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# Getting Down to Brass Tax: Why Courts Should Use Equitable Tolling to Help Taxpayer-Petitioners Impacted by COVID-19

Hannah Fisher<sup>†</sup>

## I. INTRODUCTION

Filing deadlines, and the varying ramifications for failing to satisfy them, have been a longstanding fixture of the American litigation landscape.<sup>1</sup> When faced with a plaintiff who has brought an untimely petition, a court must first determine whether Congress clearly intended the filing deadline to be a prerequisite to its jurisdiction over the suit.<sup>2</sup> If the court determines that the deadline is indeed a jurisdictional requirement, the court must dismiss the claim, no matter the stage of the litigation.<sup>3</sup> But if the court concludes that Congress did not intend to tie the requirement to jurisdiction, rendering it a mere claims-processing rule, the court may evaluate the availability of waiver, forfeiture, or equitable tolling.<sup>4</sup>

In normal times, when plaintiffs fail to diligently assert their rights, invalidating late-arriving suits serves societal interests. Statutes of limitation promote the quality of litigation and provide repose for defendants;<sup>5</sup> further, classifying time limits as jurisdictional fortifies

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<sup>1</sup> E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 187 (2006) (discussing *United States v. Curry* as an early example of holding a filing deadline to be a jurisdictional requirement).

<sup>2</sup> *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006).

<sup>3</sup> *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (“[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.”).

<sup>4</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 407–410 (2015) (citing *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 95–96 (1990)).

<sup>5</sup> Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 456–57 (1997).

the separation of powers by preventing judges from exercising their own discretion, which could potentially frustrate Congress's objectives in setting the limitation period.<sup>6</sup>

However, as often noted by the media, the events of 2020 were unprecedented in many ways.<sup>7</sup> In March of that year, the global sweep of the novel coronavirus, or COVID-19, reached the United States.<sup>8</sup> One year later, the pandemic had infected close to thirty million people and claimed the lives of more than 485,000.<sup>9</sup> Studies estimate that more than eight million Americans fell below the poverty line during the pandemic.<sup>10</sup> Just six months after COVID-19 reached the United States, business review platform Yelp reported that over 160,000 businesses listed on its website had closed, with approximately 60 percent of those closures being permanent.<sup>11</sup>

As if the economic downturn was not already felt sharply enough, the pandemic's arrival painfully coincided with the peak of the United States tax season. Income taxes were scheduled to be due just as the unemployment rate was skyrocketing; April 2020 saw a historically unprecedented increase of the unemployment rate to 14.7 percent, or 23.1 million unemployed persons.<sup>12</sup> At the direction of President Trump, the

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<sup>6</sup> Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 61–66 (1994).

<sup>7</sup> See, e.g., *Leading Through an Unprecedented Time of Uncertainty*, WASH. POST (Oct. 13, 2020), [http://www.washingtonpost.com/business/leading-through-an-unprecedented-time-of-uncertainty/2020/10/09/a5b25a06-ba46-11ea-bdaf-a129f921026f\\_story.html](http://www.washingtonpost.com/business/leading-through-an-unprecedented-time-of-uncertainty/2020/10/09/a5b25a06-ba46-11ea-bdaf-a129f921026f_story.html) [https://perma.cc/KH25-RZBB] (describing leading during an economic recession, health pandemic, and social unrest in response to racial injustice as “a monumental, unprecedented leadership challenge”); Maria Cheng, *UN: Europe's Pandemic Restrictions Are Absolutely Necessary*, ABC NEWS (Oct. 15, 2020) <http://abcnews.go.com/Health/wireStory/europes-pandemic-restrictions-absolutely-73629612> [https://perma.cc/HQN3-LUA4] (discussing COVID-related restrictions as possibly necessary due to these being such “unprecedented times”); Christopher Carbone, *Defeating COVID-19 Requires Unprecedented Action and Collaboration, Top US Scientists Say*, FOX NEWS (May 18, 2020), <https://www.foxnews.com/science/defeating-covid-19-unprecedented-action-collaboration-us-scientists> [https://perma.cc/UVZ5-5YS4] (quoting scientists for their position that high degrees of collaboration would be necessary to respond to “these unprecedented times”).

<sup>8</sup> *COVID in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last updated July 22, 2021), <http://www.nytimes.com/interactive/2020/us/covid-cases-deaths-tracker.html>? [https://perma.cc/P4YL-TY6W].

<sup>9</sup> *Id.*

<sup>10</sup> Zachary Parolin et al., *Monthly Poverty Rates in the United States During the COVID-19 Pandemic* (Oct. 15, 2020) (unpublished discussion paper), <http://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5f87c59e4cd0011fabd38973/1602733471158/COVID-Projecting-Poverty-Monthly-CPSP-2020.pdf> [https://perma.cc/NHG4-TLC5]; Catarina Saraiva, *U.S. Suffers Sharpest Rise in Poverty Rate in More Than 50 Years*, BLOOMBERG (Jan. 25, 2021), <https://www.bloomberg.com/news/articles/2021-01-25/u-s-suffers-sharpest-rise-in-poverty-rate-in-more-than-50-years> [https://perma.cc/69FL-PNYG].

<sup>11</sup> Anjali Sundaram, *Yelp Data Shows 60% of Business Closures Due to the Coronavirus Pandemic Are Now Permanent*, CNBC (Sept. 16, 2020), <https://www.cnbc.com/2020/09/16/yelp-data-shows-60percent-of-business-closures-due-to-the-coronavirus-pandemic-are-now-permanent.html> [https://perma.cc/W2HA-YMCW].

<sup>12</sup> *The Employment Situation, March 2020*, BUREAU OF LABOR STATS., <http://www.bls.gov>

Internal Revenue Service (IRS) responded to the declared state of emergency by issuing a series of notices postponing the due dates for some deadlines, including filing federal income tax returns and making payments on that tax as well as interest, additions, and penalties.<sup>13</sup> As a result, taxpayers affected by COVID-19 automatically received an extension of the April 15 deadline until July 15. Taxpayers could seek an additional filing extension until October 15 by completing a form online—though no extension was available for the tax itself, meaning that any amount not paid by July 15 would be subject to relevant interest and penalties.<sup>14</sup> The notices also gave taxpayers until July 15 to file petitions with the Tax Court or seek review of a Tax Court decision, file claims for credit or refund of tax, and bring suit upon such claims, so long as the relevant time period had not expired before April 1.<sup>15</sup>

The choice to stretch the tax timeline out six months accorded with early predictions of the pandemic's likely duration.<sup>16</sup> However, October 15, 2020, came and went with little light at the end of the tunnel for the United States. While countries like China and New Zealand reached low case levels,<sup>17</sup> American infection rates experienced a second surge.<sup>18</sup> Almost all government state of emergency declarations remained active approaching the one-year mark.<sup>19</sup> The modest three-month petition and

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/news.release/archives/empisit\_04032020.pdf [http://perma.cc/8FYC-KWJ2] (updated Sept. 2020); *The Employment Situation, April 2020*, BUREAU OF LABOR STATS., [http://www.bls.gov/news.release/archives/empisit\\_05082020.pdf](http://www.bls.gov/news.release/archives/empisit_05082020.pdf) [http://perma.cc/H629-RWQ9] (updated Sept. 2020).

<sup>13</sup> See generally 2020-23 I.R.B., [https://www.irs.gov/irb/2020-23\\_IRB](https://www.irs.gov/irb/2020-23_IRB) [https://perma.cc/57EP-B48Z]; 2020-18 I.R.B. 742, [https://www.irs.gov/irb/2020-18\\_IRB](https://www.irs.gov/irb/2020-18_IRB) [https://perma.cc/E78V-Q3QF].

<sup>14</sup> I.R.S. News Release IR-2020-153 (July 14, 2020), <https://www.irs.gov/newsroom/irs-reminder-taxpayers-can-get-an-extension-to-oct-15-to-file-taxes> [https://perma.cc/V4HC-T4W6].

<sup>15</sup> See generally 2020-23 I.R.B., [https://www.irs.gov/irb/2020-23\\_IRB](https://www.irs.gov/irb/2020-23_IRB) [https://perma.cc/57EP-B48Z]; 2020-18 I.R.B. 742, [https://www.irs.gov/irb/2020-23\\_IRB](https://www.irs.gov/irb/2020-23_IRB) [https://perma.cc/57EP-B48Z].

<sup>16</sup> *COVID-19 Is Here. Now How Long Will It Last?*, YALE SCH. OF PUB. HEALTH (Mar. 27, 2020), <https://medicine.yale.edu/news-article/23446> [http://perma.cc/4GDG-R8HP] (interviewing Professor Virginia Pitzer, who said that “with only modest control measures . . . models predict the peak would occur around July and the outbreak would last until early fall”).

<sup>17</sup> Megan Scudellari, *How the Pandemic Might Play Out in 2021 and Beyond*, NATURE (Aug. 5, 2020), <http://www.nature.com/articles/d41586-020-02278-5> [http://perma.cc/7HUW-FCR7].

<sup>18</sup> Grace Hauck & Jayme Fraser, *COVID-19 Cases in U.S. Grow at a Speed Not Seen Since July, the Summer Peak*, USA TODAY (Oct. 17, 2020), <http://www.usatoday.com/story/news/health/2020/10/15/coronavirus-cases-us-growing-speed-not-seen-since-july/3662942001> [http://perma.cc/4GLU-72VG]; Manny Fernandez et. al, *The Virus Is Devastating the U.S., and Leaving an Uneven Toll*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/us/covid-united-states-surge.html> [https://perma.cc/XC88-ZBZJ].

<sup>19</sup> All fifty states and the federal government declared states of emergency in response to the pandemic. See *Status of State COVID-19 Emergency Orders*, NAT'L GOVERNORS ASS'N (last updated Dec. 17, 2020), <http://www.nga.org/state-covid-19-emergency-orders/> [https://perma.cc/8MDE-2X3U]; Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). Michigan's order was voided in October when the state's Supreme Court held that the Governor did not have authority to extend its duration; Alaska's order expired on February 14th. *Each State's COVID-19 Reopening and Re-closing Plans and Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Feb. 8, 2021), <https://www.nashp.org/governors-prioritize-health-for-all/> [https://perma.cc/E9U6-9W3P].

claim filing extension, seemingly sufficient when it was granted in March, did nothing to aid taxpayers who were prevented by pandemic-related complications from meeting deadlines either before April 1 or after July 15.

And taxpayers might miss such deadlines for a whole host of understandable reasons. For example, they may suffer from a more severe form of COVID-19, possibly to the point of requiring hospitalization. They may be responsible for caring for sick loved ones or young children whose care options are unavailable due to the pandemic. Their employment obligations may be a barrier to timeliness, especially those who have become underemployed as a result of the economic downturn or who must compensate for another source of household income disappearing. The pandemic has also interfered with the accessibility of the Tax Court, tax preparation services, and legal services. These are just a few of the many compelling reasons that a petitioner may struggle to satisfy the Tax Code's rigid demands, which were crafted without contemplating their viability during a public health crisis.

Unfortunately, many tax filing deadlines are considered jurisdictional and are therefore unyielding to equitable exceptions. Regulators and legislators have not yet adjusted the statutory landscape to accommodate individuals who fail to meet tax filing deadlines due to COVID-19-related challenges.<sup>20</sup> However, relief may lie in the courts for some taxpayers. Recent scholarship has relied on modern Supreme Court precedents in urging courts to reclassify several tax deadlines as non-jurisdictional,<sup>21</sup> and some courts have begun to do so.<sup>22</sup>

Building from that analysis, this Comment argues that the Tax Court should make equitable tolling available for tax plaintiffs whose pandemic-related challenges have prevented them from meeting non-jurisdictional filing deadlines. Part II expands on the tax litigation environment, including court structures and the doctrines of jurisdictional and non-jurisdictional filing deadlines and equitable tolling. Part III discusses cases from other bodies of law in which courts granted equitable tolling and examines similarities to the tax context. Ultimately, Part III argues that equitable tolling should be available in the tax context and articulates a nexus test as a limiting principle. Part IV follows by analyzing arguments for and against making equitable tolling available, considering access to justice and economy of resources. Part V concludes that equitable tolling is an appropriate and necessary avenue of

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<sup>20</sup> The Biden administration's Taxpayer Advocate Service has recommended characterizing all periods within the IRS as flexible claims-processing rules. *See infra* note 82.

<sup>21</sup> *See generally* Bryan T. Camp, *New Thinking About Jurisdictional Time Periods in the Tax Code*, 73 TAX L. 1 (2019).

<sup>22</sup> *See, e.g.,* Walby v. United States, 957 F.3d 1295 (Fed. Cir. 2020).

relief for pandemic-afflicted taxpayers, and that the Tax Court is uniquely well-suited to provide that relief.

## II. THE TAX LITIGATION ENVIRONMENT: COURT STRUCTURES AND DOCTRINAL IMPLICATIONS OF JURISDICTIONAL REQUIREMENTS AND CLAIMS-PROCESSING RULES

A few key procedural peculiarities govern the progression of tax cases. First, tax cases are distinct from many other federal matters in that they do not always begin in United States district courts. Additionally, they arise under a complex landscape of various filing deadlines, and depending on the jurisdictional character of the deadlines, different consequences can arise when plaintiffs file late. This Part provides further detail on the mechanics of filing tax cases.

### A. The Life Cycle of a Tax Case

When a taxpayer disputes an adverse action or decision by the IRS, he or she can usually seek judicial review.<sup>23</sup> United States district courts hear tax cases, but so do the Tax Court, the Bankruptcy Courts, and the Court of Federal Claims—all Article I courts.<sup>24</sup> The type of adverse action and the relief sought to remedy it, corresponding with specific provisions of the Tax Code, dictate which forum or fora will be available in a given case.<sup>25</sup> Sometimes only one will have jurisdiction over the claim,<sup>26</sup> but often the petitioner will have a choice in where he or she wants to litigate the case.<sup>27</sup>

The Tax Court is the most common forum for tax cases.<sup>28</sup> One reason for this is that plaintiffs may petition the Tax Court before paying the adverse determinations against them, whereas to file in district court they must pay first and seek a refund.<sup>29</sup> Additionally, Tax Court decisions are made by judges rather than juries, and Tax Court judges have a greater degree of expertise in tax law than do most district court judges.<sup>30</sup> Additionally, choice of law is not a great concern when deciding between the Tax Court and the district court. Though differing precedents and judicial preferences might be relevant for matters of first

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<sup>23</sup> See Thomas Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX L. 311, 316 (2009) (noting some exceptions to the availability of judicial review).

<sup>24</sup> *Id.* at 311.

<sup>25</sup> *See id.* at 312.

<sup>26</sup> *See id.* at 313–14.

<sup>27</sup> *Id.* at 312.

<sup>28</sup> *Id.* at 316.

<sup>29</sup> *Id.* at 317.

<sup>30</sup> Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 138 (2005).

impression, the Tax Court applies the law of the appellate circuit to which its decision would be appealed if that circuit has ruled on the issue in question.<sup>31</sup>

## B. Distinguishing Jurisdictional Requirements from Claims-Processing Rules

When a statute or procedural rule establishes a filing deadline and a plaintiff has failed to meet it, courts must decide whether to treat the deadline as a jurisdictional requirement or as a mere claims-processing rule. If a deadline is jurisdictional, failure to meet it entirely deprives a court of its ability to hear the case.<sup>32</sup> Claims-processing rules, on the other hand, are not intended to determine courts' adjudicatory capacity; instead, they "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."<sup>33</sup> They are not jurisdictional, and if one is not met, a court may disregard the plaintiff's tardiness in some circumstances.<sup>34</sup>

For many years, the courts approached the distinction between jurisdictional requirements and claims-processing rules "less than [meticulously]," often using terminology loosely in "drive-by jurisdictional rulings."<sup>35</sup> This approach resulted in a strict filing deadline landscape operating on a presumption that requirements were jurisdictional unless specified otherwise.<sup>36</sup>

Recently, however, the Supreme Court has endeavored to clarify this body of law.<sup>37</sup> In a line of cases beginning in the late 2000s, the Court began elaborating on the distinction between requirements that implicate jurisdiction and requirements that merely facilitate the administration of claims.<sup>38</sup> As part of this effort, the Court announced a "readily administrable bright line rule" which flipped the existing presumption and instead held that deadlines are non-jurisdictional in character unless Congress clearly indicates otherwise.<sup>39</sup> A finding that a requirement is jurisdictional under the new rule requires evidence of

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<sup>31</sup> *Golsen v. Comm'r*, 54 T.C. 742, 756–57 (1970).

<sup>32</sup> *Bowles v. Russell*, 551 U.S. 205, 216–17 (2007) (Souter, J., dissenting).

<sup>33</sup> *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

<sup>34</sup> *Bowles*, 551 U.S. at 216–17 (Souter, J., dissenting).

<sup>35</sup> *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–62 (2010) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006)).

<sup>36</sup> *Camp*, *supra* note 21, at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *See Arbaugh*, 546 U.S. at 516; *Shinseki*, 562 U.S. at 435–36.

<sup>39</sup> *Shinseki*, 562 U.S. at 435–36 (citing *Arbaugh*, 546 U.S. at 514–15, 515–16).

clear congressional intent to tie the deadline to the court's subject matter jurisdiction.<sup>40</sup>

Following these recent cases, when a statute establishes a deadline for timely filing and a plaintiff has failed to meet it, courts assess the statute's unique context to determine congressional intent. Clear congressional intent that a requirement was intended to be jurisdictional in nature can exist even without use of the "magic words" of jurisdiction.<sup>41</sup> For example, in *Bowles v. Russell*,<sup>42</sup> the Supreme Court ruled that Congress demonstrated clear intent to make a statutory time limit for taking an appeal jurisdictional by leaving undisturbed a long line of cases treating it as such.<sup>43</sup> However, the contrary can also be true; in *Reed Elsevier, Inc. v. Muchnick*,<sup>44</sup> the Court held that the mere use of the word "jurisdictional" within a statute was not by itself sufficient evidence of clear congressional intent.<sup>45</sup> Similarly, "[m]ere proximity to a jurisdictional provision is insufficient."<sup>46</sup>

But in instances where clear intent is demonstrated, a court treats the plaintiff's failure to timely file as a total prohibition against hearing the case at all.<sup>47</sup> The government may not willingly waive or unwittingly forfeit its timeliness objection to the suit, and the plaintiff may not benefit from any equitable exceptions.<sup>48</sup> Such an objection may be raised at any point during the litigation, even after a determination has been made on the merits, and if not raised by the defendant, then it must be raised *sua sponte*.<sup>49</sup>

In the absence of clear congressional intent to make timely filing a prerequisite for personal or subject matter jurisdiction, courts now presume that filing deadlines are non-jurisdictional claims-processing rules.<sup>50</sup> Timeliness objections based on claims-processing rules still may defeat a plaintiff's suit if appropriately raised, but defendants may voluntarily waive or unintentionally forfeit these objections, and the court

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<sup>40</sup> *Shinseki*, 562 U.S. at 435–36.

<sup>41</sup> *Id.*

<sup>42</sup> 551 U.S. 205 (2007).

<sup>43</sup> *Id.* at 210–11.

<sup>44</sup> 559 U.S. 154 (2010).

<sup>45</sup> *Id.* at 163–65.

<sup>46</sup> *Boechler, P.C. v. Comm'r*, 967 F.3d 760, 764 (8th Cir. 2020).

<sup>47</sup> *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 433 (2011) (citing *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007)).

<sup>48</sup> *Shinseki*, 562 U.S. at 433 (citing *Bowles*, 551 U.S. at 213–14) (explaining that a jurisdictional statutory limitation "could not be excused based on equitable factors, or on the opposing party's forfeiture or waiver of any objection to the late filing").

<sup>49</sup> *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153–54 (2013) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)).

<sup>50</sup> *Arbaugh*, 546 U.S. at 516 ("But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.").



may not raise them *sua sponte*.<sup>51</sup> Courts also may equitably toll deadlines set out in claims-processing rules,<sup>52</sup> assuming certain conditions are met, as discussed further *infra* Part II.C.

However, it is unclear whether equitable tolling may be applied to all claims-processing rules. The Supreme Court has sometimes differentiated claims-processing rules that are mandatory from those that are not, and under current jurisprudence, tolling is only clearly available for non-mandatory claims-processing rules.<sup>53</sup> Like nonmandatory claims-processing rules, mandatory rules are subject to waiver and forfeiture,<sup>54</sup> but the Supreme Court has not clarified whether they may ever be subject to equitable tolling, reserving the question as recently as 2019.<sup>55</sup>

Like the distinction between jurisdictional requirements and claims-processing rules, the distinction between mandatory and non-mandatory rules lies in congressional intent; courts analyze whether the “pertinent rule or rules invoked show a clear intent to preclude tolling,”<sup>56</sup> and they presume the availability of tolling<sup>57</sup> unless there is clear evidence to the contrary.<sup>58</sup> However, the Court has not articulated a *functional* reason for distinguishing between mandatory and non-mandatory claims-processing rules. Without one, the difference may be unnecessary and arbitrary. Further, the usage of “mandatory” traces its origins to the drive-by jurisdictional ruling era, casting doubt on whether there is real utility in the distinction.<sup>59</sup> This is an area of doctrine that would benefit from further elaboration.

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<sup>51</sup> See *Hamer v. Neighborhood Hous. Serv. of Chi.*, 138 S. Ct. 13, 18 (2017) (citations omitted).

<sup>52</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 407–410 (2015) (citing *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 95–96 (1990)) (explaining that the Government may rebut the presumption of tolling, articulated in *Irwin*, by demonstrating that a deadline is jurisdictional, but that, without more, mandatory language associated with claims-processing rules is not enough to preclude tolling).

<sup>53</sup> See *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (“[S]ome claim-processing rules are ‘mandatory’ . . . . Rules in this [ ] camp are not susceptible of the equitable approach . . .”).

<sup>54</sup> *Id.* at 714.

<sup>55</sup> See *Hamer*, 138 S. Ct. at 18 n.3; *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 n.5 (2019).

<sup>56</sup> *Nutraceutical Corp.*, 139 S. Ct. at 714.

<sup>57</sup> *Irwin*, 498 U.S. at 95–96.

<sup>58</sup> *Nutraceutical Corp.*, 139 S. Ct. at 714.

<sup>59</sup> *Nutraceutical Corp.*, 139 S. Ct. at 714, cites *Manrique v. United States*, 137 S. Ct. 1266, 1271–72 (2017), for the proposition that some claims-processing rules are mandatory, and therefore their prescribed time limits are unalterable despite the availability of waiver and forfeiture. But *Manrique* was in turn relying on *Eberhart v. United States*, 546 U.S. 12, 15 (2005), a case which endeavored to make sense of the “mandatory and jurisdictional” language found in *United States v. Robinson*, 361 U.S. 220, 229 (1960), in light of the Court’s decision in *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). *Kontrick* was part of the Court’s early efforts to begin using the term “jurisdictional” more precisely. None of these cases demonstrate a clear, conscious decision to create a distinction between different claims-processing rules; they may be better understood as a

### C. Jurisdictional Requirements and Claims-Processing Rules in the Tax Context

In a recent article, Professor Bryan T. Camp thoroughly analyzed the Supreme Court's shift in guidance on jurisdictional requirements and claims-processing rules.<sup>60</sup> He then applied that new thinking to four provisions of the Tax Code that courts have historically considered jurisdictional and concluded that three of those provisions should now be considered non-jurisdictional.<sup>61</sup>

For example, Professor Camp addressed 26 U.S.C. § 6330(d)(1), which prescribes the time period by which taxpayers may petition the Tax Court when the IRS intends to file a Notice of Federal Tax Lien or undertake a levy action.<sup>62</sup> In those situations, the IRS must notify the taxpayer, and in response, the taxpayer can request a Collection Due Process (CDP) administrative hearing.<sup>63</sup> Following that hearing, the IRS will issue a Notice of Determination.<sup>64</sup> If the determination is unfavorable, § 6330(d)(1) prescribes that “[t]he person may, within thirty days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).”<sup>65</sup> Evaluating the text as well as its statutory, judicial, and legislative contexts holistically, Professor Camp argued that the time period is actually a mere claims-processing rule, as the jurisdiction clause is grammatically independent from the time period, and the jurisdiction refers to the content of the matter rather than the petition itself.<sup>66</sup> Further, he asserted that the legislative history demonstrates that the purpose of the CDP scheme was an equitable one, effected to prevent the IRS from taking advantage of taxpayers.<sup>67</sup>

Unfortunately, the perception of tax as a “self-contained body of law” has historically prevented it from benefiting from developments in other areas.<sup>68</sup> Despite growing academic support for modernizing tax

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vestige of attempting to extricate “mandatory” from “jurisdictional.”

<sup>60</sup> See generally Camp, *supra* note 21.

<sup>61</sup> Camp, *supra* note 21, at 3–4.

<sup>62</sup> *Most Litigated Issues — Appeals From CDP Hearings Under IRC §§ 6320 and 6330*, TAXPAYER ADVOCATE SERVICE, 1 ANN. REP. TO CONGRESS 488, 488 (2018), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_MLI\\_05\\_AppealsCDP.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_05_AppealsCDP.pdf) [<https://perma.cc/DVW5-RWPQ>].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 26 U.S.C. § 6330(d)(1) (2018).

<sup>66</sup> Camp, *supra* note 21, at 36–40.

<sup>67</sup> *Id.*

<sup>68</sup> Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994).

law with existing administrative law principles,<sup>69</sup> its traditional isolationism has continued to manifest in some recent lower court rulings which have failed to incorporate the new guidance on jurisdictional requirements. In July 2020, the Eighth Circuit joined the Ninth Circuit and the Tax Court in holding that the filing deadline prescribed by § 6330(d)(1) remains jurisdictional.<sup>70</sup> But the District of Columbia Circuit's precedent diverges from the majority approach; in *Myers v. Commissioner*,<sup>71</sup> the court held that § 7623(b)(4)—which contains a parenthetical jurisdiction clause identical to the one in § 6330(d)(1)—is non-jurisdictional.<sup>72</sup> The *Myers* court relied on analysis similar to Professor Camp's in its rulings,<sup>73</sup> indicating that litigants may slowly but surely begin to see some success when challenging jurisdictional requirements using the Supreme Court's more recent guidance. Such is the first step toward securing relief for COVID-19-affected taxpayers in the form of waiver, forfeiture, or equitable tolling.

However, there are several time periods that litigants will likely not be able to persuade a court to consider non-jurisdictional. For example, two courts have recently rejected Professor Camp's conclusion that the context of 26 U.S.C. § 6213(a) points toward the time limit for petitioning the Tax Court to contest a Notice of Deficiency being a non-jurisdictional requirement.<sup>74</sup> Similarly, Professor Camp suggests that 26 U.S.C. § 6015(e), which allows for petition of innocent spouse relief, should remain jurisdictional under the new Supreme Court guidance,<sup>75</sup> and no court has recently deviated from that position.<sup>76</sup>

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<sup>69</sup> See, e.g., Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014).

<sup>70</sup> See *Boechler, P.C. v. Comm'r*, 967 F.3d 760, 765 (8th Cir. 2020); *Duggan v. Comm'r*, 879 F.3d 1029, 1035 (9th Cir. 2018); *Guralnik v. Comm'r*, 146 T.C. 230, 235–36 (2016).

<sup>71</sup> 928 F.3d 1025 (D.C. Cir. 2019).

<sup>72</sup> *Id.* at 1036.

<sup>73</sup> The court favorably cited arguments raised by *amicus curiae* Federal Tax Clinic of the Legal Services Center of Harvard Law School, which has noted on its blog “Procedurally Taxing” that it is aware of and agrees with Professor Camp's analysis of jurisdictional requirements. Thus, despite the lack of a direct citation, the *Myers* court is likely, in essence, implementing Professor Camp's suggestions. See *D.C. Circuit Holds Tax Court Whistleblower Award Filing Deadline Not Jurisdictional and Subject to Equitable Tolling*, PROCEDURALLY TAXING (July 3, 2019), <http://procedurally-taxing.com/d-c-circuit-holds-tax-court-whistleblower-award-filing-deadline-not-jurisdictional-and-subject-to-equitable-tolling> [<http://perma.cc/R3M8-WT3K>].

<sup>74</sup> Compare Camp, *supra* note 21, at 23–36, with *Rivas v. Comm'r*, 2020 WL 5025892, at \*3–5 (T.C. Aug. 25, 2020) (declining to deviate from precedent that held the time limit in 26 U.S.C. § 6213(a) to be jurisdictional), and *Fujita v. Comm'r*, 816 F. App'x 209, 209–10 (9th Cir. 2020) (unpublished) (treating 28 U.S.C. § 6213(a) as a jurisdictional requirement).

<sup>75</sup> Camp, *supra* note 21, at 40–48 (treating § 6015 differently than §§ 6213 and 6330 based on clear textual links between the deadline and jurisdiction, its statutory context being that it was enacted simultaneously with another jurisdictional provision, well-reasoned judicial decisions of well-litigated cases treating it as jurisdictional, and weak legislative evidence of an intent to make the provision non-jurisdictional).

<sup>76</sup> *Id.* at 42–44.

Arguing for reclassification of filing deadlines currently characterized as jurisdictional is beyond the scope of this Comment; instead, this Comment argues for the use of equitable tolling in the narrow class of cases where it is already available, including but not limited to: § 6330(d)(1) (in the D.C. Circuit);<sup>77</sup> § 6532(c) (in the Ninth Circuit);<sup>78</sup> and § 6532(a) (in the Ninth Circuit).<sup>79</sup> Equitable tolling could also become more widely available if and when courts later reevaluate their precedents or Congress passes new legislation. Though the Supreme Court recently declined to revisit its treatment of jurisdictional requirements in the tax context,<sup>80</sup> such reevaluation could still occur sooner rather than later at the encouragement of the Taxpayer Advocate Service.<sup>81</sup> Under the Biden administration, the Service has published a legislative recommendation that Congress should characterize all periods within the Internal Revenue Code as not jurisdictional and therefore subject to forfeiture, waiver, estoppel, and tolling.<sup>82</sup> Equitable tolling analysis will be relevant in addressing pandemic-related tax litigation as it slowly works its way through the courts, and it would become especially significant in the event that additional filing deadlines are characterized as claims-processing rules in the meantime.

#### D. The Doctrine of Equitable Tolling and Applications in the Tax Context

Equitable tolling gives courts discretion to forgive plaintiffs' failure to file their petition within the time period prescribed by statute or procedural rule.<sup>83</sup> The doctrine of equitable tolling is a "long-established

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<sup>77</sup> *Myers v. Comm'r*, 928 F.3d 1025, 1036 (D.C. Cir. 2019).

<sup>78</sup> *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015).

<sup>79</sup> *Rubin v. United States*, 2019 WL 7205995, at \*1, \*6 (C.D. Cal. Nov. 21, 2019) (allowing equitable tolling when Plaintiff technically filed outside the statutory period but had complied with written instructions from the IRS because "[t]he public has a right to rely on the written instructions of its administrative agencies").

<sup>80</sup> *Organic Cannabis Found., LLC v. Comm'r*, 962 F.3d 1082 (9th Cir. 2020), *cert. denied*, 2021 WL 1725185 (U.S. May 3, 2021).

<sup>81</sup> The Taxpayer Advocate Service is an independent organization within the IRS that helps taxpayers navigate the system and understand their rights. It offers help to taxpayers on an individual basis, and it also screens for systemic issues which it then presents to Congress via annual reports. See *Who We Are*, TAXPAYER ADVOC. SERV. (last visited June 26, 2021), <https://www.taxpayeradvocate.irs.gov/about-us/> [<https://perma.cc/RTJ8-RVDK>]. One of its key successes was convincing Congress to enact the Taxpayer Bill of Rights. See Andrew R. Roberson, *The Taxpayer Bill of Rights: A Primer and Thoughts on Things to Come*, AM. BAR ASS'N (May 25, 2018), [https://www.americanbar.org/groups/taxation/publications/abataximes\\_home/18may/18may-pbm-roberson-the-taxpayer-bill-of-rights/](https://www.americanbar.org/groups/taxation/publications/abataximes_home/18may/18may-pbm-roberson-the-taxpayer-bill-of-rights/) [<https://perma.cc/ND8S-KH3V>].

<sup>82</sup> *Legislative Recommendation #47: Provide That Time Limits for Bringing Tax Litigation Are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling* ("Rec. 47"), TAXPAYER ADVOC. SERV., 2021 PURPLE BOOK 100, 102 (2021).

<sup>83</sup> *Lozano v. Alvarez*, 572 U.S. 1, 10 (2014).

feature of American jurisprudence,” and “Congress ‘legislates against a background of common-law adjudicatory principles.’”<sup>84</sup> Accordingly, courts presume equitable tolling applies unless there is “good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.”<sup>85</sup>

To qualify for relief, plaintiffs must prove that they diligently pursued their rights, but “some extraordinary circumstance” prevented timely filing.<sup>86</sup> Equitable tolling is distinct from equitable estoppel in that the extraordinary circumstances triggering its application must have been beyond the control of both parties.<sup>87</sup> Extraordinary circumstances are those that severely interfere with the plaintiff’s ability to bring suit, such as serious attorney misconduct or error<sup>88</sup> or plaintiff’s mental incompetence.<sup>89</sup>

The tax context is no exception to the availability of equitable tolling. For example, in *Johnsen v. United States*,<sup>90</sup> a district court granted equitable tolling when the petitioners were adjudicated to be incompetent and their legal representative filed an administrative claim immediately after being appointed.<sup>91</sup> Another district court also tolled the limitations period in *Rubin v. United States*,<sup>92</sup> in which the IRS had mailed a notice of disallowance to the petitioner but also sent a separate notice to his tax attorney two weeks later, which instructed that the Plaintiff had two years from the date of the letter to file suit.<sup>93</sup> The Plaintiff filed suit on the day before the expiration of the two-year period that followed the date of the letter mailed to his attorney.<sup>94</sup> Because the period actually began running when the initial notice was mailed, his filing was late.<sup>95</sup> However, the court allowed for tolling based on the right of the public “to rely on the written instructions of its administrative agencies,” reflecting a concern that time-barring the claim might encourage the IRS to engage in “deliberate trickery” going forward.<sup>96</sup>

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<sup>84</sup> *Id.* at 10–11 (citations and alterations omitted).

<sup>85</sup> *Myers v. Comm’r*, 928 F.3d 1025, 1036 (D.C. Cir. 2019) (citing *United States v. Brockamp*, 519 U.S. 347, 350 (1997)).

<sup>86</sup> *Lozano*, 572 U.S. at 10–11.

<sup>87</sup> *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 164 (2013).

<sup>88</sup> *Holland v. Florida*, 560 U.S. 631 (2010).

<sup>89</sup> *Calderon v. U.S. Dist. Court*, 163 F.3d 530 (9th Cir. 1998), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003).

<sup>90</sup> 758 F. Supp. 834 (E.D.N.Y. 1991).

<sup>91</sup> *Id.* at 836.

<sup>92</sup> 2019 WL 7205995 (C.D. Cal. Nov. 21, 2019).

<sup>93</sup> *Id.* at \*6.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

However, courts often do not reach the issue of whether equitable tolling applies in a tax case, given that many filing deadlines are still characterized as jurisdictional and thus are not subject to exceptions.<sup>97</sup> And even when equitable tolling is available, if a plaintiff has a compelling case, the IRS often settles pre-trial, limiting the availability of case law on facts that merit the application of tolling.<sup>98</sup>

Further, when courts do reach the issue of equitable tolling, they tend to be stricter about its applicability in the tax context than in other areas of law.<sup>99</sup> For example, in *Thompson v. Commissioner*,<sup>100</sup> the plaintiff claimed that she had been incorrectly advised by the IRS, somewhat like the plaintiff in *Rubin*. However, unlike in *Rubin*, this plaintiff did not have unbiased, written documentation of the IRS's instructions to her.<sup>101</sup> The Tax Court was incredibly skeptical of the plaintiff's claims, describing her narrative as "unsupported, self-serving testimony that the Court is reluctant to rely on."<sup>102</sup> The *Thompson* decision not to grant tolling seemed motivated by a concern about rewarding inexcusable neglect,<sup>103</sup> a well-established societal concern.<sup>104</sup>

But the *Thompson* court relied on somewhat outdated case law to reach its conclusions, echoing language from *United States v. Brockamp*.<sup>105</sup> In that 1997 case, the Court described tax law as "not normally characterized by case-specific exceptions reflecting individualized equities,"<sup>106</sup> therefore requiring an especially compelling case for tolling to be warranted. *Brockamp*, however, was applying another case about tolling,<sup>107</sup> *Irwin v. Department of Veterans Affairs*,<sup>108</sup> and the *Irwin* presumption in favor of equitable tolling is treated as stronger today than

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<sup>97</sup> See, e.g., *Guralnik v. Comm'r*, 146 T.C. 230, 235–36 (2016).

<sup>98</sup> See, e.g., *Volpicelli v. United States*, No. 3:10-CV-00548 (D. Nev. Mar. 4, 2016) (order on stipulation for dismissal with prejudice terminating the case) (Plaintiff was a minor when the IRS wrongfully levied his college savings in response to his father's tax debts; the Ninth Circuit held that § 6532(c) is non-jurisdictional and subject to equitable tolling and remanded to the District Court for consideration of whether tolling should apply).

<sup>99</sup> *United States v. Brockamp*, 519 U.S. 347, 352 (1997) ("Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.").

<sup>100</sup> 2008 WL 1744267 (T.C. Apr. 16, 2008).

<sup>101</sup> *Id.* at \*4–5.

<sup>102</sup> *Id.* at \*7.

<sup>103</sup> *Id.*

<sup>104</sup> See NOAH J. GORDON & GLENDA K. HARNAD, 27A AM. JUR. 2D EQUITY § 108 ("Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party . . ."); JAMES BUCHWALTER & JOHN KIMPFLER, 30A C.J.S. EQUITY § 140 ("The doctrine of laches has existed since the beginning of equity jurisdiction . . .").

<sup>105</sup> 519 U.S. 347 (1997).

<sup>106</sup> *Id.* at 352.

<sup>107</sup> *Id.* at 349–50.

<sup>108</sup> 498 U.S. 89 (1990).

it was when *Brockamp* was decided.<sup>109</sup> *Thompson* reflects the reality that, despite academic momentum in favor of modernizing tax along with developments in other bodies of law,<sup>110</sup> the Tax Court is hesitant to change. Thus, for courts—particularly the Tax Court—to allow equitable tolling in response to the pandemic, taxpayer-petitioners will likely need to demonstrate strong, well-documented facts about how COVID-19 directly interfered with their ability to file.

### III. OTHER APPLICATIONS OF EQUITABLE TOLLING SUPPORT APPLICATION IN THE TAX CONTEXT BASED ON COVID-19 CIRCUMSTANCES

Despite courts' hesitation to apply equitable tolling in the context of tax disputes, case law on tolling from both before and during the COVID-19 pandemic may have sufficiently similar facts to be persuasive.<sup>111</sup> First, this Part examines district courts' treatment of equitable tolling in response to prior states of emergency, which create comparable barriers to the courts as the recent pandemic. Next, this Part discusses cases from other subject areas in which courts granted tolling in direct response to COVID-19. It then analyzes the cases' similarities to the tax context and argues that it is both necessary and appropriate for courts adjudicating tax disputes to follow suit, concluding with a proposed test to make the application of tolling workable.

#### A. Equitable Tolling During States of Emergency

Courts have recognized equitable tolling in situations where plaintiffs were unable to timely file due to circumstances which also gave rise to a declared state of emergency. For example, in *McKibben v. Eastern Hospitality Management, Inc.*,<sup>112</sup> a district court ruled in favor of plaintiffs when inclement weather prevented them from filing a personal injury claim within the bounds of the statute of limitations.<sup>113</sup> The weekend before the deadline for the McKibbens to file their claim, a severe snowstorm hit their county. The governor declared a state of emergency, instructed citizens to only travel on state roads for emergencies,

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<sup>109</sup> See *United States v. Kwai Fun Wong*, 575 U.S. 402, 407–410 (2015) (citing *Irwin*, 498 U.S. at 95–96).

<sup>110</sup> See Grewal, *supra* note 69.

<sup>111</sup> It is important to note that litigation takes time to develop, especially during a pandemic where legal and financial resources are limited; the cases that have emerged first are the most urgent ones, such as habeas and compassionate release cases brought by prisoner plaintiffs. Over time, more general civil litigation will emerge, and along with it a better understanding of how courts might respond to equitable tolling arguments in less urgent matters.

<sup>112</sup> 288 F. Supp. 2d 723 (N.D. W. Va. 2003).

<sup>113</sup> *Id.* at 724.

and required the courthouse to close.<sup>114</sup> Several people died, and tens of thousands of power outages occurred as a result of the storm.<sup>115</sup>

State law would permit the extension of the filing period to the next day the courthouse was open following the emergency, but because the courthouse was not properly closed by court personnel, the extension was not available. The McKibbens were technically deprived of their claim despite their inability, through no fault of their own, to bring a timely action.<sup>116</sup> However, the court held that it would be “manifestly unjust to deny the plaintiffs the opportunity to bring an otherwise timely claim because the county commission wisely closed the courthouse during extreme weather conditions” which “required the plaintiffs to do the impossible: file a complaint on a day that the courthouse was ‘improperly,’ yet appropriately, closed.”<sup>117</sup> At least one other district court has followed the *McKibben* decision.<sup>118</sup>

Courts have also repeatedly allowed equitable tolling in habeas cases when flooding that prompted declaration of states of emergency and caused disruption of prison routines and evacuations prevented prisoners from timely filing their petitions.<sup>119</sup>

#### B. Equitable Tolling Due to COVID-19’s Impact on Access to Counsel and the Courts

Lower courts have already started to endorse the idea that the challenges posed by COVID-19, and long-lasting pandemics more generally, qualify as the type of extraordinary circumstances which should warrant application of equitable tolling. These decisions have primarily been made in the context of habeas petitions. Though at first blush, a prisoner’s interest in liberty seems much more dire than a taxpayer-petitioner’s interest in property, both liberty and property have, since the nation’s founding, been two of its most jealously guarded rights.<sup>120</sup> Liberty cases may properly inform property rights cases on this ground, even if disparate gravity of the rights warrants allowing greater leniency when evaluating tolling in liberty cases.

On March 30, 2020, the Eastern District of California granted prisoner Robert Wesley Cowan’s motion to prospectively equitably toll the

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 724–25.

<sup>117</sup> *Id.* at 725 (emphasis omitted).

<sup>118</sup> See *Allie v. Whole Foods Mkt. Grp., Inc.*, 746 F. Supp. 2d 773 (E.D. Va. 2010).

<sup>119</sup> See, e.g., *Jackson v. Cain*, 2014 WL 4678808 (M.D. La. Sept. 19, 2014); *Murray v. Cain*, 2019 WL 1417442 (M.D. La. Mar. 5, 2019).

<sup>120</sup> THE FEDERALIST NO. 1 (Alexander Hamilton) (arguing that a key reason to adopt the Constitution is that it will afford additional security “to liberty, and to property”).



limitations period prescribed by 28 U.S.C. § 2244, the federal habeas statute, from May 15 to August 13.<sup>121</sup> The court allowed tolling on the basis that “emergency conditions brought about by [the] pandemic had and would prevent petitioner’s timely completion of the petition to be filed . . . notwithstanding the exercise of reasonable diligence.”<sup>122</sup>

In August, the court granted him another extension until November 11 based on the pandemic’s interference with his access to counsel and the closure and impairment of function of the courts.<sup>123</sup> It found that, “notwithstanding the continuing exercise of clearly reasonable diligence, the COVID-19 pandemic makes it unlikely and very well impossible that a complete federal habeas petition . . . can be completed and filed prior to the requested, as tolled deadline of November 11, 2020.”<sup>124</sup>

The court granted equitable tolling yet again in November, extending his filing deadline until May 11, 2021, based on “governmental and judicial emergencies; various stay-at-home directives; cancellation of prison visits;” and “impediments to accessing office resources . . . and related claim development” “continuing without a clear end in sight.”<sup>125</sup>

Similarly, in *Pickens v. Shoop*,<sup>126</sup> the district court emphasized its agreement that pandemic-related challenges should warrant the application of equitable tolling. Though it declined to grant the extraordinary remedy of prospective tolling, the court was clear that it would be receptive to tolling arguments in response to hardships that had actually materialized.<sup>127</sup> The court acknowledged the impact of the declared state of emergency on the function of government operations, noting that it seemed “obvious that ‘extraordinary circumstances’ likely stand in the way of Pickens timely filing a complete petition.”<sup>128</sup> Though stressing its preference for cautious approaches, the court signaled its openness to tolling to future litigants by stressing that “this Court is inclined to find equitable tolling as to any amended claim whose factual predicate *even facially appears* to have required the type of in-person contact, or any other activities such as travel, that the current state of emergency impedes.”<sup>129</sup>

There is also indication that courts may respond to the severity of COVID-19 by relaxing the standard for circumstances that rise to the

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<sup>121</sup> Cowan v. Davis, 2020 WL 4698968, at \*1 (E.D. Cal. Aug. 13, 2020).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*6.

<sup>125</sup> Cowan v. Davis, 2020 WL 6544251, at \*1, \*2–3 (E.D. Cal. Nov. 6, 2020).

<sup>126</sup> 2020 WL 3128536 (S.D. Ohio June 12, 2020).

<sup>127</sup> *Id.* at \*2–3.

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* (emphasis added).

level of extraordinary. In *Brown v. Davis*,<sup>130</sup> the court found good cause to allow the late filing of a reply brief when counsel erroneously calendared the due date for the petitioner's reply brief and did not realize the mistake due to COVID-19-related childcare responsibilities.<sup>131</sup> Admittedly, the standard for allowing that type of late filing is much lower than that for allowing equitable tolling.<sup>132</sup> However, perhaps the decision still indicates an increasingly sympathetic view towards petitioners who request equitable tolling based on pandemic-related challenges, much like Mr. Brown's counsel's new caretaking obligations. Further, like the court in *Cowan*, the *Brown* court went on to prospectively equitably toll Brown's deadline to file his habeas petition until June 1, 2021, similarly based on the pandemic's interference with court function and access to counsel.<sup>133</sup>

Plaintiff Lemarcus Kelly had similar success with an equitable tolling argument in his Prison Litigation Reform Act compassionate release case.<sup>134</sup> In *United States v. Kelly*,<sup>135</sup> the court decided that the Act's exhaustion requirements were not jurisdictional and thus could be equitably tolled.<sup>136</sup> It then found that the high number of COVID-19 cases and deaths were extraordinary circumstances that prevented Kelly from waiting out the exhaustion requirement.<sup>137</sup> The statistics were "not mere abstractions for Kelly," as the first Bureau of Prisons inmate COVID-19 death occurred at his facility<sup>138</sup> and social distancing in prison was difficult.

Lower courts are also extending the equitable tolling arguments advanced by prisoner plaintiffs to administrative disputes, much like the tax context. In *Joseph v. United States*,<sup>139</sup> a California district court considered an appeal from a United States Department of Agriculture (USDA) decision to disqualify Save More Food Market, owned by the plaintiffs, from participation in the Supplemental Nutrition Assistance Program (SNAP).<sup>140</sup> Based on analysis of the store's SNAP transactions, the agency concluded that the plaintiffs were engaging in "trafficking" of SNAP benefits. 7 U.S.C. § 2023(a)(13) provides that plaintiffs have

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<sup>130</sup> 482 F. Supp. 1049 (E.D. Cal. 2020).

<sup>131</sup> *Id.* at 1052.

<sup>132</sup> See Purjes v. Plaustein, 2017 WL 6055047, at \*1, \*3 n.9 (S.D.N.Y. Sept. 27, 2017) (accepting the late filing of a reply brief in a footnote without discussion).

<sup>133</sup> *Id.* at \*8.

<sup>134</sup> *United States v. Kelly*, 2020 U.S. Dist. LEXIS 77080, at \*1 (S.D. Miss. May 1, 2020).

<sup>135</sup> 2020 U.S. Dist. LEXIS 77080 (S.D. Miss. May 1, 2020).

<sup>136</sup> *Id.* at \*7–11.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*12.

<sup>139</sup> 2020 U.S. Dist. LEXIS 230558, at \*1 (N.D. Cal. Dec. 7, 2020).

<sup>140</sup> *Id.* at \*2.

thirty days to file a complaint to obtain judicial review of the USDA's determination.<sup>141</sup> The plaintiffs filed their complaint thirty-six days late, but they argued that they should be eligible for equitable tolling because their tardiness was attributable to the stay-at-home orders which "impeded their ability to find and retain an attorney to prepare the lawsuit."<sup>142</sup> The court agreed with the plaintiffs, describing the "public health crisis and resulting restrictions on civil and personal life" as "extraordinary circumstances by any measure."<sup>143</sup> The court suggested that the consequences of the pandemic were most keenly felt in the early part of 2020 and noted that the plaintiffs' time limit was running during that time.<sup>144</sup>

### C. Similarities to the Tax Context

Pandemic-affected taxpayers make interesting cases for equitable tolling. In some ways, they are like the plaintiff in *Rubin v. United States*<sup>145</sup> who was misled by a letter from the IRS, as the circumstances giving rise to tolling are incredibly individualized. Yet they are also like the plaintiffs in *McKibben*, who needed tolling in response to a natural disaster that affected whole swaths of society in identical ways.<sup>146</sup> A blend of both personalized and communal implications is seen in *Joseph* and the prisoner-plaintiff cases.<sup>147</sup> Though COVID-19 is a shared setback which has generated challenges which are faced by many, it is the unique experience of those challenges by a plaintiff which warrants the application of equitable tolling.

Thus, despite the difference between the ongoing pandemic and the short-term nature of a snowstorm, pandemic-affected taxpayers may suffer from similar challenges to those which gave rise to the decision in *McKibben*. Just like the snowstorms and floods in those cases, COVID-19 has triggered states of emergency, and on a much greater scale—active states of emergency in response to the pandemic endured

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<sup>141</sup> *Id.* at \*3.

<sup>142</sup> *Id.* at \*3–4.

<sup>143</sup> *Id.* at \*7–8.

<sup>144</sup> *Id.* at \*8.

<sup>145</sup> 2019 WL 7205995, at \*1, \*6 (C.D. Cal. Nov. 21, 2019).

<sup>146</sup> 288 F. Supp. 2d 723 (N.D. W. Va. 2003).

<sup>147</sup> 2020 U.S. Dist. LEXIS 230558, at \*1 (N.D. Cal. Dec. 7, 2020).

for several months in every state and nationally.<sup>148</sup> In response, courthouses closed or reduced certain operations.<sup>149</sup> The Tax Court specifically closed in March 2020,<sup>150</sup> did not begin accepting mail again until July 10,<sup>151</sup> and as of one year later, still was not fully open to the public.<sup>152</sup> Many of the IRS's taxpayer and practitioner assistance services were not staffed for a period of time<sup>153</sup> and still were described in mid-December as having "service delays."<sup>154</sup> Further, lockdown and stay-at-home orders have been issued, which may interfere with a plaintiff's ability to seek counsel.<sup>155</sup> These are meaningful barriers for ordinary taxpayers—much like those that existed for the plaintiffs in the state of emergency cases.

One crucial difference between a COVID-19 case and the prior cases, though, is that the pandemic has lasted over a year, while the emergencies giving rise to *McKibben* and the other cases lasted only days. Perhaps the duration matters. For example, as of 2017, the time limit for filing a § 6532(c) wrongful levy suit is two years. Imagine a taxpayer, Jane, whose period began running in September 2018. If Jane did not begin seeking legal or tax assistance until March 2020, it may be hard for her to claim equitable tolling, as eighteen months went by as she failed to diligently pursue her rights. However, what if Jane's period began running in September 2019? By March 2020, only six months would have passed; perhaps then she could argue that she was not failing to be diligent, as she still had eighteen months left to file when the barrier arose.

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<sup>148</sup> *Status of State COVID-19 Emergency Orders*, *supra* note 19.

<sup>149</sup> *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> [<https://perma.cc/99H7-W3GL>] (announcing that two dozen U.S. district courts were suspending jury trials or grand jury proceedings and scaling back other courthouse activities).

<sup>150</sup> Press Release, U.S. Tax Ct. (Mar. 11, 2020), <https://www.ustaxcourt.gov/press/03112020.pdf> [<https://perma.cc/Q946-CDM4>].

<sup>151</sup> Press Release, U.S. Tax Ct. (June 11, 2020), <https://www.ustaxcourt.gov/press/06192020.pdf> [<https://perma.cc/95NV-8HJD>].

<sup>152</sup> As of December 20, the Tax Court has resumed accepting hand-delivered documents, but proceedings are still being conducted remotely. See *Press Releases*, U.S. TAX CT., [https://www.ustaxcourt.gov/press\\_releases.html](https://www.ustaxcourt.gov/press_releases.html) [<https://perma.cc/HNW4-FMRA>].

<sup>153</sup> *Covid-19: IRS Postpones Most Tax Deadlines; Court and Agency Closures Delay Federal Tax Cases—UPDATE*, LATHAM & WATKINS, CLIENT ALERT NO. 2641 (Apr. 2020) <https://www.lw.com/thoughtLeadership/COVID-19-IRS-Postpones-Tax-Deadline-and-Court-and-Agency-Closures-Will-Delay-Federal-Tax-Cases> [<https://perma.cc/GJ5H-P8EV>].

<sup>154</sup> *IRS Operations During COVID-19: Mission-Critical Functions Continue*, IRS, <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue> [<https://perma.cc/ANQ5-76VN>] (last updated July 16, 2021) ("Our service delays include: [l]ive phone support, [p]rocessing tax returns filed on paper, [a]nswering mail from taxpayers, [r]eviewing tax returns, even for returns filed electronically.").

<sup>155</sup> See *Coronavirus Restrictions and Mask Mandates for All 50 States*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>, [<https://perma.cc/RP7X-5LTQ>] (last updated Dec. 18, 2020).

Surely by the expiration of her filing deadline in September 2021, Jane could find tax assistance or legal counsel. But now imagine that Jane was one of the millions of Americans who lost her job because of the COVID-19 pandemic.<sup>156</sup> She likely only received \$3,200 in stimulus payments to get her through the summer of 2021, and that is assuming she was able to qualify based on her 2019 tax return.<sup>157</sup> Her state unemployment assistance was difficult to navigate.<sup>158</sup> She blew through her savings trying to pay rent,<sup>159</sup> and eviction moratoria were about to expire.<sup>160</sup> Even though Jane might have had the time to find legal counsel or tax assistance in theory, her time was better used trying to make ends meet, and she certainly did not have the money for it. In such a case, the pandemic is long-lasting, but so are its effects, and courts may consider whether duration is a mitigating factor in the fact-specific inquiry that is required to determine whether tolling is warranted.

Further, just because the pandemic is long-lasting does not mean that all of its impacts are foreseeable or avoidable. Imagine another taxpayer, John. In November 2020, he was issued an unfavorable Notice of Determination regarding the IRS's intent to file a Notice of Federal Tax Lien, which entitles him to petition the Tax Court under § 6330(d)(1). He had thirty days to do so, and because he lived in the District of Columbia, this requirement was non-jurisdictional.<sup>161</sup>

Assume John was fortunate to avoid the struggles faced by Jane; he kept his job, so he was able to begin seeking a lawyer by the end of the first week, and by the end of the second week he had hired one and began planning to file his suit. However, before finalizing plans with the lawyer, John contracted COVID-19. He developed a severe case and had to be hospitalized for two weeks, like approximately 15 percent of hospitalized COVID-19 patients.<sup>162</sup> When the lawyer did not hear from

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<sup>156</sup> *The Employment Situation*, *supra* note 12.

<sup>157</sup> See *What to Know About All Three Rounds of Coronavirus Stimulus Checks*, PETER G. PETERSON FOUND. (Mar. 15, 2021), <https://www.pgpf.org/blog/2021/03/what-to-know-about-all-three-rounds-of-coronavirus-stimulus-checks> [<https://perma.cc/WEC9-M7U6>].

<sup>158</sup> See, e.g., Sally Beauvais, *Texas' Unemployment System Is Confusing and Frustrating. Here's How to Navigate It.*, THE TEX. TRIB. (Dec. 4, 2020), <https://www.texastribune.org/2020/12/04/texas-unemployment-how-to-apply/> [<https://perma.cc/DA6X-YEAT>].

<sup>159</sup> Michael Sainato, *'Nothing Under Our Tree:' Millions in U.S. Cope with Financial Misery During Holiday Season*, GUARDIAN (Dec. 19, 2020), <https://www.theguardian.com/world/2020/dec/19/us-millions-financial-misery-during-holiday-season> [<https://perma.cc/44S8-YBJN>] (quoting nurse Sierra Schauvilegee: "I used all my savings to survive and I begged my mother to move in until I received rental assistance and food stamps, that is all I literally have").

<sup>160</sup> Trevor Ault et al., *Eviction Crisis Looms as Millions Rely on Federal Moratorium Expiring This Month*, ABC NEWS (Dec. 9, 2020), <https://abcnews.go.com/US/eviction-crisis-looms-millions-rely-federal-moratorium-expiring/story?id=74589282> [<https://perma.cc/8Z2J-F4XB>].

<sup>161</sup> See discussion *supra* note 73 and accompanying text.

<sup>162</sup> *Preliminary Medicare COVID-19 Data Snapshot*, CTRS. FOR MEDICARE & MEDICAID SERVS. 11 (Sept. 11, 2020), <https://www.cms.gov/files/document/medicare-covid-19-data-snapshot-fact->

John, he did not file the suit, and John's time limit expired. John was diligently pursuing his rights, and extraordinary circumstances prevented him from meeting the deadline through no fault of his own. In such a case, the long-lasting nature of the pandemic still does not provide an opportunity to mitigate barriers to timely filing.

Some of the burdens faced by our hypothetical tax plaintiffs are identical to those that district courts have recognized when granting equitable tolling for prisoner plaintiffs. Cowan, Pickens, and Brown asserted that COVID-19 had interfered with their ability to access the materials necessary develop their cases, and the same is true for tax plaintiffs; the pandemic also "wreaks havoc with taxpayers' ability to gather documents, find paid help, or even find free help."<sup>163</sup> The habeas cases cited court closures as a reason for tolling, and those closures similarly affect tax plaintiffs.<sup>164</sup> The Tax Court specifically was not fully accessible beginning in March 2020, and still was not as of July 2021.<sup>165</sup> The courts also noted the habeas plaintiffs' difficulty when trying to meet with their lawyers. In some ways that challenge is similar to the unavailability and delay of IRS taxpayer and practitioner assistance services that has occurred in the tax context;<sup>166</sup> both struggles prevent plaintiffs from getting the help they need to timely file.

Tax plaintiffs likely would have less in common with prisoners seeking compassionate release, as the purpose of their tax litigation would not be to seek relief from the exponential risk of contracting a potentially deadly disease while incarcerated.<sup>167</sup> To rely on such cases, taxpayer-petitioners would need to establish that, due to preexisting conditions, they would have been particularly at risk should they have contracted COVID-19. Further, they would need to show that the activities necessary to meet their filing deadlines would have created greater

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sheet-september2020.pdf [<https://perma.cc/9WTJ-C253>].

<sup>163</sup> Bryan Camp, *Lesson From the Tax Court: Late is Late! The Impact of COVID-19 on Filing Petitions*, TAXPROF BLOG (May 11, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/05/lesson-from-the-tax-court-late-is-late-the-impact-of-covid-19-on-filing-petitions.html](https://taxprof.typepad.com/taxprof_blog/2020/05/lesson-from-the-tax-court-late-is-late-the-impact-of-covid-19-on-filing-petitions.html) [<https://perma.cc/SF9P-CE9P>].

<sup>164</sup> *Courts Suspending Jury Trials as COVID-19 Cases Surge*, *supra* note 149.

<sup>165</sup> See Press Release, U.S. Tax Ct. (Mar. 11, 2020), *supra* note 150 (showing that as of December 20, the Tax Court had resumed accepting hand-delivered documents, but proceedings were still being conducted remotely).

<sup>166</sup> See *Covid-19: IRS Postpones Most Tax Deadlines; Court and Agency Closures Delay Federal Tax Cases—UPDATE*, LATHAM & WATKINS, CLIENT ALERT NO. 2641 (Apr. 2020), <https://www.lw.com/thoughtLeadership/COVID-19-IRS-Postpones-Tax-Deadline-and-Court-and-Agency-Closures-Will-Delay-Federal-Tax-Cases> [<https://perma.cc/GJ5H-P8EV>]; *IRS Operations During COVID-19: Mission-Critical Functions Continue*, *supra* note 154.

<sup>167</sup> See Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> [<https://perma.cc/6UBB-83LD>] (noting that the COVID-19 positivity rate among state and federal prisoners is four times as high as the general population).

risk of exposure to COVID-19. Considering that many taxpayer assistance resources are available online and the courts have adapted to the virtual environment, taxpayer-petitioners seem unlikely to succeed on this type of theory.<sup>168</sup>

Reliance on *Joseph* would likely be most persuasive for tax litigants. Taxpayers contesting a decision by the IRS are similarly situated to participants in a government assistance program contesting a decision to disqualify them. Both are challenging administrative determinations in the courts, and they are likely litigating under statutes with similar constructions. Further, the stakes of the decision are alike. Both allege a monetary injury; there are no direct life or personal liberty interests at stake as in the prison plaintiff cases. Using a theory like the one that succeeded in *Joseph*, tax plaintiffs who lived in areas with stay-at-home orders during their periods of limitation may be able to persuade courts to grant equitable tolling based on impediment to their ability to secure legal services.

In addition to the challenges giving rise to the state of emergency and habeas cases, an estimated 51 percent of United States COVID-19 hospitalizations lasted longer than eight days.<sup>169</sup> Many Americans chose to quarantine away from their traditional primary residences where they receive mail.<sup>170</sup> And there were a myriad of service issues with the United States Postal Service during 2020.<sup>171</sup> It seems entirely plausible that taxpayers could be prevented by any combination of these extraordinary COVID-19 circumstances from satisfying filing deadlines. The extended duration of the federal and state declarations of emergency lends support to the idea that the ongoing nature of the pandemic did not reduce the severity of its barriers to timely filing, and courts should not lessen their sympathy for affected taxpayers just because they suffered COVID-19-related impacts later on in the pandemic.<sup>172</sup>

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<sup>168</sup> It is worth noting that citing technology resources as a reason to withhold tolling assumes both technology access and technology literacy. Struggling taxpayer-petitioners may have neither, but advising courts on how to respond to such situations is better left for another Commentator.

<sup>169</sup> *Preliminary Medicare COVID-19 Data Snapshot*, *supra* note 162.

<sup>170</sup> Anna Bahney, *For These Buyers, Second Homes Are Much More Than Vacation Spots*, CNN BUS. (July 7, 2020), <https://www.cnn.com/2020/07/07/success/real-estate-coronavirus-buying-an-optional-home/index.html> [<https://perma.cc/R8LV-3Y6X>].

<sup>171</sup> See Jordan Weissman & Aaron Mak, *How Much Should You Panic over the U.S. Postal Service?*, SLATE (Aug. 21, 2020), <https://slate.com/business/2020/08/usps-mail-slowdown-dejoy-trump-election.html> [<https://perma.cc/LUJ2-ZPNC>]; Aaron Mak, *Why the Mail System Is Buckling*, SLATE (Dec. 18, 2020), <https://slate.com/business/2020/12/postal-service-delays-problems-holidays-covid.html> [<https://perma.cc/R8DR-JH6F>].

<sup>172</sup> Scudellari, *supra* note 17.

#### D. Distinguishing COVID-19 from Other Routine Medical Care

The above discussion of the pandemic-related obstacles to bringing suit illustrates why COVID-19 should be treated with more flexibility than more common medical problems. First, many challenges created by the pandemic are not present with other illnesses. Widespread lockdowns and court closures are unique responses to COVID-19's high virulence and potential lethality, so petitioners experiencing other health-related difficulties would not have the same substantial barrier to accessing the courts and legal assistance.

Further, one would expect petitioners facing more routine medical hardships to rely on their support networks of friends and family to navigate any legal obligations that arose. The necessary public health response to COVID-19 counsels the exact opposite—to fight the pandemic, government officials implored people to stay home and distance from others to the greatest extent possible. Friends and family likely would not shoulder the legal obligations themselves and would instead assist with time management tasks such as meals, childcare, and other household chores, in most cases requiring a substantial degree of in-person contact. Accordingly, reliance on support networks to meet filing deadlines in a way that would traditionally be reasonable would, in this case, run directly counter to more important public health policy.

And beyond the issue of contradicting public health policy, petitioners likely would also have practical problems turning to their support networks during the pandemic. As discussed previously, COVID-19 has drastically shifted caretaking and work obligations. During the pandemic, it seems probable that a struggling petitioner's friends and family may themselves be struggling, and thus would be much less available to provide the assistance we would usually expect. Based on the marked differences between the resources available to a typical taxpayer-petitioner experiencing routine medical hardship and those of one impacted by COVID-19, it is reasonable to argue that the latter should benefit from tolling even while the former, without more, would not.

#### E. Possible Limiting Principles for Granting Tolling in Pandemic Tax Cases

Because highly individualized analyses of COVID-19's impact on taxpayer-petitioners would likely prove unwieldy and inconsistent, courts would benefit from reliance on limiting principles which promote the orderly and fair application of equitable tolling. One example may



be found in *United States v. Henry*,<sup>173</sup> in which the Western District of Pennsylvania held that a plaintiff did not qualify for pandemic-related equitable tolling because there was “no apparent ‘nexus’ between COVID-19 and [plaintiff’s] failure to timely file his motion.”<sup>174</sup> Under the nexus test, mere “conclusory assertions” that COVID-19 created extraordinary circumstances would be insufficient, and plaintiffs must actually show that the pandemic prevented timely filing by impeding their ability to pursue their rights.<sup>175</sup>

To further develop the nexus test for use in determining the availability of tolling in tax cases, courts might borrow from 26 U.S.C. § 6511(h). Congress enacted § 6511(h) to partially overrule the Supreme Court’s decision in *United States v. Brockamp*<sup>176</sup> that the deadline for filing tax refund claims was jurisdictional.<sup>177</sup> Section 6511(h) creates an exception that tolls the period of limitation in the event that a taxpayer is financially disabled, defined as “unable to manage his financial affairs by reason of a medically determinable physical or mental impairment” so long as it “can be expected to result in death or [ ] has lasted or can be expected to last for a continuous period of not less than 12 months,” and the individual’s spouse or another person is not authorized to act on his or her behalf in financial matters.<sup>178</sup>

If § 6511(h)’s narrow definition of financial disability were the only circumstance which created a nexus between COVID-19 and the failure to file, only individuals who contracted COVID-19 and did not have someone authorized to act on their behalf would qualify for tolling, and it would only be warranted in refund or credit for overpayment cases. Many petitioners validly affected by the pandemic and in need of procedural relief would be excluded. Thus, courts could employ a modified definition of “disabled” which also includes petitioners who lost employment or income because of the pandemic’s economic impact, those who struggled to obtain legal or tax assistance due to pandemic-related business closures, and those charged with new caregiving responsibilities which interfered with their ability to build their cases.

Such an expansion of the definition of disability to determine a nexus to COVID-19 would provide relief to deserving plaintiffs without allowing frivolous claims. Section 6511(h)(2)(A) provides that individuals must furnish proof of their impairments, and courts could continue

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<sup>173</sup> 2020 U.S. Dist. LEXIS 234135 (W.D. Penn. Dec. 14, 2020).

<sup>174</sup> *Id.* at \*8.

<sup>175</sup> *Id.* at \*9–10.

<sup>176</sup> 519 U.S. 347 (1997).

<sup>177</sup> 15 MERTENS LAW OF FED. INCOME TAX’N § 58:36 (2021).

<sup>178</sup> 26 U.S.C. § 6511(h)(2)(A–B) (2018).

to incorporate that requirement in order to weed out the aforementioned mere conclusory assertions. For example, a plaintiff who lost his or her job for cause could not establish the necessary nexus, as the job loss would not have resulted from COVID-19.

#### IV. GRANTING OF EQUITABLE TOLLING RELIEF IS NECESSARY AND APPROPRIATE

Following from the conclusion that equitable tolling can be made available to taxpayers who can establish a nexus between COVID-19 and their failure to meet tax deadlines, this Part argues that such relief is both necessary and appropriate given economic circumstances. The relief provided thus far did little to help taxpayers affected later in the pandemic or by provisions beyond the return filing deadline, and there is no clear evidence that Congress intended to make tolling relief unavailable. Further, the Tax Court and district courts are in a unique position to mitigate access to justice problems by providing tolling on first instance, and such procedural relief would not be overly economically burdensome.

##### A. Current Relief Is Inadequate

Though equitable tolling should be granted based on the circumstances of individual plaintiffs, COVID-19 has caused broad-based economic hardships affecting many across the country, underscoring the urgency with which courts should act.<sup>179</sup> Both federal and state governments have been conservative in their approach to relieving financial burdens in response to the pandemic. The primary procedural tax relief was the extension of filing deadlines through October 2020, and, as discussed in Part I, *supra*, that extension's practical value was reduced by the pandemic lasting much beyond its predicted six-month duration.<sup>180</sup> When October came and went, taxes came due without struggling taxpayers having a real opportunity to get back on their feet. The deadline extension also did not alter time limits beyond the one for filing tax returns, which does little to help a person who was healthy up until contracting the virus in November and was thus rendered unable to file a timely response regarding a tax dispute. Such an outcome is not only possible but likely given the high number of cases the United States has experienced.<sup>181</sup>

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<sup>179</sup> See generally Brian Root & Lena Simet, *United States: Pandemic Impact on People in Poverty*, HUM. RTS. WATCH (Mar. 2, 2021), <https://www.hrw.org/news/2021/03/02/united-states-pandemic-impact-people-poverty#> [<https://perma.cc/EUQ6-NQJY>].

<sup>180</sup> *COVID-19 Is Here. Now How Long Will it Last?*, *supra* note 16.

<sup>181</sup> *COVID in the U.S.: Latest Map and Case Count*, *supra* note 8.

Further, the stimulus payments likely did not constitute substantive tax burden relief for most. Through the Coronavirus Aid, Relief, and Economic Security (CARES) Act,<sup>182</sup> the federal government paid out \$1,200 in April 2020 to individuals who qualified based on their 2018 or 2019 tax returns, with an additional \$600 available for each dependent.<sup>183</sup> The CARES Act also provided for unemployment benefits of \$600 per week for eleven weeks in addition to benefits provided by state governments.<sup>184</sup> The later stimulus packages in December 2020 and March 2021 provided for payment of \$2,000 total in relief checks for qualifying individuals.<sup>185</sup> The enormous relief bills were without a doubt legislative achievements, but individuals who qualified for the April stimulus payment only received \$1,809 on average<sup>186</sup> to last them the next nine months, all while the average United States rent cost as of February 2020 was \$1,468 per month.<sup>187</sup>

With United States vaccine distribution not nearing completion for some time<sup>188</sup> and the economy's rebound following closely behind, taxpayers have continued to struggle with their tax liability without some other kind of relief. The most compelling arguments against relief understandably would raise concerns about the balance against government interests in efficient administration and predictable tax revenue, especially given the expenditure of trillions of dollars in aid.<sup>189</sup> But utilizing equitable tolling would not implicate either of those interests. Tolling is procedural relief and is therefore in fact the perfect balance of interests—it allows taxpayers to manage their barriers to suit without reducing their substantive tax liability and thus interfering with the government's reliance interests in their tax revenue.

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<sup>182</sup> Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>183</sup> *Id.* at § 2201; 134 Stat. at 335–40.

<sup>184</sup> Emily Cochrane, *Congress Strikes Long-Sought Stimulus Deal to Provide \$900 Billion in Aid*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/us/politics/congress-stimulus-deal.html> [<https://perma.cc/8XRK-QCGZ>].

<sup>185</sup> *See What to Know About All Three Rounds of Coronavirus Stimulus Checks*, *supra* note 157.

<sup>186</sup> Darla Mercado, *This Is the Average Coronavirus Stimulus Payment in Your State*, CNBC (May 22, 2020), <https://www.cnbc.com/2020/05/22/this-is-the-average-coronavirus-stimulus-payment-in-your-state.html> [<https://perma.cc/F5PH-QQ7B>].

<sup>187</sup> *Average Monthly Apartment Rent in the United States from September 2016 to February 2020*, STATISTA (Mar. 2020), <https://www.statista.com/statistics/1063502/average-monthly-apartment-rent-usa/> [<https://perma.cc/RT6G-E5B7>].

<sup>188</sup> Nandita Bose & Jeff Mason, *Biden Aims for 70% of U.S. Adults to Get One Vaccine Dose by July 4*, REUTERS (May 4, 2021), <https://www.reuters.com/world/us/biden-set-outline-plans-make-vaccine-doses-more-accessible-2021-05-04/> [<https://perma.cc/TZA2-3XZM>].

<sup>189</sup> Cochrane, *supra* note 184.

## B. Expanding Use of Equitable Tolling Does Not Present a Separation of Powers Problem

As the tests for jurisdictional requirements and the availability of equitable tolling heavily focus on congressional intent, some may argue that courts should leave expansions of equitable tolling to Congress. But the CARES Act was signed into law back in March 2020.<sup>190</sup> At that time, Congress's priorities were not all that long-term; the CARES Act's provisions addressing tax issues were focused on helping relieve immediate economic burdens for individuals and employers through rebate and payroll tax adjustments.<sup>191</sup> Alterations to procedural and jurisdictional considerations, in comparison, are longer-term solutions. The CARES Act's focus on immediate solutions reflects early predictions that the pandemic would be over by fall,<sup>192</sup> and its silence in March on equitable tolling of tax filing deadlines should not be construed as an explicit rejection of the idea.

Further, Congress's failure to revisit the idea also should not be considered a rejection. The legislature battled for months over a second stimulus bill, so it is perhaps unsurprising that it did not get to the topic of tax filing deadlines when it could hardly agree to approve \$600 stimulus checks.<sup>193</sup> Though the Democrats took control of the White House and the Senate beginning in January 2021, Republicans quickly demonstrated that Democrats would need to make significant compromises in order to accomplish their agenda,<sup>194</sup> so it is uncertain how soon Congress would be able to enact the Taxpayer Advocate Service's recommendation to make all IRC periods subject to equitable tolling.<sup>195</sup>

## C. Access to Justice Concerns Exist Which the Tax Court and District Courts Are Uniquely Positioned to Resolve

Cases reconsidering old jurisdictional tax filing deadline precedents have most often come not from the Tax Court or district courts,

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<sup>190</sup> Garrett Watson et al., *Congress Approves Economic Relief Plan for Individuals and Businesses*, TAX FOUND. (Mar. 30, 2020), <https://taxfoundation.org/cares-act-senate-coronavirus-bill-economic-relief-plan/> [<https://perma.cc/L3AJ-FVU9>].

<sup>191</sup> *Id.*

<sup>192</sup> *COVID-19 Is Here. Now How Long Will it Last?*, *supra* note 16.

<sup>193</sup> Cochrane, *supra* note 184.

<sup>194</sup> Benjamin Fearnow, *This Is Why We Fail: Democrats Accused of Caving on Trump Impeachment Trial Witnesses*, NEWSWEEK (Feb. 13, 2021), <https://www.newsweek.com/this-why-we-fail-democrats-accused-caving-trump-impeachment-trial-witnesses-1569147> [<https://perma.cc/5KRR-LWPK>] (discussing how Republicans threatened to filibuster all Senate business if Democratic House impeachment managers insisted on calling witnesses during former President Trump's second impeachment trial).

<sup>195</sup> *Rec. 47*, *supra* note 82.

but from the circuit courts of appeals.<sup>196</sup> Civil appeals are famously expensive<sup>197</sup> and take quite some time to resolve.<sup>198</sup> Even before the COVID-19 pandemic, scholars noted that “the costs of appeal, the demoralizing effect of a trial loss, the need for closure, and other factors” might prevent filing of meritorious appeals.<sup>199</sup> Aggrieved taxpayers are already attempting to protect their financial assets from the government, and COVID-19 surely exacerbated the financial strain experienced by the petitioners who file suit.

The costs associated with appeals create an access to justice concern. If the lower courts issue “play-it-safe” jurisdictional decisions which bar equitable tolling, an under-resourced plaintiff, whose claims may ultimately be meritorious, might be forced to accept that unfavorable result. The lower courts are uniquely positioned to protect such financially vulnerable petitioners from the costs of appeal by interpreting jurisdiction and equitable tolling more expansively in light of the pandemic, as done in the decisions discussed in Part III, *supra*. While the IRS could appeal when the lower courts rule for the petitioner, as noted previously, it is plausible that the government will settle if the petitioner has a compelling case.<sup>200</sup>

#### D. Allowing Tolling Would Not Be Resource-Prohibitive

As mentioned in Part IV.A, *supra*, the courts have particular reason, given 2020’s economic downturn and accompanying government relief efforts, to be concerned about equitable tolling’s potential adverse financial effects. One might worry that allowing equitable tolling for taxpayers facing pandemic-related challenges could create an expensive drain on government administrative resources and decrease the government’s reliance on those individuals’ tax revenue.

But the proportion of administrative proceedings against the IRS relative to the total number of taxpayers is exceedingly small, and the Tax Court only receives about 30,000 petitions per year.<sup>201</sup> Even if all

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<sup>196</sup> See, e.g., *Myers v. Comm’r*, 928 F.3d 1025 (D.C. Cir. 2019); *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015).

<sup>197</sup> Donna Bader, *FAQ, AN APPEAL TO REASON* (2011), <http://www.anappealtoreason.com/faq/> [<https://perma.cc/GZ5X-8JL5>] (estimating that an average appeal costs \$20,000–\$50,000).

<sup>198</sup> Paul J. Killion, *How Long Does a Ninth Circuit Civil Appeal Take?*, DUANE MORRIS APP. REV. (Apr. 6, 2018), <https://blogs.duanemorris.com/appellatelaw/2018/04/06/how-long-does-a-ninth-circuit-civil-appeal-take/> [<https://perma.cc/7FLF-FGR5>] (“The 2017 median time from notice of appeal to decision across all Circuits is 12.1 months.”).

<sup>199</sup> Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 No. 3 J. EMPIRICAL LEGAL STUD. 659, 679–80 (2004).

<sup>200</sup> See *United States v. Brockamp*, 519 U.S. 347, 352 (1997).

<sup>201</sup> Peter J. Reilly, *Tax Court IRS and Secret Law*, FORBES (Dec. 8, 2017), <https://www.forbes.com/sites/peterjreilly/2017/12/08/tax-court-irs-and-secret->

30,000 were appeals under non-jurisdictional time limits which were not timely filed and warranted equitable tolling, the disruption to the government's predicted revenue stream would likely be fairly small. And there's no way that such a great proportion of those petitions would fall into such a narrow category, considering the Tax Court's jurisdiction to hear all sorts of tax-related disputes. Coupled with the bipartisan support of increasing funding for the IRS, which seems plausible under the Biden administration,<sup>202</sup> it also seems unlikely that a changed approach to that narrow class of cases would significantly strain IRS administrative resources.

## V. CONCLUSION

The COVID-19 pandemic and its accompanying economic consequences have left many Americans financially vulnerable with little to no relief from their tax burdens. But one form of reprieve may be found in the courts in the form of equitable tolling. If a taxpayer fails to satisfy a filing deadline when they believe they have been wronged by the IRS, but that deadline is a non-mandatory claims-processing rule rather than a jurisdictional one, the courts have the power to make an equitable exception. To qualify, the plaintiff must have diligently pursued their rights and only been prevented from timely filing by extraordinary circumstances beyond their control.

Other applications of tolling—both before and during the pandemic—to states of emergency, prison litigation, and administrative appeals support the idea that the Tax Court and district courts adjudicating tax disputes should implement this equitable relief. Doing so will provide procedural aid to taxpayers facing COVID-19-related barriers to suit without materially altering their substantive tax liability in a way that would be adverse to governmental interests. Courts can utilize a nexus test expanding on prior statutory definitions of financial disability to ensure that equitable tolling is granted fairly and consistently for plaintiffs whose failures to file have a documented connection to COVID-19.

Providing such relief is both appropriate and necessary, and the lower courts are uniquely positioned to help tax litigants. Doing so would not be overly burdensome to the government and would immensely help burdened plaintiffs navigate the inequities of COVID-19. Therefore, to promote justice and financial recovery, lower courts

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law/?sh=499e500c2ba9 [https://perma.cc/5E7H-ERMA] (“The Tax Court docketed about 30,000 cases a year.”).

<sup>202</sup> Naomi Jagoda, *Biden's Treasury Pick Will Have Lengthy To-Do List on Taxes*, HILL (Nov. 27, 2020), <https://thehill.com/policy/finance/527629-bidens-treasury-pick-will-have-lengthy-to-do-list-on-taxes> [https://perma.cc/G3LZ-CMDV].

should utilize equitable tolling in the narrow class of cases where it is available.