that if there is an adverse decision on equitable tolling -- that the Government's misconduct induced hospitals to fail to timely assert claims for reimbursement that they were entitled to receive by statute -- the financial consequences to the Government can be large. But if that were to be the result, this Court would have the opportunity to consider all of the issues related to the ruling, including the specific lower court ruling presented here, on a full record, in a developed factual context. The solution is not to address the issue now, in the absence of a factual record, in order to exclude any and all Medicare reimbursement decisions from the reach of the equitable tolling doctrine in the absence of any identifiable reason why the doctrine does not apply. Moreover, even if the Government were at risk for substantial liability as a result of this decision, as the court of appeals noted in another case: "Having to pay a sum one owes can hardly amount to an equitable reason for not requiring payment." *In re Medicare Reimbursement Litig., Baystate Health System v. Leavitt*, 414 F.3d 7, 13 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1054 (2006).

The petition does not even argue that the decision below conflicts with any precedent of this Court and identifies no decision in conflict with the decision in this case. At most, the petition argues that the D.C. Circuit misapplied this Court's precedent. Moreover, the Secretary does not say, nor could she, that the D.C. Circuit applied any standard that is inconsistent with this Court's decisions. Again, at most, the petition argues that the D.C. Circuit misapplied the standards adopted by this Court. But, this Court does not sit to correct errors

in the application of established precedents and this alleged error is not worthy of review. And there is no conflict here. The D.C. Circuit's decision upholding equitable tolling under Title XVIII of the Social Security Act -- the Medicare Act -- is not in conflict with any other decision of any federal appellate court, and it is fully consistent with this Court's holding in *Bowen v. City of New York, supra*, applying tolling to another analogous provision in Title II of the Social Security Act, which Congress incorporated into the Medicare review scheme at issue here. Finally, the stale conflict argued in the petition is not actually a conflict involving the decision in this case.

In sum, for the reasons summarized here, and elaborated below, the petition should be denied.

COUNTER-STATEMENT

The petition sets forth the statutory and regulatory framework, as well as the history of the case. Therefore, the Hospitals here emphasize only a few salient points that bear directly on the question whether the petition should be granted.

A. The Statutory and Regulatory Framework Is Incompatible with the Secretary's Position

As explained in the petition, the Medicare program establishes a system of payments for services provided to Medicare beneficiaries by, *inter alia*, hospitals. The total payment due to a hospital for a fiscal year for services rendered to Medicare beneficiaries is initially determined by a fiscal intermediary -- a Health and Human Services ("HHS") contractor -- which issues a notice of program reimbursement setting forth the total

Medicare payment amount the intermediary proposes that the hospital be paid for the services provided during the fiscal year. 42 C.F.R. § 405.1803 (2011). The hospital can, of course, contest the determination by making a claim for additional compensation.

By statute, a hospital seeking to contest the notice is granted 180 days to request a hearing before the Provider Reimbursement Review Board ("PRRB" or "Board"). 42 U.S.C. § 1395oo(a)(3). To all appearances, this time limitation on the ability to press a claim for additional Medicare payment looks like an ordinary limitations period. The statute provides that the appeal may be pursued:

> If – . . . (3) such provider files a request for a hearing within 180 days after notice of the intermediary's final determination under paragraph 1(A)(i), or with respect to appeals under paragraph 1(A)(ii), 180 days after notice of the Secretary's final determination, or with respect to appeals pursuant to paragraph (1)(B) or (C), within 180 days after notice of such determination would have been received if such determination had been made on a timely basis.

42 U.S.C. § 1395oo(a)(3). Thus, the time limitation is structured to afford the hospital, the provider of Medicare services, a means of recourse if it feels the Secretary, or the intermediary acting on the Secretary's behalf, has not authorized the proper total Medicare payment to which it is entitled. The statute confirms that the same 180-day time limitation applies where (a) the intermediary timely issues a reimbursement notice, (b) the Secretary has herself made a payment determination (typically in

a regulation), or (c) the intermediary has failed to timely issue a reimbursement notice.

Significantly, the Secretary has never suggested, does not suggest, and could not suggest, that this statutory time limit is, or was intended *by Congress* to be, absolute and not subject to equitable considerations in its administration. The Secretary does not and cannot contend that considering claims beyond the 180-day limitations period prescribed by statute would contravene either the text of the statute or the intent of Congress in enacting it. To the contrary, the Secretary, by regulation, has herself *broadly* allowed relief from the 180-day limitation for good cause shown, for up to three years after the determination. 42 C.F.R. § 405.1841(b) (2007).[2] The Secretary must acknowledge that allowing such relief is, at a minimum, consistent with both the text of the statute and Congressional intent. Thus, the Secretary's assertion of her own broad authority to provide relief from the 180-day limitation for a wide range of equitable reasons is fundamentally inconsistent with the notion that allowing relief from the limitations period for the single most time-honored, and well-justified of equitable reasons -- encapsulated in the equitable tolling doctrine as a remedy for a defendant's misleading behavior -- is somehow inconsistent with the statute or Congress's will.

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[2] The Hospitals cite to the 2007 version of 42 C.F.R. § 405.1801 *et seq*. because the 2008 amendments to those regulations apply only to Medicare payment administrative appeals pending as of August 21, 2008. 73 Fed. Reg. 30,190 (May 23, 2008). The Hospitals, however, exhausted the administrative process for their appeals before that date.

The Secretary does *not* suggest that her own regulation allowing relief from the 180-day period was itself an effort to structure or channel traditional equitable tolling claims or addresses the unique considerations associated with a traditional equitable tolling, including the very basic principle that tolling is appropriate only where the Government is uniquely possessed of information *not* available to the hospital and has wrongfully concealed that information, thus preventing the hospital from knowing that there is something wrong, giving rise to a potential challenge. Neither does the Secretary suggest that any of her regulations could in any way preempt or circumscribe equitable tolling principles already implicit in the statute. To the contrary, it appears to be the Secretary's position that while she possesses broad authority to announce exceptions to the 180-day period, which will *not* undermine the administrative scheme, the narrow, traditional rule of equitable tolling associated with most limitations periods, to guard against abuse, is somehow out-of-bounds.[3]

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[3] The Secretary argues that the decision of the court below, if allowed to stand, "would impose a considerable administrative burden on HHS and would expose the Medicare Trust Fund to substantial and unpredictable liabilities for past cost years that have long since been closed." Pet. 10-11 (underlining added). Of course, the fact that the Secretary already allows claims to be reopened for three years diminishes any additional burden from allowing equitable tolling in the narrow circumstances where it is appropriate. Moreover, the Secretary long ago adopted a regulation making all past cost years subject to correction *at any time* where the determination was the result of "fraud or similar fault" (42 C.F.R. § (continued…)

B. The Decision Below Rejected the Secretary's Claim to a Categorical Exemption from Equitable Tolling Principles

The Hospitals sought to challenge a series of determinations by their respective intermediaries for the years 1987-1994. The PRRB rejected their claims as untimely and held that it lacked any general authority to recognize equitable exceptions to the limitations period not expressly authorized by HHS regulations. App. 55a-56a.

The Hospitals ultimately appealed to the United States District Court for the District of Columbia. There the Secretary persuaded the district court judge that the PRRB's determination that these claims were untimely was somehow *not* a final decision subject to judicial review and, even if it was, the 180-day limitation period could not be equitably tolled. App. 29a and 35a. Although the Secretary had contended that the facts would *not* justify equitable tolling under that doctrine as properly (and narrowly) construed, it did not press that contention in its motion. It posited instead the categorical rule that equitable tolling would not be available to a hospital in any circumstances involving the Medicare payments at issue.

The Court of Appeals panel, Circuit Judges Henderson and Griffith, and Senior Circuit Judge

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405.1885(b)(3) (2011); 42 C.F.R. § 405.1885(d) (2007)), which the Secretary has defined as, *inter alia*, "deliberate concealment of information." Medicare Claims Processing Manual, Chapter 29, § 90.9 (as cited below).

Williams, rejected both of the district court's principal rulings.

The Court of Appeals first held that the federal courts did indeed have jurisdiction to consider the Hospitals' appeal. App. 5a. The Government apparently *no longer* suggests otherwise.[4]

The Court of Appeals likewise rejected the contention that the 180-day period is not, in a proper instance, subject to equitable tolling. App. 10a. The Court of Appeals began by noting three uncontroversial principles, reflected in this Court's cases that ultimately controlled the disposition of this case: (1) that it is hornbook law that limitations periods are customarily subject to equitable tolling, unless equitable tolling would be inconsistent with the text of the relevant statute; (2) that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (quoting *Irwin,* 498 U.S. at 95-96); and (3) that the presumption in favor of recognizing equitable tolling is not disturbed by the fact that the issue arises in the context of a government benefits program like Medicare (citing, as an example, *Scarborough v. Principi*, 541 U.S. 401, 422 (2004)). App. 5a-7a.

The Court of Appeals found nothing in the statutory text to suggest that Congress wished to bar the application of the doctrine to the 180-day period. To the contrary, the statute describes the 180-day limitation period in conventional and "fairly simple"

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[4] Whether the Government would expect this Court to address and resolve the jurisdictional issue if certiorari were granted is left unclear in the petition.

terms, similar to other statutes in which the applicability of equitable tolling has been recognized. App. 9a. The Court of Appeals also recognized that the basic nature of the claim, a fee paid for a service rendered, left it roughly analogous to a contract claim for work performed. App. 6a n.1.

In particular, the Court of Appeals rejected the Secretary's effort to analogize the case to the limitations period for tax refund claims at issue in *United States v. Brockamp*, 519 U.S. 347 (1997). App. 7a-10a. In *Brockamp*, Congress, by statute, had enacted a set of comprehensive exceptions and limitations in a highly detailed and technical manner, with a range of interdependent provisions. Thus, it was reasonable to conclude that *Congress* had fully and comprehensively addressed the circumstances where relief from the time limits in the statute itself, leaving no room for other, even conventionally implied, exceptions. There were no comparable provisions here. To be sure, the "good cause" exception of 42 C.F.R. § 405.1841(b) (2007) might be relevant. But that exception is in the regulations, not the statute, "... and does not bear on whether Congress rebutted the presumption of equitable tolling by enacting a complex set of exceptions to the statute of limitations." App. at 9a.

On that basis, the Court of Appeals reversed and remanded for a determination whether the doctrine had any proper application here.[5] App. 10a.

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[5] The Secretary notes that the Court of Appeals remanded this case to the district court and "assume[s]" that the Court of Appeals "intended the district court to first remand to the [Provider Reimbursement Review] Board for (continued…)

The government filed a petition for rehearing, which failed to garner even a request for a vote. App. 64a. Judge Griffith, joined by Senior Judge Williams filed an opinion concurring in the denial of rehearing *en banc*. App. 65a-66a. In that separate opinion, they emphasized that there was absolutely no textual basis upon which to conclude that Congress intended to preclude equitable tolling, again contrasting the statutory text with the emphatic, detailed, and repeated limitations provisions statutorily stated in *Brockamp*. App. 66a.

REASONS FOR DENYING THE WRIT

The Secretary presents no reasonable or responsible argument that the decision below does anything more than follow this Court's established precedents on the availability of equitable tolling in the context of a claim against the Government. There is simply no textual indication that Congress intended for the 180-day period governing claims against the Government for reimbursement under the Medicare program to be any more absolute than most limitations periods, *i.e.* subject to limited equitable exceptions necessary to prevent gross injustice at the hands of the Government.

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'any further factual development.'" Pet. 8 n.5. However, the PRRB's 2008 regulations limit discovery that is available against the Secretary and the Centers for Medicare & Medicaid Services ("CMS") (42 C.F.R. § 405.1853(e)) and prohibits the PRRB from issuing a subpoena to the Secretary and CMS (42 C.F.R. § 405.1857(a)). Thus, the Hospitals expect the process for further factual development to be considered by the district court in accordance with the remand order of the Court of Appeals.

Notwithstanding the Secretary's arguments that allowing equitable tolling will give rise to onerous administrative burdens, the narrowness of the equitable tolling doctrine, and the Secretary's own historic willingness to allow the time for claims to be appealed to be extended for up to three years for good cause, and to allow corrective reopening *indefinitely* where information relevant to a payment was deliberately concealed, thoroughly undermine that argument. And the Secretary's effort to manufacture a conflict of some sort among the Circuits by reviving stale Circuit Court rulings on some arguably related point that have, in fact, been long since superseded by this Court's own decisions, rings entirely hollow.

In truth, the petition rests on the notion that if equitable tolling is allowed generally, and is proven applicable in this case, the fiscal burden of requiring the Government to pay precisely what it owed the Hospitals, under statute, for the services they provided could be large. But even if that could be a proper ground for certiorari (which it is not), it certainly does not justify consideration of the issue in its current interlocutory posture, for there would be time enough to address the issue presented here, along with any other issue concerning the right to tolling in light of the government's conduct, if and when the issues have been addressed by the agency and/or the lower courts.

I. The Court of Appeals Correctly Applied This Court's Precedents And The Application Of Those Precedents Does Not Call For This Court's Review

In *Irwin,* 498 U.S. at 95-96, this Court held that "the same rebuttable presumption of equitable

tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." And this rule is a corollary of the more general understanding that "limitations principles should apply generally to the Government in the same way that they apply to private parties." *See Franconia Associates v. United States*, 536 U.S. 129, 145 (2002). The rationale for that presumption in favor of equitable tolling is, of course, two-fold. The exception to the strict application of limitations periods under the doctrine of equitable tolling has long been understood as part of limitations law and there is ordinarily no reason to believe that Congress would wish to disavow it. Moreover, the application of the equitable tolling doctrine, at least in the narrow form applied in the federal courts, is simply designed to prevent fundamental injustices, such as allowing the defendant to profit from misleading the complainant and inducing the complainant to allow a deadline to pass. Thus, the presumption that Congress expected equitable tolling of limitations periods for claims against the Government, just as in connection with private suits, reflects "a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Irwin,* 498 U.S. at 95.

That basic principle of statutory interpretation of federal limitations provisions has not proven overly difficult to understand – though it appears fair to say that the Government has frequently resisted its application. Congress itself has been alerted to the presumptive rule for interpreting its enactments, and thus that it has the power to change it if it leads to undesired results, either generally, or in particular contexts (which it has not

done for the statute at issue, despite revisiting it six times since *Irwin* was decided (Pet. 13 n.6), five of which provided cross-references to where judicial review is *not* available (as explained below)). And this Court too has repeatedly and recently reaffirmed *Irwin's* breadth, noting that it extends beyond causes of action with ready common law analogues (like this case), and also in connection with statutes that create special rights against the Government. "*Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private litigation equivalent." *Scarborough*, 541 U.S. at 422.

The Secretary here primarily relies on *United States v. Brockamp*, *supra*. In *Brockamp*, this Court rejected the application of equitable tolling in the context of the complex, comprehensive, and emphatic time limits on tax refund claims. The special governmental nature of the taxing power is, of course, readily distinguishable from the types of claims at issue here.[6]

The claims at issue here are for proper reimbursement for services rendered to Medicare beneficiaries, which the Secretary allegedly

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[6] Moreover, and more importantly, the circumstances under which the claims arose were also quite different. In *Brockamp*, in "each case a taxpayer initially paid the Internal Revenue Service (IRS) several thousand dollars that he did not owe. In each case the taxpayer (or his representative) filed an administrative claim for refund several years after the relevant statutory time period for doing so had ended." *Brockamp*, 519 U.S. at 348. Thus, claimants in *Brockamp* negligently made erroneous payments, which they untimely sought to recover. There was no allegation that the IRS acted improperly with regard to the erroneous payments.

underpaid and which the Hospitals did not timely appeal because of the Secretary's deliberate concealment of information about the cause of the underpaid claims. Though the Medicare program is complex (as are many private contracts), the basic claim at issue here is fundamentally analogous to a contract (or, reaching back further, an action in *assumpsit*), *i.e.* an entitlement to payment on stated terms for services rendered (as opposed to an effort to recover an improper payment, negligently made and untimely claimed, against a defendant who did not act improperly). Unlike *Brockamp*, this is a context in which entitlement to payment, and the inequity of denying payment for those services where the claimant has been misled and induced by the payer into allowing an applicable time limit to pass, is easily seen. In any event, this Court has made clear that in judging whether equitable tolling is available, it is helpful that the claim at issue resemble a common law claim, but no "readily identifiable private litigation equivalent" (*Scarborough,* 541 U.S. at 422) is required.[7]

Of course, as special as the tax code may be, this Court did not rest its decision in *Brockamp* on judge-conceived postulates and intuitions about whether equitable tolling would be appropriate in connection

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[7] There is, in fact, an exact "private litigation equivalent" for the claims at issue. Private risk-bearing health plans, known as Medicare Advantage plans, acting pursuant to contracts with HHS, are now responsible for almost 20% of all Medicare payments. If a hospital is dissatisfied with the payment it receives from a Medicare Advantage plan for providing care to Medicare beneficiaries, including the Part A payments at issue in this case, the hospitals bring private litigation against the plans.

with particular government programs. Rather, the Court properly looked to the statutory text itself and found that the comprehensive, repeated, and emphatic references to the limitations period in the statute left little room for the implication of an equitable tolling exception, and thus *textually* rebutted the presumption that tolling applies. As the D.C. Circuit panel repeatedly noted, there is no textual basis to suggest that principles of equitable tolling were not intended to apply here (it is also not clear that the equities favored the taxpayer in *Brockamp* in that, unlike as alleged here, the IRS did not conceal any information, deliberately or otherwise).

The Secretary strains to suggest textual complexity, and the kind of comprehensive treatment of limitations, found in *Brockamp*. In support of that theory, she asserts that the "time deadline is just one of three mandatory preconditions to invoking administrative review," and neither of the other two "mandatory preconditions" is amenable to tolling. Pet. 19. Of course, it is odd indeed to see the provider's "dissatisfaction" with the ruling characterized as a "mandatory precondition" to the provider's right to seek review -- but it does illustrate the weakness in the Secretary's theory. And the amount in controversy requirement, as a precondition to invoking the right of review (42 U.S.C. § 1395oo(a)(2)), is a perfectly conventional limitation on bringing a claim. That an amount in controversy requirement may not be subject to equitable considerations (though it is unclear what they might even be), says nothing at all about whether limitations periods, which are historically and

conventionally subject to equitable tolling, is or is not subject to equitable tolling under this statute.

The petition, at 9-10 and 20, takes the Court of Appeals to task because it allegedly "failed to appreciate the significance of the fact that Section 1395oo(a)(3) prescribes a deadline for filing an administrative appeal with the PRRB, not a statute of limitations for filing suit in federal court." The categorical distinction that the Secretary proposes between administrative claims and court claims for purposes of the application of equitable tolling simply does not wash. In *Brockamp*, this Court considered an internal administrative appeal. If that was enough to rule out the application of equitable tolling, the opinion would have begun and ended at that. But this Court did not deem that to be a viable distinction. To the contrary, it engaged in the textual analysis and evaluation that plainly distinguishes this case from that one. *See Brockamp*, 519 U.S. at 350-352. This distinction was also rejected in *Bowen v. City of New York*, 476 U.S. at 482, where this Court stated:

> At the outset, we note that by the time this lawsuit was filed, it was too late for a large number of class members to exhaust their claims, since expiration of the 60-day time limits for administrative appeals barred further access to the administrative appeals process. (citations omitted). For these claimants, we conclude that exhaustion is excused for the same reasons requiring tolling of the statute of limitations.

Thus, the Secretary errs by suggesting that *City of New York* only involved "the 60-day limitations period for seeking *judicial* review . . . ." Pet. 18 n.9 (emphasis in original).

Absent some meaningful textual rationale for rejecting equitable tolling, the Secretary's assertion that tolling should be categorically rejected because it is somehow incompatible with Medicare would necessarily rest on judicial imaginings of a proper *ipse dixit* rule. At a minimum, it would leave the instruction of *Irwin* -- recognizing that Congress itself ordinarily intends its limitations periods to be subject to equitable tolling, presumably unless it says otherwise -- without any force at all.

Moreover, the Secretary cannot make the one argument that she would perhaps most like to make in arguing against allowing relief from the 180-day requirement for equitable tolling: that the limitations period was intended by Congress to be rigorously applied and, in effect, jurisdictional (as, she suggests, is the amount in controversy requirement), and cannot tolerate exceptions. That argument is not made because the Secretary has long had in place regulations that effectively allow relief from these limitations for, among other things, good cause (42 C.F.R. § 405.1841(b) (2007); 42 C.F.R. § 405.1836 (2011)), and a regulation that protects the Medicare program indefinitely from payments based on a provider's deliberate concealment of relevant information (42 C.F.R. § 405.1885(d) (2007); 42 C.F.R. § 405.1885(b)(3) (2011)).

The notion that the 180-day period was intended by Congress to be so rigid that it displaces a time-honored, equitable exception, which was designed to prevent injustice at the hands of the

defendant, and which is recognized as implicit in virtually all limitations periods, but somehow not so rigid as to allow the Secretary to create equitable exceptions of her choosing, is hard to sustain -- and certainly finds no support in any statutory text or decisions of this Court.

Significantly, the Secretary does not suggest that her own regulatory exceptions to the 180-day period could somehow preempt or supersede the doctrine of equitable tolling implicit in the statute. And while the Secretary complains that allowing equitable tolling will subject her to untold numbers of meritless claims in the future, she does not consider whether, for example, consistent with the D.C. Circuit's decision, she can mitigate the claimed burden of equitable tolling by using her rulemaking authority. The Secretary does not consider how she may, through regulation, require greater diligence on the part of hospitals, or set forth more clearly the information that will be made available to hospitals or which they may request, thereby limiting the availability of equitable tolling in a manner consistent with the statute and the doctrine itself. All these potential mitigating measures are left unexplored in the petition, while the Secretary cites administrative burdens as justifying the categorical exclusion of her Medicare program from principles of equitable tolling.

II. The Secretary's Claims Of Administrative Burden Ring Hollow

This Court has not suggested that a court's intuitions and gleanings about the possible administrative burden of allowing equitable tolling in a particular setting could, in the absence of some meaningful textual indication that equitable tolling

is not to be allowed, suffice to allow the courts to imply a bar on equitable tolling with respect to some specific limitations period.[8] Nonetheless, the Secretary repeatedly posits a parade of horribles that would follow from allowing equitable tolling in the context of Medicare reimbursement, all flowing from some flood of entirely meritless claims that she sees as authorized by the D.C. Circuit's opinion.

At the outset -- as pointed out above -- claims of administrative burden are significantly weakened by the fact that the Secretary has long allowed relief from the 180-day period simply upon a showing of good cause (albeit, allowing such relief for only three years after the decision). Having allowed that broad relief, albeit limited as to time, the Secretary could only complain of the *incremental* burden of allowing a narrow exception to the time limit for equitable tolling to apply for a somewhat longer period of time.

Nonetheless, the Secretary repeatedly raises the spectre of administrative burden flowing from an avalanche of meritless claims as reason for categorically rejecting the applicability of equitable tolling. Indeed, this purported avalanche of meritless claims that will supposedly flow from allowing the D.C. Circuit's opinion to stand, for even a short time, provides the sole rationale offered by the Secretary why this Court should grant the petition in the case's interlocutory posture, rather

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[8] Even the district court, accepting the Secretary's argument, acknowledged that the statute at issue here lacks the decisive complexity associated with the tax refund limitations period at issue in *Brockamp*. App. 35a.

than wait for a final decision, and address the issues on a complete and proper record. Pet. 28 n.15.

The Secretary's argument is fundamentally misguided and the claimed burdens ephemeral and wholly lacking in support in the record of this case. The federal doctrine of equitable tolling redresses only gross injustices. As this Court has made clear, the doctrine is applied "only sparingly," in narrow circumstances. *Irwin*, 498 U.S. at 96 (summarily rejecting the application of the doctrine on the claim presented). To the extent relevant here, it is, as this Court explained, available "where the complainant has been induced or tricked by his adversary's misconduct in allowing the filing deadline to pass." *Id.* The doctrine typically does *not* excuse a failure of the complainant to exercise due diligence and timely pursue all legal and factual issues available. The reason it is plausibly available in this case, as alleged, is that the information deceptively concealed from the Hospitals, was *not* something that the Hospitals could have known and the Hospitals were misled by the Secretary with regard to a payment determination that is made entirely by the Secretary without any input from any provider. A payment determination made entirely by the Secretary without provider input is actually quite rare in Medicare.

Thus, the Secretary's effort to invoke "each of the tens of thousands of sophisticated Medicare-provider recipients" who are "generally capable of identifying an underpayment in its own [Medicare notice of program reimbursement] within the 180-day time period," but instead choosing to hold back and "evade" the 180-day time limitation (and three-year "good cause" time extension provision), is

unconvincing. Pet. 26. Such claims could not plausibly be brought. Underpayments that can be readily identified by the provider are simply not within the scope of the doctrine. Neither could "health care consulting" firms "scour old cost reports looking for" errors -- because if the errors are there to be seen, they must be timely asserted. The circumstances giving rise to plausible claims for equitable tolling simply do not arise very often -- and if they do, are almost invariably the product of the kind of misconduct and injustice that commands that relief be granted. Equitable tolling is a remedy for injustice, not its cause.

Finally, in the very rare circumstances where, in the context of Medicare reimbursement, plausible claims for equitable tolling might be presented, the "statute and regulations permit health care consulting firms to bring group appeals on behalf of large numbers of providers." Pet. 28. When multiple group appeals are filed, one is typically designated as the lead case for purposes of judicial review. This is precisely what happened here and in *In re Medicare Reimbursement Litig., supra,* where later-filed cases were held in abeyance pending the outcome of the lead case.

Significantly, equitable tolling does not eliminate the limitations period, but merely tolls its application for a period of time. Claimants are required to proceed diligently after the facts that had been concealed have become known. Thus, there is no reason to expect large numbers of duplicative proceedings arising out of some common error: if a case for tolling did arise, it could be addressed and resolved with relative efficiency. While it cannot be said that acknowledging the availability of equitable

tolling will impose *no* burdens on the agency -- nor should it because it is, after all, largely a means of correcting for misconduct that causes a provider to lose its rightful payment for services rendered -- the parade of horribles suggested by the Secretary is well wide of the mark. Indeed, as Judge Griffith noted in the statement accompanying the order denying the Secretary's petition for rehearing *en banc*: "Although it is no doubt true that the complex Medicare reimbursement scheme will be more difficult to administer with equitable tolling available to claimants, that factor alone is not enough to persuade us that Congress rejected the presumption of equitable tolling with the type of clarity the precedents require." App. 66a.

The real "burden" here is not administrative, but potentially financial if the government misconduct at issue, properly pleaded and proved, results in some large number of providers being improperly deprived of the payments that they were entitled to receive for the services they provided to Medicare beneficiaries. It is, however, hard to see how the Secretary is burdened by paying the amounts required to have been paid by statute many years after the payments should have been made. But even assuming that could be the basis for a certiorari petition (which it cannot), the proper time to consider such a factor would be on final judgment, when the facts could be assessed and the circumstances considered. It is surely not appropriate to speculate about such possibilities on this interlocutory record.

III. The Secretary's Effort to Manufacture a Circuit Conflict Is Strained and Unconvincing

Straining to manufacture a circuit-split on account of the D.C. Circuit's decision in this case, the Secretary asserts that "the court of appeals' decision cannot be reconciled with" rulings of the Eighth and Eleventh Circuits. Pet. 23.

Even the Secretary recognizes, however, that there is no actual circuit-split on the question at issue in this case, *i.e.*, whether equitable tolling applies to the 180-day time limitation for seeking PRRB hearings pursuant to 42 U.S.C. § 1395oo(a)(3). As she ultimately acknowledges, "neither [the Eighth nor the Eleventh Circuit] court[s] specifically considered the question of equitable tolling." Pet. 24. Thus, by the Secretary's own admission, the specific issue presented by this appeal is not subject to a circuit-split and the petition, thus, should be denied.

In reality, what the Secretary references is a very old and stale, but certainly very different, circuit-split concerning her authority to enact the "good-cause" regulation contained in 42 C.F.R. § 405.1841(b) (2007). *See Lenox Hill Hospital v. Shalala*, 131 F. Supp. 2d 136, 142 n.6 (D.D.C. 2000) ("There is a circuit split on the lawfulness of the Secretary's good-cause regulation."). The Ninth Circuit Court of Appeals ruled in 1986 that the Secretary did not exceed statutory authority by promulgating the "good-cause" exception. *Western Medical Enterprises, Inc. v. Heckler*, 783 F.2d 1376, 1379 (9th Cir. 1986). A few months later, the Eighth Circuit reached an opposite result, "conclud[ing] that the Secretary had no authority to promulgate a regulation that effectively expanded the jurisdiction

of the PRRB to entertain untimely appeals." *St. Joseph's Hospital v. Heckler*, 786 F.2d 848, 852 (8th Cir. 1986). As the Secretary notes, the Eleventh Circuit concurred with the Eight Circuit's approach. *Alacare Home Health Servs., Inc. v. Sullivan*, 891 F.2d 850 (1990).[9] The question in those cases concerned the Secretary's "power to promulgate the regulation" that she had adopted. *Western Medical*, 783 F.2d at 1379. In short, the circuit-split concerns the question of whether or not the Secretary has the authority to create *ad hoc* exceptions of her own making in implementing the 180-day limitations period. It has nothing to do with whether or not the Medicare Act generally, or the 180-day limitations period specifically, are subject to the historic principle of equitable tolling. [10]

Nonetheless, the Secretary tries to create the misimpression that the circuit-split she references is new and results directly from the D.C. Circuit's decision in this case. Pet. 24. However, the only

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[9] The D.C. District Court sided with the Ninth Circuit on this issue. *Ozark Mountain Reg. Rehab Center v. DHHS*, 798 F. Supp. 16, 20 (D.D.C. 1992) ("the Court determines that § 405.1841(b) is valid.").

[10] In *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 853 (9th Cir. 1997), the Ninth Circuit reserved on the issue of equitable tolling ("Since the Board never resolved the equitable tolling issue, we remand to the Secretary for a final decision on the merits of Anaheim's equitable tolling claim."). The court in *Bradford Hospital v. Shalala*, 108 F. Supp. 2d 473, 484 (W.D. Pa. 2000), recognized that "numerous courts have applied equitable tolling to regulatory filing deadlines" and held that "equitable tolling is generally applicable to Medicare regulatory filings." The petition does not identify a case where a court has held that equitable tolling is not available to Medicare appeals.

actual conflict that the Secretary identifies concerns the Secretary's "good cause" regulation, not equitable tolling (". . . neither court specifically considered the question of equitable tolling."). *Id*. And the ostensible split over the good cause regulation would not be addressed or resolved in this case.

Moreover, the circuit-split concerning whether the "good cause" regulation is *ultra vires* is not new; it has existed for over a quarter of a century, stemming from the differing conclusions of the Ninth and Eighth Circuits in 1986. Thus, the conflict involving the validity of the "good cause" regulation, if it needs to be addressed at all in light of the change to that regulation discussed below, is best left to be addressed in a case where the validity of that regulation is actually at issue.

Further, even on an abstract or purely conceptual level, there is no "conflict" at all with any of the cases cited by the Secretary. There is nothing inconsistent between the view, on the one hand, that (a) the 180-day period of the statute incorporates, as a matter of presumptive Congressional intent, the doctrine of equitable tolling where that narrow doctrine is applicable and, on the other, (b) that the Secretary has no authority to create *ad hoc* exceptions of her own to the 180-day limit. Moreover, addressing the issue that arguably *is* presented by this petition -- whether equitable tolling is available under this statute -- will do nothing at all to resolve the conflict that the Secretary cites, *i.e.*, whether she has the power to create exceptions of her own to the 180-day period.

Nonetheless, the Secretary tries to generate a conceptual conflict by characterizing the prior cases as resting on the "jurisdictional" nature of 180-day

period. Pet. 24. But the injection of that terminology will not create a conflict where none exists. The cases cited by the Secretary hold that the Secretary had no power to enact the rule. Any effort to characterize this as a holding that the rule has "jurisdictional" significance -- and thus is not subject to exceptions for any reason -- simply will not wash under this Court's more recent cases. Indeed, as the district court explained, this Court has repeatedly "'[r]ecogniz[ed] that the word "jurisdiction" has been used by courts, including this Court, to convey "many, too many, meanings," [and] we have cautioned, in recent decisions, against profligate use of the term.'" App. 24a-25a (quoting *Union Pacific R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009), quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006)).[11]

Even if the claimed split over the good cause regulation could be resolved in this case, it is doubtful that the more than 25-year old split that the Secretary does identify remains real. As pointed out in the petition, the "good cause" regulation rejected by the Eighth and Eleventh Circuits is no longer on the books. Pet. 4 n.3 and 25 n.13. The Secretary has recently promulgated a new "good

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[11] The district court in this case observed that "it is important to note that the 180-day limitations period cannot plausibly be characterized as jurisdictional. . . . [T]here is no language in § 1395oo(a) or (f) indicating that the limitations period is jurisdictional. The Supreme Court has cautioned that, 'when Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character.' *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006)." Pet. 24a.

cause" regulation, which has apparently not been rejected by any court. *Id*. And it very likely would not be. As noted above, this Court's more recent cases -- in the more than 25 years since the Eighth and Eleventh Circuit rulings cited by the Secretary -- have decisively rejected the tendency to characterize time limits as "jurisdictional" and thus unwaivable in any circumstances. Moreover, in *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (1999), this Court had before it much of the Secretary's regulatory structure concerning the flexibility of the 180-day period, providing some limited further support for the Secretary's authority with respect to the 180-day limitations period. Significantly, the Secretary does not argue that anything in *Your Home* controls or determines the outcome here. In sum, if there will be (or even if it can be said that there remains) a circuit-split on the issue of the Secretary's exceptions to the 180-day rule, that split is not presented or addressed by the petition, and if it is important to the Secretary, can be addressed and resolved in a proper case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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