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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF BENJAMIN N. CARDOZO SCHOOL OF LAW TAX CLINIC AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The Cardozo Tax Clinic represents, for free, low-income taxpayers with respect to their federal income tax matters – both before the Internal Revenue Service and in the federal courts. Occasionally, the Clinic's assistance has been sought after those individuals, on their own, filed a document late – either with the IRS or the courts -- under a time deadline set out in the Internal Revenue Code or in a regulation promulgated thereunder. Usually, no extraordinary equitable reasons occurred that might excuse such late filing. See, e.g., *Iljazi v. Commissioner*, T.C. Summary Op. 2010-59 (client simply filed administrative claim for equitable innocent spouse relief beyond the time permitted in 26 C.F.R. § 1.6015-5(b)). But, on occasion, there have been good equitable reasons for the late filing. So, in recent years, the Clinic has argued before the courts for the equitable tolling of certain tax-related time limits. See, e.g., *Gormeley v. Commissioner*, T.C. Memo. 2009-252, appeal

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed with the submission of this brief to the Clerk. This brief was not written, in whole or in part, by counsel for any party, and no person or entity other than Yeshiva University has made a monetary contribution to the preparation and submission of this brief. Yeshiva University, of which the Benjamin N. Cardozo School of Law and its Tax Clinic are components, employs counsel for *amicus*. Cardozo third-year law students Stephanie Cerino and Yonatan Tammam assisted in drafting this brief.

conceded by government (3d. Cir. 2010) (client sought equitable tolling of 90-day period at § 6015(e)(1)[2] in which to file Tax Court petition seeking equitable innocent spouse relief determination).

Besides representing its own clients, the Cardozo Tax Clinic has submitted amicus briefs to two Circuit Courts of Appeal arguing for equitable tolling. *Mannella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011) (brief arguing for equitable tolling of time period in 26 C.F.R. § 1.6015-5(b) called "effective[]" and caused remand); *Terrell v. Commissioner*, 625 F.3d 254 (5th Cir. 2010) (brief arguing for equitable tolling of time period at § 6015(e)(1); issue not reached by court).

Counsel for the Clinic, its Director, has also published articles arguing for equitable tolling of several time periods contained in the Internal Revenue Code. Carlton M. Smith, "*Friedland*: Did the Tax Court Blow Its Whistleblower Jurisdiction?", 131 *Tax Notes* 843 (May 23, 2011) (arguing that the 30-day period at § 7623(b)(4) to file a Tax Court petition to review IRS' denial of a whistleblower award is subject to equitable tolling); Carlton M. Smith, "Equitably Tolling Innocent Spouse and Collection Due Process Periods", 126 *Tax Notes* 1106 (Mar. 1, 2010).

The Cardozo Tax Clinic does not represent any particular client in filing this brief. However,

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

anticipating future clients who may want to argue for equitable tolling of certain Internal Revenue Code time limits, the Clinic is concerned that what this Court may say in this case in comparing the Medicare statute at issue herein to the statute at issue in *United States v. Brockamp*, 519 U.S. 347 (1997), may adversely affect future lower court opinions concerning jurisdiction and equitable tolling in the tax area.

SUMMARY OF ARGUMENT

The Medicare time period in dispute herein is not jurisdictional, and a regular *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), presumption in favor of equitable tolling applies to the time limit – not a "weakened" version of the presumption. The government's argument that there is a "weakened" *Irwin* presumption in areas not known to be equitable, such as Medicare and tax collection, is not supported by logic or any authority. Since there is insufficient evidence to rebut the presumption herein, equitable tolling should be allowed of this case's time limit.

Contrary to this Court's statements in *Brockamp* and *Holland v. Florida*, 130 S. Ct. 2549 (2010), tax collection has historically involved equitable determinations – particularly where taxpayers and non-taxpayers seek to avoid the consequences of missing statutory deadlines. And, since *Brockamp* was decided in 1997, Congress has substantially increased the number of equitable tax collection determinations. To avoid accidentally, by dicta, effectively deciding lower-court disputes over

the possibility of equitably tolling Tax Code time limits other than section 6511, when resolving this Medicare time limit dispute, in its opinion herein, this Court should clearly indicate that it did not intend to suggest in *Brockamp* or *Holland* that no time deadlines in the Tax Code may be equitably tolled.

ARGUMENT

I. INTRODUCTION

This case involves a Medicare statute. It does not involve the Internal Revenue Code. However, from the briefing herein and the fact that the D.C. Circuit spent the last third of its opinion in this case discussing *Brockamp*, it seems likely that this Court, in its own opinion, will discuss what it said in *Brockamp* about why an Internal Revenue Code time period could not be equitably tolled. It would not be the first time this Court would discuss *Brockamp* in a non-tax case: In *Holland v. Florida, supra*, this Court also compared in detail a non-tax statute to the tax statute involved in *Brockamp*.

The Cardozo Tax Clinic is concerned both (1) about how language in *Brockamp* is being misused by the government in both tax and non-tax cases and (2) that this Court not, in this case, issue another gloss on the *Brockamp* opinion (like it did in *Holland*) that the government could misuse.

The Cardozo Tax Clinic does not see any error in the ruling of the D.C. Circuit below. Despite the complexity of the Medicare scheme in general, the 180-day time limit involved herein does not appear

to be jurisdictional. There is insufficient evidence that Congress wanted it to be jurisdictional. And this is a simple, short time limit as to which the *Irwin* presumption should apply. The statute should be subject to equitable tolling.

The respondent has effectively expanded upon the arguments summarized in the prior paragraph, so the Clinic has little to add on that score. Much of what the Clinic does have to add, though, are facts and arguments about how the opinion in this case may, if not carefully drawn, affect the interpretation of Internal Revenue Code time limits, as well. Accordingly, this brief proceeds in three parts:

The first part summarizes the Court's actual statements and holdings in *Brockamp* and *Holland.* It argues against the existence of something the government calls a "weakened" *Irwin* presumption in Medicare and tax cases.

The next part shows how one of the statements by this Court in *Brockamp* about equity in tax collection was, unfortunately, an overstatement when made, and, in light of later statutory developments, is even less accurate today.

The last part points out many tax deadlines for which the government has continued (with mixed success) arguing in the lower courts for no equitable tolling, citing *Brockamp*. These are disputes over time periods that may be affected by language in the forthcoming opinion in this case.

To avoid accidentally, by dicta, effectively deciding those and other Tax Code time limit disputes when resolving this Medicare time limit

dispute, the Cardozo Tax Clinic asks that this Court clearly indicate that it did not intend to suggest in *Brockamp* that no time deadlines in the Tax Code could ever be equitably tolled.

II. THERE IS NO SUCH THING AS THE GOVERNMENT'S "WEAKENED" *IRWIN* TOLLING PRESUMPTION

In the instant case, the government has argued that "even if [the *Irwin* presumption] . . . were to apply, any . . . presumption would be substantially weakened in this context, where equitable principles do not traditionally govern the substantive law and where Congress enacted a time deadline eighteen years before this Court's decision in *Irwin*." Pet. Br. 14. Further, the government has said that "Medicare Part A is far more analogous to the subject matter in *Brockamp* (tax collection) and *Beggerly* (land claims) than to the subject matter in *Holland* (habeas corpus) or *Irwin* (Title VII)." Pet. Br. at 45. The Cardozo Tax Clinic disagrees with much in these assertions.

Irwin was an employment discrimination suit. In it, 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." *Irwin*, *supra*, 498 U.S., at 95-96.

Brockamp involved two companion cases decided by the Ninth Circuit in 1995. In them, taxpayers made payments to the IRS before returns were due, yet subsequently failed to file returns on time. When late original returns were filed, they

showed overpayments. The taxpayers asked that the time periods to file timely refund claims be equitably tolled -- due to a taxpayer's mental incapacity in one case and alcoholism in the other. The tolling was sought for the periods that the taxpayers were effectively unable to act. Absent equitable tolling, the refund claims were untimely. Applying the *Irwin* presumption, however, the Ninth Circuit held that the time period in which to file a tax refund claim at § 6511(a) was subject to equitable tolling. *Brockamp v. United States*, 67 F. 3d 260 (9th Cir. 1995); *Scott v. United States*, 1995 U.S. App. LEXIS 37932 (9th Cir. 1995).

A dissenting judge in the Ninth Circuit thought otherwise. Among the reasons he gave for not finding the § 6511 period to be tollable was that "equitable tolling principles are inconsistent with the foundational underpinnings of the Internal Revenue Code. That is because tax laws are 'technical laws which are not subject to general principles of equity.' *Oropallo [v. United States]*, 994 F.2d [25] at 28 n. 3 [(1st Cir. 1993)] (citing *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 249 (1955))." *Brockamp v. United States*, 67 F.3d at 265 (Fernandez, J., dissenting; some citations omitted).

In *Oropallo*, the First Circuit had called the requirement to timely file an administrative tax refund claim under § 6511 a jurisdictional requirement for a district court suit under 28 U.S.C. § 1346(a)(1). For this proposition, the First Circuit had cited this Court's holding in *United States v. Dalm*, 494 U.S. 596 (1990) -- decided just months before *Irwin*. *Oropallo*, 994 F.2d at 26. In part

because *Dalm* said that the § 6511 time period was jurisdictional, the First Circuit in *Oropallo* held that the time period was not subject to equitable tolling.

Lewyt Corp. -- cited by the First Circuit in *Oropallo* -- was a 1955 opinion of this Court deciding both the proper year for an accrual basis taxpayer to deduct excess profits taxes in computing income taxes and the proper amount of such deduction. In its opinion in *Lewyt*, this Court, preliminarily, noted "the rule that general equitable considerations do not control the measure of deductions or tax benefits". *Lewyt*, 349 U.S. at 240. The page from *Lewyt* cited in *Oropallo*, page 249, is actually one from the dissent. Page 249 contains the sentence, "Where the taxing measure is clear, of course, there is no place for loose conceptions about the 'equity of the statute.'" *Lewyt*, 349 U.S. at 249 (Frankfurter, J., dissenting). In any event, *Lewyt* involved assessment of the correct amount of tax -- not the subject matter of tax collection mechanisms (the subject matter of *Brockamp*).

In 1997, this Court reversed the Ninth Circuit's equitable tolling holdings in both of the companion cases in a combined opinion in *United States v. Brockamp*, 519 U.S. 347. This Court's *Brockamp* opinion was devoid of the words "jurisdiction" or "jurisdictional". Notably, the opinions in *Dalm*, *Brockamp*, and *Oropallo*, all predate this Court's recent statements that both this Court and lower courts have in the past called too many statutory requirements for suit – especially time limits – jurisdictional. See *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). Perhaps for this reason, in

his *amicus* brief herein, Professor Manning has not cited *Brockamp* as an example of a jurisdictional ruling of this Court.

In *Brockamp*, this Court held that § 6511(a)'s period in which to file a timely refund claim was not subject to equitable tolling. The Court wrote:

> Section 6511 sets forth its time limitations in unusually emphatic form. Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception. But § 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, § 6511 reiterates its limitations several times in several different ways. . . .
>
> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery -- a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together,

indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

The nature of the underlying subject matter -- tax collection -- underscores the linguistic point. The IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. See Dept. of Treasury, Internal Revenue Service, 1995 Data Book 8-9. To read an "equitable tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification. See H. R. Conf. Rep. No. 356, 69th Cong., 1st Sess., 41 (1926) (deleting provision excusing tax deficiencies in the estates of insane or deceased individuals because of difficulties involved in defining incompetence). The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to

> decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

Id., at 352-353 (citations omitted).

The sentence from *Brockamp* quoted above that states that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities"; *id*., at 352; is not attributed to any prior opinion of this Court, but likely is a paraphrase of what Judge Fernandez said about tax law and equity in his dissent in the Ninth Circuit's opinion in *Brockamp*. It appears that the ultimate source for Judge Fernandez's statement was this Court's statement(s) in *Lewyt*, -- statement(s) in *Lewyt* (1) directed at computing the correct amount of a tax assessment, not its collection, and (2) when made therein not supported by citation to other opinions of this Court or to statutory provisions.

But, the next sentence from *Brockamp* did not refer to tax law generally, or to assessing the correct amount of tax, but to a subset of tax law, tax collection: "The nature of the underlying subject matter -- tax collection -- underscores the linguistic point." *Id*. This second sentence omits the qualifier "normally" used in the first sentence referring to "tax law" – suggesting to the reader that perhaps no aspect of tax collection involves equity in the Court's eyes. At least, this is how the government has, with one exception, read the combined effect of those two sentences ever since when the issue of possible

equitable tolling of a Tax Code time period has arisen.

In 2010, this Court decided *Holland v. Florida*, *supra*, in which it compared the statute there at issue to the one involved in *Brockamp*. *Holland* involved a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that limits state prisoners sentenced to the death penalty in filing for a writ of habeas corpus in the federal district courts. The AEDPA provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). In *Holland*, an attorney missed the deadline to file a habeas corpus petition, despite repeated urging of his death-row client to file on time. Eventually, the client learned of the event that triggered the running of the period and filed a habeas petition himself, but it was five weeks late.

This Court held that equitable tolling could apply to the statute, stating:

> First, the AEDPA "statute of limitations defense . . . is not 'jurisdictional.'" It does not set forth "an inflexible rule requiring dismissal whenever" its "clock has run."
>
> We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a "rebuttable presumption" in *favor* "of equitable tolling."
>
> In the case of AEDPA, the presumption's strength is reinforced by the

fact that "'equitable principles'" have traditionally "'governed'" the substantive law of habeas corpus, for we will "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command'". The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption.

Second, the statute here differs significantly from the statutes at issue in *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998), two cases in which we held that *Irwin*'s presumption had been overcome. In *Brockamp,* we interpreted a statute of limitations that was silent on the question of equitable tolling as foreclosing application of that doctrine. But in doing so we emphasized that the statute at issue (1) "se[t] forth its time limitations in unusually emphatic form"; (2) used "highly detailed" and "technical" language "that, linguistically speaking, cannot easily be read as containing implicit exceptions"; (3) "reiterate[d] its limitations several times in several different ways"; (4) related to an "underlying subject matter," nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial; and (5) would, if tolled, "require tolling, not only procedural limitations, but

> also substantive limitations on the amount of recovery -- a kind of tolling for which we . . . found no direct precedent." And in *Beggerly* we held that *Irwin*'s presumption was overcome where (1) the 12-year statute of limitations at issue was "unusually generous" and (2) the underlying claim "deal[t] with ownership of land" and thereby implicated landowners' need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge."
>
> By way of contrast, AEDPA's statute of limitations, unlike the statute at issue in *Brockamp,* does not contain language that is "unusually emphatic," nor does it "re-iterat[e]" its time limitation. Neither would application of equitable tolling here affect the "substance" of a petitioner's claim. Moreover, in contrast to the 12-year limitations period at issue in *Beggerly,* AEDPA's limitations period is not particularly long. And unlike the subject matters at issue in both *Brockamp* and *Beggerly* -- tax collection and land claims -- AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. In short, AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations.

Id., at 2560-2561 (citations omitted; emphasis in original).

Note how *Holland* seems to underscore the thought that there is no equity in tax collection,

stating that the subject matter at issue in *Brockamp* was "tax collection" and implying that, by contrast to the AEDPA, which pertains to habeas corpus, equity does not find a "comfortable home" in tax collection. There is no mention in *Holland* of *Brockamp*'s caveat that tax law is only "normally" not "characterized by case-specific exceptions reflecting individualized equities". 519 U.S. at 352. A flat rule seems implied by *Holland* for all tax collection statutes: They do not admit of equity. This is wrong, as will be detailed below.

Further, in the early part of the above *Holland* quote appear the words indicating that, if a time period is found in an equitable area, "the [*Irwin* tolling] presumption's strength is reinforced". The Court in *Holland* did not say that a time period existing in an area not known for equity is entitled only to a "weakened" *Irwin* presumption or no presumption at all.

In its opinion in this case, the D.C. Circuit, before analyzing the Medicare statute, spent a long paragraph summarizing the statements this Court made in *Brockamp* with respect to § 6511. Among the statements that the D.C. Circuit quoted was that "[t]ax law . . . is not normally characterized by case-specific exceptions reflecting individualized equities." *Auburn Regional Medical Center v. Sebelius*, 642 F.3d 1145, 1150 (D.C. Cir. 2011).

But, when comparing the Medicare statute herein to § 6511, the D.C. Circuit did not make any statement concerning whether the United States Code's Title 42 Medicare and Title 26 tax provisions were or were not areas as to which equity finds a

comfortable home. The issue of whether either area involved equitable determinations did not factor into the D.C. Circuit's decision in this case.

The Cardozo Tax Clinic believes the D.C. Circuit acted correctly in this regard. Under *Holland*, an *Irwin* presumption should be discussed as being "reinforced" only if (1) an area was traditionally thought to involve equity, (2) Congress, before *Irwin*, had engrafted an equitable provision into the United States Code in an area not previously considered equitable, or (3) after *Irwin*, Congress enacted a statute with a non-jurisdictional time period. The Medicare statue at issue herein satisfies none of those three criteria for producing a "reinforced" presumption.

The closest thing to discussing equity was the D.C. Circuit's response to the government's implicit argument about the comparative complexity of both Medicare and the Internal Revenue Code to other areas of the United States Code. The D.C. Circuit observed that:

> contrary to the Secretary's suggestions, the Court's focus in *Brockamp* was not the complexity of tax law per se, but rather the complexity of the provisions governing whether and when a claim could be filed. *Menominee*, 614 F.3d at 530 ("[F]ocus on the regulatory scheme as a whole is misplaced. The *Brockamp* Court did not concern itself with the complexity of the Tax Code as a whole, but the complexity of the time limitations found in § 6511."). It is true that as a general matter, the Medicare statute, like

> the Internal Revenue Code, is quite complex. But unlike the tax code, the Medicare statute does not create a detailed Jenga tower of deadlines and exceptions that equitable tolling might topple. Rather, its timing scheme is straightforward and readily amenable to tolling.

Id.

Irwin never said its tolling presumption was only appropriate in areas of the United States Code traditionally governed by equitable principles. The Title VII employment discrimination provision involved in *Irwin* was in part of Title 42 of the United States Code, 42 U.S.C. § 2000e-16(c). The Medicare provision involved in this case, 42 U.S.C. § 1395*oo*(a)(3), is also in part of Title 42. If the government's argument were accepted that the Medicare statute involved in this case – one drafted before *Irwin* and involving an area not traditionally equitable -- gets a "weakened" *Irwin* presumption of tolling, doesn't the statute involved in *Irwin* – also drafted before *Irwin* and not in an area traditionally equitable – also get a weakened *Irwin* presumption? How can *Irwin* itself involve a weakened presumption that it just laid out?

The truer reading of this Court's opinions in *Brockamp* and *Holland* must be that there is an *Irwin* presumption for all time limits in the United States Code that are not jurisdictional, and the *Irwin* presumption can only be "reinforced", not "weakened". There is no case law supporting the existence of a "weakened" *Irwin* presumption, and the government here cites none. Indeed, if there

were such a "weakened" presumption, most of the United States Code would likely fall into the government's "weakened" presumption. Surely, this is not what this Court intended to say when it laid down the *Irwin* presumption as a general rule for the entire United States Code.

Although the government has not made the argument in this case (a Medicare case), both before and after *Brockamp*, the government's position in every case where a taxpayer or other person has asked a court to equitably toll a time period in the Internal Revenue Code has been that either the time period is jurisdictional or, if not jurisdictional, is still not tollable. While the government has not always explicitly argued that there can never be equitable tolling in the Tax Code, that appears to be the thrust of its position.

As this Court decides the instant case and compares the statute herein to that in *Brockamp*, the Cardozo Tax Clinic asks the Court to be careful not to describe its *Brockamp* holding in a way that supports this government position. Rather, the Clinic believes that this Court should explicitly state that *Brockamp* was focused only on § 6511 and in no way should be read to preclude all other time periods in the Internal Revenue Code from being subject to tolling – i.e., that *Brockamp*'s language should not be read as turning the *Irwin* presumption in favor of tolling into an irrebuttable presumption against tolling in the Tax Code.

The Cardozo Tax Clinic is not setting up a straw man. As early as 1999, the government argued to the Seventh Circuit that *Brockamp*

precluded any time period in the Internal Revenue Code from being tolled. In *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572 (7th Cir. 1999), the Seventh Circuit refused to decide whether a 90-day period to file a Tax Court declaratory judgment petition on pension plan qualification under § 7476 could be subject to equitable tolling because it saw no good reason for the petitioner having filed one day late therein. However, the Seventh Circuit expressed great skepticism of the government's argument that the specific period could not be tolled and that *Brockamp* prohibited the tolling of any time period in the Tax Code:

> The government asks us, on the authority of *Brockamp*, to broaden the exception to cover the entire tax code. But *Brockamp* is not broadly written. The Court pointed to emphatic statutory language not paralleled in the sections of the code at issue in this case indicating Congress's disinclination to permit any delays in the institution of tax refund litigation and to the administrative complexities that would ensue from injecting the complex, nuanced, case-by-case doctrine of equitable tolling into the assembly-line production of tax refunds in response to the enormous number of refund claims (more than a hundred million) filed every year.

Id., at 577.

To show how the government effectively continues to imply to the lower courts that no Tax Code time limit may ever be equitably tolled, below is a passage from motion papers filed earlier this

year by the government in a pro se individual's appeal to the Ninth Circuit of *Volpicelli v. United States*, 2011 U.S. Dist. LEXIS 140827 (D. Nev. 2011). *Volpicelli* involves whether the 9-month time period at § 6532(c) in which a nontaxpayer must file a district court wrongful levy action under § 7426 may be equitably tolled.

Logan Volpicelli was a minor in 2003, when the Reno police obtained a search warrant to look into the safe deposit box of his father, Ferrill. Ferrill has been incarcerated before. In the box, the police found two large checks from Ferrill's parents made out to Ferrill, and they turned the checks over to the IRS. The IRS applied the proceeds of the checks to Ferrill's tax debts. Within the 9-month time period at § 6532(c), Ferrill brought a wrongful levy suit in the district court for the District of Nevada on behalf of his son, arguing that the checks were intended to be gifts to Logan and that the checks had only been made out to Ferrill because Logan was a minor. In the Ninth Circuit, a parent cannot represent his minor child – a lawyer must – but Ferrill did not hire a lawyer (perhaps Ferrill lacked funds or was in jail). So, the court dismissed the case. In 2010, when Logan reached the age of majority (18), he promptly brought a new wrongful levy suit in the Nevada district court and asked the court to toll the § 6532(c) time period, citing *Supermail Cargo, Inc. v. United* States, 68 F.3d 1204 (9th Cir. 1995), in his papers. In *Supermail Cargo*, the Ninth Circuit, relying on the *Irwin* presumption, held that the § 6532(c) time period could be equitably tolled.

Supermail Cargo was decided before this Court issued its opinion in *Brockamp*. Perhaps because of this, the Nevada district court dismissed Logan's most recent suit, merely citing *Brockamp* and not even mentioning *Supermail Cargo*. In Logan's currently-pending pro se Ninth Circuit appeal, the Ninth Circuit had issued an order to show cause asking Logan to identify a substantial legal issue for his appeal.[3] In a responsive motion paper filed on March 12, 2012 in Ninth Circuit Docket No. 12-15029, the government wrote (page 9 n. 5):

> [T]he case law plainly supports the District Court's holding that, contrary to Logan's argument, the statute of limitations for a wrongful levy action cannot be equitably tolled. *United States v. Brockamp*, 519 U.S. 347, 354 (1997); *Becton Dickinson and Company v. Wolckenhauer*, 215 F.3d 340, 344-354 (3d Cir. 2000).

Becton Dickinson is a Third Circuit opinion that explains why the Third Circuit, relying on the alleged similarity between the purposes of §§ 6511 and 6532(c) and this Court's opinion in *Brockamp*, disagrees with the Ninth Circuit in *Supermail Cargo*. All one can make of the government's arguments in *Volpicelli* and in other recent cases is that any time a taxpayer – or even a nontaxpayer

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[3] The Ninth Circuit later decided that the case should go forward. The parties are in the midst of briefing the merits of the appeal. The government has not yet filed its merits brief.

like Logan -- asks[4] that a Tax Code time period be equitably tolled, the government cites *Brockamp* as enough of a refutation because it believes that there is no tolling in the Internal Revenue Code.

III. INDIVIDUAL EQUITABLE DETERMINATIONS OFTEN OCCUR IN THE AREA OF TAX COLLECTION

A. EQUITABLE TAX COLLECTION DETERMINATIONS WERE FAIRLY COMMON BEFORE *BROCKAMP*

This Court in *Brockamp*, unfortunately, overstated the situation when it said that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities". 519 U.S., at 352. This part of the brief focuses particularly on tax collection, not tax computation. As detailed below, there was a large amount of equity involved in tax collection prior to 1997:

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[4] In one instance, the IRS argued that a Tax Code provision was subject to equitable tolling, where the tolling would benefit the government. In *Doe v. United States*, 398 F.3d 686 (5th Cir. 2005), the government argued that the time period to assess taxes at § 6501 could be equitably tolled in the IRS' favor. The Fifth Circuit rejected the government's argument. This was not surprising, since § 6501 is nearly as detailed and exception-ridden as § 6511 and is essentially the flip side of § 6511. Indeed, an extension signed of the § 6501 assessment period also extends the § 6511 refund period. See §§ 6501(c)(4) and 6511(c).

1. Under the doctrine of "equitable recoupment" -- available in the district courts and the Court of Federal Claims prior to 1997 -- overpayments that are time-barred from refund under § 6511 can be applied to reduce timely-asserted tax assessments where the taxpayer would otherwise be taxed inconsistently on the same transaction. *United States v. Dalm*, *supra*; *Stone v. White*, 301 U.S. 532 (1937); *Bull v. United States*, 295 U.S. 247 (1935).

2. In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court recognized a similar judicial equitable exception – like that of equitable tolling -- to the Tax Code's anti-injunction act, § 7421(a). Section 7421(a) provides that, other than in the case of certain enumerated statutory exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." In *Williams Packing*, this Court stated that despite the words of the act, "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the [*Miller v. Standard*] *Nut Margarine* [*Co.*, 294 U.S. 498 (1932)] case, the attempted collection may be enjoined if equity jurisdiction otherwise exists." *Id.*, at 7.

3. In *United States v. Rodgers*, 461 U.S. 677 (1983), this Court considered whether § 7403

empowered a district court to order the sale of a family home owned by a delinquent taxpayer at the time he incurred his tax indebtedness, but in which the taxpayer's spouse (who did not owe any of that tax indebtedness) had a Texas "homestead" interest. This Court held that "district courts may exercise a degree of equitable discretion in § 7403 proceedings." *Id*., at 709.

4. Section 6901(a) provides procedures for the government to assess and collect "liability, at law or *in equity*, of a transferee of property". (Emphasis added.) In *United States v. Bess*, 357 U.S. 51 (1958), this Court upheld a district court suit in equity against a widow -- enforcing the government's interest in the cash surrender value of a life insurance policy owned by the decedent husband at the time of his death.

5. In 1971, Congress enacted an "innocent spouse" provision at § 6013(e) to mandate relief from joint and several income tax liability in the case of certain large omissions of unreported income. Sec. 411, Pub. L. 98-369, 98 Stat. 790. The statute directed relief for an innocent spouse if a number of conditions were met, including that "taking into account all . . . facts and circumstances, it is *inequitable* to hold the other spouse liable for the deficiency in tax". Former § 6013(e)(1)(C) as originally adopted, before later amendment. (Emphasis added.)

6. In 1984, Congress amended the estimated tax penalty provision to provide for a waiver "with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstance the imposition of such addition to tax would be *against equity and good conscience*". § 6654(e)(3)(A). The Tax Court has granted the waiver in equitable cases of serious illness (AIDS) and/or mental disability. *Meyer v. Commissioner*, T.C. Memo. 2003-12; *Shaffer v. Commissioner*, T.C. Memo. 1994-618; *Carnahan v. Commissioner*, T.C. Memo. 1994-163.

7. The late-filing and late-payment penalties at paragraphs (1), (2), and (3) of § 6651(a) have long had "reasonable cause and not willful neglect" exceptions. This Court, in *United States v. Boyle*, 469 U.S. 241 (1985), indicated that these exceptions are likely met in equitable situations. In *Boyle*, this Court noted that the IRS, in most cases, did not impose the penalties when the circumstances that caused the taxpayer to pay late or file late were beyond the taxpayer's control. *Id*., at 248 n. 6. Furthermore, this Court indicated that for disabled taxpayers, "disability alone could be an acceptable excuse for late filing." *Id*., at n. 6. Even before 1997, the Tax Court had often granted these exceptions from the penalties in cases of mental disability -- consistent with the Court's comments in *Boyle*. *Shaffer v. Commissioner*, *supra*; *Carnahan v. Commissioner*, *supra*.

8. In 1986, Congress amended § 6404 by adding a subsection (e) that allowed the IRS to abate interest attributable to an error or delay of an IRS officer or employee in performing a "ministerial" act. Sec. 1563(a), Pub. L. 99-514, 100 Stat. 2762. Congress said it did "not intend that this provision be used routinely to avoid payment of interest." S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986). Rather, Congress intended the section to be used in instances in which an error or delay in performing a ministerial act resulted in the imposition of interest, and the failure to abate the interest "would be widely perceived as grossly unfair;" *id*. – i.e., where it would be perceived as inequitable. In 1996, Congress expanded the interest abatement authority to include an error or delay of an IRS officer or employee in performing a "managerial" act. Sec. 301(a)(2), Pub. L. 104-168, 110 Stat. 1457.

9. The IRS has had long-standing power to provide taxpayers with extensions to file their tax returns; see § 6081(a); and with extensions to meet election deadlines – deadlines that can be either in the area of tax collection or in the substantive calculation of the assessable amount of tax. One of the current regulations at 26 C.F.R. § 301.9100-1 *et seq*. governing requesting such so-called "9100 relief" lists acceptable excuses, including: "Failed to make the election because of intervening events beyond the taxpayer's control." 26 C.F.R. § 301.9100-3(b)(1)(ii). This sentence essentially

> acts as a blanket equitable exception. Moreover, the regulations even provide for certain automatic extensions that affect substantive tax liability -- including extending (1) the 15-month time limit in which to file an exemption application for a § 501(c)(3) organization under § 508, (2) the time limit in which to elect to be treated as a homeowners association under § 528, and (3) the time limit in which to elect to adjust basis on partnership transfers and distributions under § 754. 26 C.F.R. § 301.9100-2(a)(2).

In sum, even before this Court's 1997 *Brockamp* opinion, both through explicit Congressional authorization and judicial and regulatory exceptions, the collection and even imposition of taxes often involved equitable determinations.

B. EQUITABLE TAX COLLECTION DETERMINATIONS HAVE BECOME INCREASINGLY MORE COMMON SINCE *BROCKAMP*

Since 1997, Congress has increasingly called on the IRS to make equitable determinations in tax collection and liability matters. The Court should take this increasing amount of equity into consideration in any discussion of *Brockamp* in its opinion herein.

Further, in the listing of new equitable time limit provisions below, note that all were enacted after *Irwin*, so that, according to *Holland*, in the event these provisions are not held to present

jurisdictional time limits, they are all due a "reinforced" *Irwin* presumption.

1. In 1998, Congress implemented a statutory partial overruling of *Brockamp* by amending § 6511 to add a new subsection (h) providing that "the running of the periods specified in subsections (a), (b), and (c) shall be suspended during the period of such individual's life that such individual is financially disabled". Subsection (h) defines "financially disabled" as arising from a medically-determinable physical or mental impairment meeting certain requirements. Sec. 3202(a), Pub. L. 105-206, 112 Stat. 740-741.

2. Paired with the adoption of § 6511(h), in 1998, Congress repealed § 6013(e) and implemented a greatly-expanded "innocent spouse" provision at § 6015. Sec. 3201(a), Pub. L. 105-206, 112 Stat. 734-740. Section 6015(b) -- an expanded version of the former § 6013(e) -- retained the condition of the former § 6013(e) that, "taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax". § 6015(b)(1)(D). Congress provided for even broader relief by adopting § 6015(f) -- applicable to both deficiencies in tax and underpayments of tax shown on the return. Subsection (f) provides that "if—(1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either); and (2) relief is not

available to such individual under subsection (b) or (c), the Secretary may relieve such individual of such liability." In 2005, the National Taxpayer Advocate reported to Congress that the IRS was receiving approximately 50,000 requests for relief under § 6015 a year. National Taxpayer Advocate 2005 Annual Report to Congress (Dec. 31, 2005) at 329, available at www.irs.gov. This is a significant amount of equitable tax collection determinations being made annually.

3. In the same 1998 legislation, Congress enacted new standards and procedures for offers-in-compromise ("OICs") under § 7122 by which taxpayers and the IRS can compromise assessed tax liabilities with finality. Sec. 3462, Pub. L. 105-206, 112 Stat. 764-767. Language in the Conference Committee Report encouraged the IRS to consider "factors such as *equity*, hardship and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration". H.R. Rep. No. 105-509 at 289 (1998) (emphasis added). The IRS later adopted regulations providing that, even when an individual taxpayer could pay his or her income taxes in full, "the IRS may compromise to promote effective tax administration where compelling public policy or *equity considerations* identified by the taxpayer provide a sufficient basis for compromising the liability. Compromise will be justified only where, due to exceptional

circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and *equitable* manner." 26 C.F.R. § 301.7122-1(b)(3)(ii) (emphasis added).

4. In the same 1998 legislation, Congress also created "Collection Due Process" ("CDP") hearings at the IRS Office of Appeals by enacting new §§ 6320 and 6330. Sec. 3401, Pub. L. 105-206, 112 Stat. 746-750. A taxpayer can now insist on a CDP hearing at either of two critical times in the tax collection process -- the issuance of a notice of intention to levy or the filing of a notice of federal tax lien. In a CDP hearing, the Appeals Officer must not only consider collection alternatives -- such as a proposed installment payment agreement under § 6659 or an OIC -- but also must consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary". § 6330(c)(3). This is essentially an equitable inquiry. In the fiscal year ended September 30, 2011, the Office of Appeals held 51,832 CDP hearings. IRS Data Book, 2011 at 49 (Table 21), available at www.irs.gov. That is far more "equitable" tax collection hearings than there were Tax Court cases (29,442) and district court and Court of Federal Claims tax refund cases (397) closed, combined, in that year. *Id*., at 61 (Table 27). Indeed, these last three additions to the Tax Code by the IRS

Restructuring and Reform Act of 1998 – by adding so many more equitable determinations to be administered by the IRS -- caused a prominent tax procedure professor to complain about the inefficiency of all these equitable determinations being thrust on the IRS, as follows:

> Congress made the wrong choice in creating these grounds [for equitable relief in innocent spouse, CDP, and OICs]. It forgot that costs as well as benefits must be considered. As said, the benefits were expected to be and apparently have been, for the rare cases. In securing those rare benefits, there were costs in many more cases: expended administrative resources that could have been applied to much greater effect elsewhere in the tax system. In short, the game was not worth the candle. At a time when the IRS is otherwise squeezed for resources, it is unwise, on balance, to expend its available resources on these residual, equitable categories.

Steve Johnson, "Symposium: Tax Compliance: Should Congress Reform the 1998 Reform Act: The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification", 51 *Kan. L. Rev.* 1013, 1059 (2003). The Cardozo Tax Clinic does not agree with Professor Johnson's conclusion, but does agree with him that the IRS is much

more in the equity-determining business since the 1998 legislation.

5. In a provision actually affecting the computation of assessable tax -- not tax collection -- in 2001, Congress amended the IRA provisions to allow the IRS to waive the 60-day window in which to roll over an IRA distribution "where the failure to waive such requirement would be *against equity or good conscience*, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." § 408(d)(3)(I), added by sec. 644, Pub. L. 107-16, 115 Stat. 123 (emphasis added).

6. In 2006, Congress further expanded equity in tax collection when it resolved a Circuit split by amending § 6214(b) to provide that "the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims." Sec. 858, Pub. L. 109-280, 120 Stat. 1020.

Furthermore, in addition to these new equitable provisions, Congress in 2006, added subsection (b) to § 7623, allowing the Tax Court (a court established as an Article I court under § 7441) for the first time to hear appeals of adverse IRS determinations concerning tax whistleblower awards. Although the tax whistleblower provision is not one that is inherently equitable, Congress may be happy to put a thumb on the scale of the whistleblower who for good equitable reasons misses

the simple, 30-day Tax Court filing time limit, just as this Court did for veterans – a traditionally favored class -- last year in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (holding that the period to file in an Article I veterans appeals court was not "jurisdictional").

As the Tax Code continues to grow, there are more and more instances in it where equitable factors are taken into consideration and more and more provisions that are not in the core of the tax collection provisions (such as the whistleblower provisions), such that equitable tolling of simple Tax Code time limits might be what Congress contemplates. The Court, thus, must take great care in its opinion in this case in making generalizations about the degree to which equity finds a comfortable home in the Tax Code.

IV. THE GOVERNMENT HAS IN MANY CASES BEEN READING *BROCKAMP* TO ESSENTIALLY ABOLISH THE *IRWIN* PRESUMPTION IN THE TAX CODE.

Why is the Cardozo Tax Clinic so worried about what this Court may say about the Tax Code when deciding this case? Well, there are many disputes currently ongoing in the lower courts over whether particular Internal Revenue Code time limits are jurisdictional or may be equitably tolled. To give a sense of the potentially-affected disputes, below is a partial listing of time periods in the Internal Revenue Code (other than § 6511) where taxpayers or non-taxpayers have argued for equitable tolling or that the period not be treated as

jurisdictional – together with citations of lower-court opinions addressing those disputes. While the courts have in most cases been reluctant to embrace tolling in the Tax Code, the argument has been accepted by some courts – even after *Brockamp*.

Further, the Tax Clinic notes that in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), among the reasons given by this Court for its holding that the time period -- currently located as 42 U.S.C. § 2000e-5(e) – in which to file with the EEOC a charge of employment discrimination was not jurisdictional, but was subject to equitable tolling, was that "a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Id*., at 397 (internal citation for quote omitted). Among the arguments in this case made by the government is that "unlike the filing of charges under Title VII, the payment system under the Medicare program applies to sophisticated providers which are often assisted by 'trained lawyers'". Pet. Br. 34. Yet, many, if not most, of the people who have sought equitable tolling in the cases listed below -- like Mr. Volpicelli in his wrongful levy suit or "innocent spouses" filing an IRS Form 8857 seeking relief from joint and several income tax liability -- are self-represented. Thus, tolling might be appropriate at least in certain areas of the Tax Code where the self-represented predominate.

1. The at least two-year period in § 6532(a) in which to bring a tax refund lawsuit in district court or the Court of Federal Claims under 28 U.S.C. § 1346(a)(1). Compare *Marcinkowsky*

v. United States, 206 F.3d 1419, 1422 (Fed. Cir. 2000) (no tolling possible, citing this Court's statement in *Brockamp* that "tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities"); *Webb v. United States*, 66 F.3d 691, 699 (4th Cir. 1995) (no tolling possible; noting the "limited relevance of equitable principles in tax cases"); with *Miller v. United States,* 500 F.2d 1007, 1010-1011 (2d Cir. 1974) (allowing equitable estoppel against the government with respect to the time limit).

2. The 9 month period in § 6532(c) in which to bring an action for wrongful levy in district court under § 7426. Compare *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 344-354 (3d Cir. 2000) (no tolling possible, citing *Brockamp*); *Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910 (8th Cir. 1998) (time period jurisdictional); *Dahn v. United States*, 127 F.3d 1249, 1252 (10th Cir. 1997) (time period jurisdictional); with *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995) (tolling possible, citing *Irwin*); *Gothenburg State Bank & Trust Co. v. United States*, 1999 U.S. Dist. LEXIS 7021 (D. Neb. 1999) (same, citing *Supermail Cargo*). See also *Volpicelli v. United States*, *supra* (district court in Nevada followed *Brockamp* and denied tolling; case is currently on appeal in Ninth Circuit).

3. The 90-day period in § 6015(e)(1) in which to bring in the Tax Court an action to determine innocent spouse relief from joint and several income tax liability. Compare *United States v. Pollock*, 2007 U.S. Dist. LEXIS 98153 (S.D. Fla. 2007) (tolling granted to pro se taxpayer to file late in Tax Court); with *Pollock v. Commissioner*, 132 T.C. 21 (2009) (Tax Court rejects late filing by the same taxpayer in the prior cited opinion because the Tax Court finds the time period jurisdictional). See also *Terrell v. Commissioner*, 625 F.3d 254, 258 n. 1 (5th Cir. 2010) (because IRS did not send notice to taxpayer's last known address, court noted, but did not reach, equitable tolling and equitable estoppel issues).

4. The 90-day time period in § 7476(b)(5) in which to file a Tax Court petition to review an IRS determination of the tax qualification of a retirement plan. *Calvert Anesthesia Associates v. Commissioner*, 110 T.C. 285 (1998) (time period jurisdictional); see also *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572 (7th Cir. 1999) (court did not reach issue, but expressed skepticism that no tolling was possible).

5. The two-year deadline to file a Form 8857 requesting innocent spouse relief from income tax liability under 26 C.F.R. § 1.6015-5(b)(1) for equitable relief under § 6015(f). *Mannella v. Commissioner*, 631 F.3d 115, 126 (3d Cir. 2011) (remanding to Tax Court to consider possibility of tolling); *Hall v. Commissioner*,

135 T.C. 374 (2010) (regulatory time period invalid; six concurring judges would find period, if valid, subject to tolling – see Wells, J., concurring, at 387 n. 5). The IRS subsequently abandoned enforcing the regulatory deadline. Notice 2011-70, 2011-2 C.B. 135.

6. The 30-day period in § 7623(b)(4) in which a whistleblower may seek Tax Court review of an award. *Friedland v. Commissioner*, T.C. Memo 2011-90 (rejecting equitable estoppel argument).

7. The 60-day period in which a notice partner may file a petition for readjustment of partnership items under § 6226(b)(1). *A.I.M. Controls, L.L.C. v. Commissioner*, 672 F.3d 390 (5th Cir. 2012) (distinguishing *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), rejecting tolling, and finding period jurisdictional).

With these, and no doubt more, Tax Code time periods arguably subject to tolling, this Court, again, must exercise considerable care in drafting the opinion herein not to, by dicta, cause all lower courts to automatically hold that Tax Code time deadline may never be equitably tolled.

CONCLUSION

This Court should find that the Medicare time period in dispute herein is not jurisdictional and that a regular *Irwin* presumption in favor of equitable tolling applies to the time limit – not a "weakened" version of the presumption. Since there is insufficient evidence to rebut the presumption herein, equitable tolling should be allowed of the time limit involved in this case. To avoid accidentally, by dicta, effectively deciding lower-court disputes over the possible equitable tolling of Tax Code time limits other than those in § 6511, when resolving this Medicare time limit dispute, in its opinion herein, this Court should clearly indicate that it did not intend to suggest in *Brockamp* or *Holland* that no time deadlines in the Tax Code could ever be equitably tolled.

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