No. 02-1389

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI; AND FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

This case presents the question whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must, as a matter of federal law, make a separate assessment of the taxes owed by the partnership against each of the partners directly. Pet. i. As explained in the government's opening brief, (i) the federal employment taxes involved in the case were imposed by the Internal Revenue Code directly upon the partnership in which respondents were general partners, (ii) those taxes were then validly assessed under the applicable provisions of the Internal Revenue Code, and (iii) the partners are derivatively liable under state law for all valid debts of the partnership, including its unpaid taxes. U.S. Br. 10-12. Because a valid assessment of these taxes was made, the United States had 10 years to bring a "proceeding in court" to collect the unpaid taxes either from the partnership or from the partners. 26 U.S.C. 6502(a). This action was brought within that 10-year period. The court of appeals thus erred in concluding that the United States could not bring this "proceeding in court" to enforce its claim without first assessing the taxes against each of the partners individually. Pet. App. 8a, 16a.

Much of respondents' brief has no bearing on the federal tax issue that is presented in this case. Respondents instead have stressed new claims that they did not raise below and that, in any event, are plainly without merit.[1] Moreover, to the extent that respondents *have* addressed the question before the Court in this case, they have made a striking concession in their brief, in which they acknowledge that "If Respondents are secondarily liable for the partnerships taxes then the Ninth Circuit's ruling that the IRS must assess the Respondents to collect the partnership taxes is incorrect" (Resp. Br. 3). As we discuss in detail below, it is well established that the liability of partners for the debts of their partnership is secondary or derivative rather than primary. The partnership is itself "a separate entity," and the partners are "in the nature of guarantors" rather "than principal debtors" on the debts of the partnership. Uniform Partner-

[1] For example, respondents spend much of their brief discussing the agency's authority to pursue an "administrative collection action" (Resp. Br. 6-7, 12, 14-16, 20-27, 34-42, 46-47). This case, however, plainly does not involve "administrative collection activity." Instead, this case involves a judicial collection action brought by the United States in bankruptcy court. Pet. App. 5a. As we explained in our opening brief, the requirement that notice of the assessment and demand for payment under Section 6303 be given prior to the seizure and sale of property by administrative levy is *not* a precondition to the filing of a judicial collection suit. U.S. Br. 14-16 n.8 (citing cases). Respondents' reliance on the notice requirements of Section 6303 (Resp. Br. 2, 34) is thus clearly misplaced in this judicial collection proceeding.

ship Act § 307 cmt. 4 (1997), 6 U.L.A. 125 (2001). Respondents' concession that the government need not make an assessment against them directly in order to bring this suit to enforce their secondary liability for the partnership tax debts is sufficient by itself to resolve this case in the government's favor.

Finally, respondents' newly minted contention that this federal tax collection action should be barred by a state statute of limitations (Resp. Br. 30-34) was not raised below and therefore may not be raised at this time. Their untimely contention that a state statute of limitations applies to this case is, in any event, squarely foreclosed by the decisions of this Court.

A. THE FEDERAL EMPLOYMENT TAXES INVOLVED IN THIS CASE WERE VALIDLY ASSESSED BY THE COMMISSIONER.

1. *The Employment Taxes Were Imposed On The Partnership As The Employer, And The Partners Are Derivatively Liable For Those Taxes.* Respondents acknowledge that "there is no provision in the Internal Revenue Code which states that general partners are liable for taxes of a partnership." Resp. Br. 19. The Code instead imposes the employment taxes involved in this case directly on the partnership, as the "employer" within the meaning of Sections 3102(b), 3111(a), 3301, and 3403. U.S. Br. 16; Pet. App. 50a, 62a. Partners are responsible for the unpaid taxes owed by the partnership because they are derivatively liable under state law for all of the unpaid debts of the partnership. Cal. Corp. Code § 16306(a) (West Supp. 2003); *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960). The liability of partners for the taxes owed by the partnership is dependent on, and secondary to, the primary liability of the partnership. It is therefore "derivative" by definition. See *Black's Law Dictionary* 399 (5th ed. 1979) ("Derivative. Coming from

another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another."); *Livingstone* v. *Department of Treasury*, 456 N.W.2d 684, 688-689 (Mich. 1990).

Respondents nonetheless claim that their liability for such taxes should be regarded as "primary," rather than "derivative," and that they therefore must be assessed directly for the taxes. They contend that their liability is "primary" because, under state law, they are "jointly and severally liable with their partnership" for the tax obligations (Resp. Br. 7). The "joint and several" liability to which respondents refer, however, is not "with the partnership." Instead, the partners are each derivatively liable, jointly and severally *with each other*, for the partnership's debts. Under modern partnership law, the partnership is itself "a separate entity," and the partners are "in the nature of guarantors" rather "than principal debtors" on the debts of the partnership. Uniform Partnership Act § 307 cmt. 4 (1997), 6 U.L.A. 125 (2001). See also Cal. Corp. Code § 16201 (West Supp. 2003) ("A partnership is an entity distinct from its partners."). Under the Uniform Partnership Act, which California has adopted (see U.S. Br. 10 n.4), a creditor ordinarily "cannot proceed against the partners until after exhausting remedies against the partnership" and "*the partners are essentially guarantors of an independent partnership debt rather than being directly responsible*." A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 1.03(c)(4), at 1:40:1 (Supp. 2003-2) (emphasis added).

The partnership also has "primary" or "principal" liability for federal employment taxes as a matter of *federal* law. The Internal Revenue Code imposes the employment tax liability directly on the partnership as the "employer." See U.S. Br. 16. The liability of the partners is secondary, or "derivative," because it arises under state law when, as here, the partnership fails to satisfy its federal tax obligations. *United States* v. *Wright*, 57 F.3d 561, 563 (7th Cir. 1995) (partners are "derivatively" liable under state law for the unpaid tax debts of the partnership). As the court explained in *Remington* v. *United States*, 210 F.3d 281, 283 (5th Cir. 2000), "[t]he partnership is the primary obligor and its partners are jointly and severally liable on its debts."

Nothing in the Internal Revenue Code provides any support for respondents' unanchored claim that they are "primarily liable" for the partnership's taxes.[2] Resp. Br. 2, 4, 6-

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[2] Respondents err in seeking to rely (Resp. Br. 4) on a 1970 General Counsel Memorandum that recommends that parallel assessments be issued to a partnership and to its general partners. In the first place, General Counsel Memoranda are not binding on the Commissioner and cannot be relied upon or otherwise cited as precedent by taxpayers. IRS Gen. Couns. Mem. No. 34329, 1970 WL 22475 (July 31, 1970); see *Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* v. *United States*, 129 F.3d 195, 200 (D.C. Cir. 1997) (GCMs lack "precedential value"), cert. denied, 525 U.S. 811 (1998); *Vons Companies, Inc.* v. *United States*, 51 Fed. Cl. 1, 8-9, 11, 12 (2001). Moreover, although General Counsel Memoranda may provide useful guidance or background as to the agency's interpretation of the Internal Revenue Code (see *Western Co. of North America* v. *United States*, 323 F.3d 1024, 1032 (Fed. Cir. 2003); *Geisinger Health Plan* v. *Commissioner*, 30 F.3d 494, 499-500 (3d Cir. 1994)), the memorandum cited by respondents does not purport to establish an official interpretation of the law. Instead, it offers cautionary advice to revenue agents concerning steps that may be useful in avoiding controversy. For example, after discussing how different conclusions could be drawn from the caselaw, the memorandum advises that an "[a]ssessment of the penalty in the name of the partnership and each of the individual partners * * * would offer the greatest assurance that the Service had complied with the requirements of sections 6203 and 6303 of the Code." 1970 WL 22475. Respondents' effort to infer a bright-line rule of law from an abundance of caution on the part of the "anonymous Internal Revenue Service lawyer" who authored the memorandum "represents an unjustified quantum leap." *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 541 (3d Cir. 2000) (Shadur, J., concurring), cert. denied, 531 U.S. 1104 (2001). Moreover, respondent's suggestion that there is a conflict between

12. The analogy drawn by respondents to spouses who file a *joint* income tax return under Section 6013 is obviously inapt, for the Code makes no provision for partners to file joint employment tax returns with their partnership. Respondents' focus on the liabilities of lenders, responsible persons, and transferees of an estate is similarly misplaced. Those liabilities arise under federal law and, in the case of responsible persons and transferees, Congress has specifically provided that those liabilities may be assessed. 26 U.S.C. 6671 (the liabilities imposed on responsible persons under 26 U.S.C. 6672 "shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes"); 26 U.S.C. 6901(a) ("The amounts of the following liabilities [including the liability of a transferee under 26 U.S.C. 6901(a)(1)(A)] shall * * * be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred."). By contrast, Congress has *not* provided for the assessment of a partner's state-law derivative liability for partnership taxes.[3] Nor has Congress required any such assessment as a prerequisite for the enforcement of the partner's derivative liability in an action to collect the partnership debts.

The liability of respondents for the employment taxes imposed on the partnership is thus secondary and derivative, rather than primary. And, given that fact, respondents concede that "the Ninth Circuit's ruling that the IRS must as-

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the agency's administrative practices and its position in this case (Resp. Br. 34-42) is simply incorrect. The Internal Revenue Manual makes clear that separate assessments are not required (see Resp. Br. 34-36), and none were made here.

[3] Section 6201 authorizes the assessment only of the taxes "imposed by [the Internal Revenue Code]" (26 U.S.C. 6201), and the Code does not directly impose liability on the partners for the partnership's taxes.

sess the [partners directly] to collect the partnerships taxes is incorrect." Resp. Br. 3.

2. *An Assessment Of Employment Taxes Is Complete When The Amount Of Taxes Determined To Be Due Is Recorded By The Secretary.* There is another, independent reason why respondents' position in this case is incorrect. The "assessment" of "taxes" that is made under Section 6201(a) of the Internal Revenue Code, 26 U.S.C. 6201(a), is a formal record of the amount of tax that has been determined to be due. Once the "summary list of assessments" is signed by the Internal Revenue Service to record the *amount* of the tax liability, "the official act of assessment has occurred for purposes of the Code." M. Saltzman, *IRS Practice and Procedure* ¶ 10.02, at 10-4 to 10-7 (2d ed. 1991); see U.S. Br. 13-14 n.6. After the amount of a tax is so recorded, no further "assessment" is necessary to enforce that liability against *any* party who is directly or indirectly liable for the tax. As a result, this Court and the other courts of appeals have consistently held that, when an assessment of the taxes owed by the party primarily liable has been made, a judicial action may proceed to collect those taxes from parties whose liability is only derivative "without assessment" of the taxes against them directly. *Leighton* v. *United States*, 289 U.S. 506, 508 (1933); see cases cited U.S. Br. 18-24. These courts have emphasized that a "[f]urther independent assessment" against the party derivatively liable for the tax is unnecessary and "would accomplish nothing." *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).

The court of appeals erred in this case by ignoring this precedent and in suggesting that a party whose liability is only derivative or secondary should be treated as a "taxpayer" for whom a separate assessment would be required (Pet. App. 8a). The court based its conclusion on the general definition in 26 U.S.C. 7701(a)(14), which states that a "taxpayer" is "any person subject to any internal revenue tax."

The court formulated the syllogism that (i) the term "taxpayer" includes "any person" (26 U.S.C. 7701(a)(14)); (ii) the term "person" includes "an individual" (26 U.S.C. 7701(a)(1)); (iii) a partner may be an "individual" person; and, *therefore*, (iv) a partner is a "person subject to" the employment taxes involved in this case.[4] Pet. App. 7a-8a.

That reasoning is flawed and leads to absurd conclusions. Under the court's reasoning, *any* "person" who may ultimately be required to pay a tax owed by another person (such as the executor of an estate, the recipient of a gift, or the trustee of a debtor in bankruptcy) would be said to be the "taxpayer" and therefore be subject to assessment for the taxes owed by the primary obligor. This Court has clearly held, however, that suits to collect taxes from parties whose liability is only derivative may proceed "without assessment" of the tax against them directly. *Leighton* v. *United States*, 289 U.S. at 508-509; see *United States* v.

[4] Respondents suggest (Resp. Br. 19-20) that their claim that partners are "taxpayers" with respect to the taxes imposed on the partnership is "consistent with" this Court's holding in *United States* v. *Williams*, 514 U.S. 527 (1995). In *Williams*, this Court held that a person whose property was subject to a federal tax lien with respect to a tax for which she was not personally liable could bring a suit to recover an amount paid to remove the lien, as an action to recover a "tax" or "sum" "erroneously * * * collected under the internal-revenue laws" (28 U.S.C. 1346(a)(1)). 514 U.S. at 532. The Court held that such a person could bring an action to recover her payment even if she was not the "taxpayer" liable for the tax (*id.* at 534) and that, in the context of a refund suit, the term "taxpayer" would, in any event, be "broad enough" to include the person who actually paid the tax (*id.* at 535). The Court in *Williams* plainly did not address the question whether an assessment against a derivatively liable person is necessary in order to enforce the tax liability incurred by the person upon whom the Code directly imposes the liability. Instead, as we explained in our opening brief, this Court and other courts have consistently resolved that question in the government's favor. See *Leighton* v. *United States*, 289 U.S. at 509; U.S. Br. 18-19.

Wright, 57 F.3d 561, 564 (7th Cir. 1995); U.S. Br. 18-21. In short, as respondents now concede (Resp. Br. 11), a person or entity whose liability for a tax debt is only "secondary" or "derivative" is, by definition, *not* the "taxpayer" whose taxes are assessed under the Code.[5]

Moreover, as the predecessor of the Federal Circuit explained in *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937), it is the "tax" and not the "taxpayer" that is assessed. Section 6501(a) specifies that it is "the amount of any tax," not the taxpayer or person derivatively liable, that is "assessed" under the Code. 26 U.S.C. 6501(a). See U.S. Br. 18-21. An assessment is a record of the liability filed "in the office of the Secretary" (26 U.S.C. 6203); U.S. Br. 13-14. Such an assessment is valid *as an assessment* even if notice of the assessment is not issued to the party who is directly liable for the tax or to any other particular individual. Notice of the assessment and demand for payment of the tax are *not* preconditions to the filing of a judicial collection suit, either against the party whose liability is primary or against parties whose liability is only derivative. See U.S. Br. 15-16 n.8 (citing cases).

3. *Notice Of The Assessment Is Not Required Before A Judicial Collection Proceeding May Be Commenced.* Much of respondents' brief is incorrectly premised on the assertion that notice of an assessment must be given to the partners before any steps to collect the taxes from the partners may proceed (Resp. Br. 6-7, 12, 14-16, 20-27). Notice of an assessment is required only for *administrative* collection of partnership tax debts by lien or levy. Before a lien or levy

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[5] Respondents agree that a person whose liability for the tax is secondary or derivative is *not* "*the person who is identified as the taxpayer under [26 U.S.C.] 6203.*" Resp. Br. 11 (emphasis original). They state that "secondarily liable persons are, by definition, not the 'taxpayer'" for assessment purposes. *Ibid.*

may be executed, notice of the assessment and demand for payment is to be given to "each person liable for the unpaid tax." 26 U.S.C. 6303(a); see 26 U.S.C. 6321, 6331(a). This case, however, does not involve liens or levies or any other aspect of the *administrative* collection process. Instead, in this case, the government seeks to enforce the derivative liabilities of the partners for the debts of the partnership through a *judicial* proceeding in bankruptcy court. Although notice of an assessment and demand for payment are prerequisites for levies and other administrative collection measures that are *not* involved in this case, such notice and demand are not required as a prerequisite for judicial proceedings for the collection of taxes through money judgments. See U.S. Br. 15-16 n.8 (citing cases).

Whether the government may undertake *administrative* collection action against partners based on an assessment of the taxes owed by the partnership—and without providing any further assessment or notice of assessment directed to each partner individually—is thus simply not at issue in this case. It should be noted, however, that courts have repeatedly concluded that "[a] demand upon the partnership is a demand upon all of the partners and is a sufficient compliance with the terms of both § 6321 [lien for taxes] and § 6303 [notice and demand for tax] of the [Code] for the purpose of making the taxes assessed a lien on the property of the individual partners." *American Surety Co.* v. *Sundberg*, 363 P.2d 99, 103 (Wash. 1961), cert. denied, 368 U.S. 989 (1962); see also *Underwood* v. *United States*, 37 F. Supp. 824 (E.D. Tex. 1939) (filing of lien notices for taxes owed by partnership causes liens to attach to partners' property as well), aff'd, 118 F.2d 760 (5th Cir. 1941); *Heyward* v. *United States*, 2 F.2d 467, 467 (5th Cir. 1924) (when partnership was dissolved and reorganized as a corporation, corporation took partnership property subject to federal tax lien, "because it had notice through the former partners, * * * who are chargeable with notice, although the assessment was not recorded until after the partnership assets were acquired"); W. Plumb, *Federal Tax Liens* 31 (3d ed. 1972).

B. UNDER 26 U.S.C. 6502(a), THE TIME FOR COMMENCING A "PROCEEDING IN COURT" TO COLLECT UNPAID TAXES EXTENDS TO "10 YEARS AFTER THE ASSESSMENT OF THE TAX."

1. *The Time For Commencing This Judicial Collection Proceeding Was Extended For Ten Years By The Assessment Of The Employment Taxes*. As the court of appeals recognized (Pet. App. 6a), the timely assessment of the partnership's unpaid taxes within the three-year period allowed by Section 6501(a) of the Internal Revenue Code, 26 U.S.C. 6501(a), extended for ten years the period in which a judicial action could be commenced to collect that liability (26 U.S.C. 6502(a)). For the reasons detailed in our opening brief, that statute directly governs this case. U.S. Br. 18-24. An assessment of the taxes owed by the partnership as the "employer" was timely made, and this "proceeding in court" (26 U.S.C. 6502(a)) to collect that liability was commenced within ten years of the assessment. U.S. Br. 11.

The decisions of this Court and of the courts of appeals have consistently concluded that the broad text of this statute governs the time for commencing any "proceeding in court" to collect such taxes, whether that proceeding is brought against the party who is directly liable for the tax or against parties whose liability is only derivative. See, *e.g.*, *United States* v. *Updike*, 281 U.S. 489, 494 (1930); *United States* v. *Botefuhr*, 309 F.3d 1263, 1277-1278 (10th Cir. 2002); U.S. Br. 17-22 (citing cases). As the Seventh Circuit summarized in *United States* v. *Wright*, 57 F.3d 561, 563-564 (1995), "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers" and a "claim against derivatively liable persons remains alive under federal law so long as the taxpayer itself is liable."

2. *The New Statute Of Limitations Argument That Respondents Seek To Raise Was Waived By Their Failure To Raise It In The Courts Below.* In their effort to avoid this settled rule, respondents seek to raise an entirely new argument in their merits brief. Respondents now argue for the first time (Resp. Br. 30-34) that a general California statute of limitations—and not the specific federal limitations provision in 26 U.S.C. 6502(a)—should govern the time in which this federal tax collection action may be brought. Respondents' new statute of limitations claim was not raised below. It therefore has been waived and may not be raised at this time.

A statute of limitations is an affirmative defense. It is waived when, as here, it is not pled in the answer or otherwise timely raised. See, *e.g.*, *In re Kontrick*, 295 F.3d 724, 734 (7th Cir. 2002) ("As a general matter, a statute of limitations defense must be raised in an answer or responsive pleading. See Fed. R. Civ. P. 8(c) * * * . Federal Rule of Civil Procedure 8 is incorporated into the Bankruptcy Rules. See Fed. R. Bankr. P. 7008."), cert. granted, No. 02-819 (argued Nov. 3, 2003); *United States* v. *DeTar*, 832 F.2d 1110, 1114 (9th Cir. 1987) (statute of limitations "provides an affirmative defense, which is waived in this circuit if it is not asserted before or at trial"); *In re Estate of Marcos Litigation*, 978 F.2d 493, 495 n.2 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993).

In the proceedings below, respondents never suggested that a state statute of limitations applied, and the parties and the courts were in agreement that this case is governed by the *federal* statutes of limitations in Section 6501 and 6502 of the Internal Revenue Code. See U.S. Br. 12, n.5; Pet. App. 6a-8a, 14a, 16a-17a; 20a-21a, 29a, 34a, 42a-43a, 46a-47a, 54a, 59a, 66a. The decision of the court of appeals addressed solely the question whether the time for collection provided by these governing federal statues had expired before the United States filed its claim in the bankruptcy court. Neither the parties nor the courts below addressed respondents' new contention that a state statute of limitations should govern instead.[6] That issue is also not contained within the question presented on which this Court granted certiorari. Furthermore, in their brief in opposition to the certiorari petition, respondents did not contend that any state statute of limitations should apply to this case. Respondents' newly minted argument that a state statute of limitations is available as an affirmative defense to this federal tax collection action has thus been waived by respondents, and it is not properly presented in this case.

3. *The New Statute Of Limitations Argument That Respondents Seek To Raise Is Foreclosed By The Decisions Of This Court*. In any event, respondents' new argument is squarely foreclosed by the decisions of this Court. The assertion that "the IRS is bound by the state period of limitations" where "derivative liability is based upon state law" (Resp. Br. 3, 29-34) is plainly incorrect. It has long been "well settled that the United States is *not* bound by state statutes of limitation * * * in enforcing its rights." *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940) (emphasis added); see also *United States* v. *John Hancock Mut. Life*

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[6] The state statute of limitations that respondents now cite for the first time (Resp. Br. 33, citing Cal. Civ. P. Code § 338(a) (West Supp. 2003)) merely provides generally that "[a]n action upon a liability created by statute, other than a penalty or forfeiture," must be commenced within three years. Respondents have not provided any discussion or explanation of their rationale for claiming that this statute would generally apply to claims brought against partners for tax-related partnership debts. Since the state statute of limitations was not raised in any earlier stage of this case, there is also nothing in the record or decisions below that addresses that question.

Ins. Co., 364 U.S. 301, 308 (1960) ("the United States is not subject to local statutes of limitations"); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938) (noting rule that "the sovereign is exempt from the consequences of its laches"); *Phillips* v. *Commissioner*, 283 U.S. 589, 602-603 (1931) ("The United States is not bound by state statutes of limitations unless Congress provides that it shall be.").

In *Summerlin*, the Court emphasized that, when the United States holds a claim "in its governmental capacity," the period of limitations for enforcing a claim derived from state law is determined by federal law. 310 U.S. at 417. This is because the rights of the United States, whether derived from state or federal law, are held by the United States as sovereign and:

> [w]hen the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.

United States v. *California*, 507 U.S. 746, 757 (1993) (quoting with approval *United States* v. *Summerlin*, 310 U.S. at 417).

In the present case, the United States brought claims against respondents to enforce its right to obtain collection of the unpaid federal tax obligation of the partnership. This tax obligation was imposed by the Internal Revenue Code, and the United States unquestionably brings its claim to collect these taxes "in its governmental capacity." As this Court has frequently noted, taxes are the "life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States*, 295 U.S. 247, 259 (1935); see *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977). A claim brought by the United States to collect the federal revenue is a paradigmatic example of a claim that the

United States holds in its governmental or sovereign capacity.

Respondent errs in suggesting (Resp. Br. 32) that *United States* v. *California*, 507 U.S. at 757, supports a different conclusion. The present case differs radically from *United States* v. *California*, in which this Court concluded that a state-law claim that the United States sought to enforce had lapsed under state law *before* the United States perfected its rights. See *id.* at 756. In *California*, the rights of the party that the United States claimed to possess through a right of subrogation had "lapsed," and the Court concluded that "the claims of the United States [were therefore] also barred" because, as subrogee, it stepped into the shoes of the party whose rights it asserted. *Ibid.* The Court emphasized in *California* that rights obtained by the government by assignment from another party are not revived by such an assignment but continue to be barred if they had lapsed *prior* to the assignment, even if the government otherwise "had a right to be free from the statute of limitations." *Id.* at 758 (citing *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938)).

In the present case, by contrast, the United States is pursuing its sovereign right to collect unpaid federal revenues. The government's claim is not based on an assignment of rights from any other parties. It is based on the government's sovereign right to impose and then collect taxes.

The Court noted in *United States* v. *California*, 507 U.S. at 757, that claims of the United States that are based upon state-created causes of action are not subject to state limitations provisions when "either the right at issue was obtained by the Government through, or created by, a federal statute, or a federal statute provided the statute of limitations." *Ibid.* (citations omitted). When the United States exercises rights under either federal or state law "in its efforts to collect taxes," it "unquestionably is acting in its sovereign capacity; indeed, the right to collect taxes is among the most basic attributes of sovereignty." *Bresson* v. *Commissioner*, 213 F.3d 1173, 1178 (9th Cir. 2000) (action to recover federal taxes under state fraudulent conveyance law).

The state statute of limitations therefore does not govern this action to collect unpaid federal taxes. There is, instead, a federal statute of limitations that applies directly to the government's claim in this case. Section 6502(a) of the Internal Revenue Code provides ten years after assessment for the government to bring any "proceeding in court" to obtain collection. 26 U.S.C. 6502(a). Until respondents filed their brief on the merits in this Court, all of the parties and the courts below had agreed that Sections 6501(a) and 6502(a) of the Internal Revenue Code provide the applicable limitations periods that govern this case. In holding that this same period of limitation governs not only suits against "taxpayers" but also suits against parties derivatively liable for the tax, this Court emphasized in *United States* v. *Updike*, 281 U.S. at 494, that "[t]he aim in the one case, as in the other, is to enforce a tax liability."[7]

The state statute of limitations now cited by respondents is thus inapplicable to this case not only because the United States is proceeding in its governmental capacity in collecting the federal revenue, but also because "a federal statute [has] provided the statute of limitations" for the government's claim. *United States* v. *California*, 507 U.S. at 757.

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[7] Respondents suggest that this Court in *Updike* "did not preclude the possibility" (Resp. Br. 33) that a state limitations period would apply in "a suit by the IRS for secondary liability" under state law. In *Updike*, however, the Court held that the same federal limitations period that applies to tax collection actions against a party whose liability is direct applies as well to the party whose liability is only derivative. 281 U.S. at 494. See *United States* v. *Wright*, 57 F.3d at 563 ("the governing principle is all-for-one, one-for-all").

4. *The Agency's Administrative Collection Practices Are Not At Issue In This Case And, In Any Event, Are Not Unconstitutional.* Respondents' broad suggestion that "constitutional issues" are "created by the IRS's current collection practices" (Resp. Br. 42-46) is misplaced. The constitutional concerns described by respondents relate to their mistaken assertion that they are the "taxpayers" who are subject to assessment under the Code. That assertion is invalid for the reasons described above. See pages 3-9, *supra.* Moreover, this case is a judicial collection proceeding, not an administrative enforcement action. See pages 9-11, *supra.*[8] A judicial proceeding to collect a tax does not violate due process even when, as Section 6501(a) permits, it is commenced "without assessment" of the tax. 26 U.S.C. 6501(a). See *In re Goldston*, 104 F.3d 1198, 1201 (10th Cir. 1997); U.S. Br. 15 n.7. A judicial proceeding to determine and enforce a tax liability provides all the process that is due, for it affords respondents a meaningful opportunity to dispute the debt before payments of the tax must be made. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). Moreover, this Court has long held that due process is satisfied by the availability of *post*-collection judicial review of tax determinations, for "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for

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[8] Respondents have suffered no deprivation of due process from any acts of administrative collection for the simple reason that no such acts have been undertaken against them. In any event, as this Court held in rejecting a similar challenge by a stockholder who, as transferee of a corporation, was derivatively liable for the taxes owed by the corporation, "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." *Phillips* v. *Commissioner*, 283 U.S. at 595.

recovery, is paramount." *Phillips* v. *Commissioner*, 283 U.S. at 599; see note 8, *supra*.

Finally, respondents claim that it is unfair for the partnership tax obligation to have remained unpaid for so many years, accumulating interest and penalties along the way (Resp. Br. 2, 44, 45). That claim of unfairness is extraordinarily hollow. In their capacity as general partners, respondents obviously were aware of, and benefitted from, any delay in the payment of the debts for which they were responsible. Penalties are imposed for the purpose of ensuring timely compliance, and the interest that has accrued on the tax debt is simply a reflection of the time-value of the monies that the partners should have ensured were timely paid. Interest charges do not *create* unfairness, they *avoid* the unfairness that would otherwise exist if the debtor were allowed simply to withhold (and use) funds owed to a creditor for a lengthy period of time before paying them over.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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