No. _____

# In the Supreme Court of the United States

HOWARD L. BALDWIN AND
KAREN E. BALDWIN,
A MARRIED COUPLE, PETITIONERS

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

*National Cable & Telecommunications Association v. Brand X Internet Services* held that an agency's "*permissible* reading" of a statute trumps circuit-court precedent if the prior court had interpreted a statute that was silent or ambiguous with respect to the specific issue. 545 U.S. 967, 984 (2005) (emphasis in original). In all other situations, *stare decisis* dictates that opinions issued by federal appellate panels can be overruled only by *en banc* courts of appeals, by this Court, or by a properly enacted statute.

The Ninth Circuit in this case, acting under the *Brand X* doctrine, deferred to the Internal Revenue Service's interpretation of 26 U.S.C. § 7502 and held that the Ninth Circuit's prior construction of the statute did not bar IRS's subsequent contrary construction of that section because the statute was "silent" as to the specific legal issue. App.11a. The Ninth Circuit's precedent, established in 1992, had upheld the common-law mailbox rule. Nearly 20 years later in August 2011, IRS issued its contrary interpretation, which not only overruled court precedent but also abrogated a common-law rule that has prevailed for hundreds of years.

Absent *Brand X*, Ninth Circuit precedent based on ordinary tools of statutory construction would have controlled. Consequently, Howard and Karen Baldwin, who prevailed in district court, would have obtained a tax refund of about $168,000, plus statutory interest and attorneys' fees. Accordingly, the Baldwins present the following questions:

(1) Should *Brand X* be overruled?

(2) What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation, such as the common-law presumption canon?

## DETAILS REQUIRED BY RULE 14.1(b)

**Parties**

All parties are listed on the cover page.

Petitioners are Howard Baldwin and Karen Baldwin, a married couple, who were plaintiffs in the district court and appellees in the court of appeals.

Respondent (defendant-appellant in the court of appeals) is the United States of America.

**Rule 29.6 Statement**

None of the parties are corporations.

**Related Proceedings**

Proceedings directly related to the case are as follows:

- *Baldwin v. United States*, No. 2:15-CV-06004-RGK-AGR, U.S. District Court for the Central District of California. Judgment after bench trial entered December 2, 2016, and Order awarding attorney's fees entered January 24, 2017.

- *Baldwin v. United States*, Nos. 17-55115, 17-55354 (consolidated, respectively, appeal from the December 2 Judgment, and appeal from the January 24 Order), U.S. Court of Appeals for the Ninth Circuit. Panel decision issued April 16, 2019, and Order denying rehearing issued June 25, 2019.

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## PETITION FOR A WRIT OF CERTIORARI

Howard and Karen Baldwin, who produced the critically acclaimed movie *Ray* (2004) based on Ray Charles' life, had filed a claim for the refund of their 2005 income tax. Four months before the deadline to claim a refund, they mailed a refund claim to the Internal Revenue Service (IRS) to recover $167,663 in overpaid taxes by regular United States mail.

IRS claimed it never received their refund claim and refused to pay them. The Baldwins sued IRS to get their money back. There was an easy way to prove—and they did so at trial—that they had in fact mailed the claim on June 21, 2011, four months before the October 15 refund-filing deadline.

The relevant statute (26 U.S.C. § 7502), Ninth Circuit precedent, and the centuries-old common-law mailbox rule were all on the Baldwins' side. That precedent clearly allowed the Baldwins to prove the postmark date, which is deemed the date of delivery, by using extrinsic evidence such as witness testimony.

After trial, the district court entered judgment against IRS. On appeal, however, the Ninth Circuit concluded that IRS's later-in-time interpretation (issued in August 2011) trumps the centuries-old common-law mailbox rule, the Ninth Circuit's longstanding precedent, and the plain text of Section 7502, all under the *Brand X* doctrine. IRS's new interpretation did not allow use of extrinsic evidence to prove the postmark date of a tax document sent by regular U.S. mail.

Thanks to *Brand X*, the court below reversed the favorable outcome the Baldwins had obtained after full trial. Absent *Brand X*, the Ninth Circuit would have simply followed its *Anderson* (1992) decision. *Brand X*, therefore, was outcome-determinative here. The Court

should grant certiorari to revisit *Brand X*, or in the alternative, to determine whether *Brand X* permits an agency to uproot the common law and plug the hole with its own rule.

## OPINIONS BELOW

The Ninth Circuit opinion is reported at 921 F.3d 836. App.1a–15a. The district court opinion is not reported but reproduced at App.16a–31a.

## JURISDICTION

The Baldwins invoked the district court's jurisdiction under 28 U.S.C. § 1346(a)(1). The Ninth Circuit issued its opinion on April 16, 2019. App.1a. It denied a timely-filed petition for rehearing *en banc* on June 25, 2019. App.42a. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1254(1). This petition is filed within 90 days of the Ninth Circuit's denial of the petition for rehearing per Rule 13.3.

## RELEVANT STATUTES AND REGULATIONS

The relevant provisions are reproduced at App.44a–77a, namely: 26 U.S.C. §§ 6511, 7422, 7502; 28 U.S.C. § 1346; 26 C.F.R. § 301.7502-1 (old and new versions).

## STATEMENT OF THE CASE

### A. The Baldwins Mailed the Tax-Refund Claim Four Months Before the Filing Deadline

Howard and Karen Baldwin overpaid their 2005 income taxes. As a result, they were entitled to a tax refund of $167,663. App.18a.

To obtain the refund, the Baldwins had until October 15, 2011 to file their amended 2005 tax return pursuant to the limitations period given in 26 U.S.C. §§ 6511(a), (b)(1), (d)(2)(A). App.4a. IRS agrees that was their deadline. The Baldwins mailed the relevant tax documents by regular U.S. mail to IRS on June 21, 2011—*i.e.*, about four months before the statute of limitations ran. App.10a.

#### 1. Claiming the Filing Was "Untimely," IRS Sought Dismissal of the Baldwins' Suit

IRS claimed it never received the return. It denied the Baldwins' refund claim as "untimely." 26 U.S.C. § 7422(a); App.4a. The Baldwins then filed suit under 28 U.S.C. § 1346(a)(1).

In the district court, IRS filed a motion for summary judgment claiming the case should be dismissed for lack of jurisdiction. App.33a. In the motion, IRS argued that because the Baldwins' filing was untimely, the agency was immune from suit. To understand that argument, one needs to look at the statutory scheme.

There are several logical steps linking untimeliness with sovereign immunity in IRS's argument. It argued as follows:

- To maintain a civil action in federal court under 28 U.S.C. § 1346(a)(1) "for the recovery of" overpaid taxes—and to overcome sovereign immunity—the taxpayer must meet three requirements: (1) the taxpayer must fully pay the tax for the year in question. *Flora v. United States*, 362 U.S. 145, 176 (1960); (2) the refund claim must be "duly filed" with IRS under Internal Revenue Code (IRC) § 7422(a), 26 U.S.C. § 7422(a)[1]—*i.e.*, filed within the limitations period of Section 6511[2]; and (3) the tax-refund suit must be filed within the period given in IRC § 6532(a)(1).

- If there is a dispute as to the precise filing date, IRC § 7502 resolves such a dispute. Section 7502 provides that for tax-refund claims sent to IRS "by United States mail," the "postmark" date "shall be deemed to be the date of delivery" of the tax-refund claim. 26 U.S.C. § 7502(a)(1).

- Thus, a refund claim is "duly filed" within the meaning of Section 7422(a) if the "postmark" date falls, as relevant here, within the limitations period of IRC §§ 6511(a), (b)(1), (d)(2)(A).

- As a result, if the postmark date cannot be proved or if it falls beyond the statute of limitations, then

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[1] Unless otherwise noted, all statutory references are to Title 26 of the United States Code.

[2] Sections 6511(a), (b)(1), (d)(2)(A), as relevant here, establish a six-year limitations period to seek a tax refund. That is, Section 6511(d)(2)(A) adds three additional years to the three-year statute of limitations given in Sections 6511(a), (b)(1) for the specific type of refund claimed by the Baldwins.

federal courts do not have jurisdiction to entertain a taxpayer's tax-refund suit.

### 2. The Only Dispositive Issue Pertained to Section 7502

In its summary-judgment motion, based on this extended syllogism, IRS claimed it was immune from suit and had not waived sovereign immunity. App.35a. The Court held that the Baldwins plainly met the first and third requirements: they had fully paid (in fact, overpaid) the tax liability for tax-year 2005 and filed the suit within the prescribed time. App.36a.

The only question, therefore, was whether the Baldwins had met the second of these three requirements—timely filing of the refund claim. IRS maintained it never received the refund claim. App.37a.

Thus, the case depended on whether the refund claim was timely filed under Section 7502. That is, if the Baldwins could prove the postmark date of June 21, 2011, the refund claim would be deemed filed on that date, well before the October 15 deadline. Consequently, they would satisfy all three requirements for maintaining the tax-refund suit, establish the district court's jurisdiction, and receive their refund, plus statutory interest and attorneys' fees.

### B. The District Court Ordered Trial to Prove—and the Baldwins Proved—Timely Mailing Under Section 7502

#### 1. The Common-Law Mailbox Rule Under *Anderson* Applies Here

As relevant here, Section 7502 provides for two ways to prove the postmark date for tax documents sent by "United States mail": (1) presenting proof of registered or certified mail conclusively proves delivery, and (2) for other types of United States mail, such as regular or first-class mail, proving the postmark date by introducing extrinsic or circumstantial evidence establishes a presumption of receipt by IRS. Compare IRC § 7502(a)(1) (providing for "deliver[y] by United States mail," which includes, *inter alia*, priority mail, first-class mail, registered mail, certified mail), with IRC § 7502(c) (providing special rules for registered mail, certified mail, and electronic filing).

Following enactment of Section 7502 in 1954, a circuit split developed. On one side[3] were circuits holding that Section 7502 is "exclusive" and that it "displac[es] the common-law mailbox rule altogether." App.8a. In these circuits, Section 7502 does not "tolerat[e] testimonial and circumstantial evidence to prove when a document was mailed (and thus presumptively delivered)." App.8a. The Baldwins' claim would be considered untimely filed in these circuits because the only evidence they had establishing the June 21 postmark date was

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[3] *Maine Medical Center v. United States*, 675 F.3d 110 (1st Cir. 2012); *Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986); *Surowka v. United States*, 909 F.2d 148 (6th Cir. 1990); *Carroll v. Commissioner*, 71 F.3d 1228 (6th Cir. 1995).

"[o]ral testimony and documentary exhibits," which these circuits do not allow. App.17a.

On the other side[4] of the split were circuits concluding that Section 7502 "is best read as providing a safe harbor" for taxpayers. App.8a. These circuits relied on the principle that "statutes should not be read as displacing the common law unless Congress clearly so intended." *Id.* Section 7502 in these circuits did not "displace the common-law mailbox rule." At common law, "proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." App.5a. The Baldwins' refund claim would have been duly filed in these circuits based on oral testimony and documentary exhibits that proved the refund claim was postmarked June 21, 2011.

The Ninth Circuit, in *Anderson v. United States*, adopted the latter reasoning. 966 F.2d 487 (9th Cir. 1992). *Anderson* was a refund-recovery suit like the Baldwins'. The sole question, as here, was whether the plaintiff "had filed a timely claim for refund." 966 F.2d at 488. Acknowledging the circuit split, *Anderson* held that "[n]either the language of the statute nor Ninth Circuit precedent bars admission of extrinsic evidence to prove

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[4] *Philadelphia Marine Trade Ass'n–Int'l Longshoremen's Ass'n Pension Fund v. Commissioner*, 523 F.3d 140, 147 (3d Cir. 2008); *Estate of Wood v. Commissioner*, 909 F.2d 1155, 1161 (8th Cir. 1990) (affirming U.S. Tax Court's *en banc* decision in *Estate of Wood v. Commissioner*, 92 T.C. 793 (1989)); *Sorrentino v. IRS*, 383 F.3d 1187 (10th Cir. 2004).

The Fourth and Federal Circuits have declined to take sides on this question. *Spencer Medical Associates v. Commissioner*, 155 F.3d 268, 272 (4th Cir. 1998); *Martinez v. United States*, 101 Fed. Cl. 688, 693 (2012) (citing *Davis v. United States*, 230 F.3d 1383 (Fed. Cir. 2000)).

timely delivery," and that "enactment of Section 7502 did not displace the common law presumption of delivery" because the "statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule." *Id.* at 491.

The common-law rule has an ancient pedigree. As far back as 1884, this Court concluded that the common-law mailbox rule is "well settled" for letters sent by United States mail, *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884):

> The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

In the Baldwins' case, the Central District of California said that the Ninth Circuit's *Anderson* decision, which in turn relied on *Rosenthal*, controlled. The court explained that "the common law provides that proof of timely mailing of the return raises a rebuttable presumption that it was timely received." App.37a (quoting *Anderson* at 491). Under Section 7502, a taxpayer can introduce extrinsic and circumstantial evidence of mailing to establish "a presumption of receipt." App.37a (citing *Anderson*).

### 2. IRS Overruled the *Anderson* Decision by Amending Its Regulation

In 2011, however, IRS amended 26 C.F.R. § 301.7502-1 ("Regulation"), and made "registered or

certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received." App.37a–38a (emphasis in original) (citing 26 C.F.R. § 301.7502-1(e)). Consequently, the question the district court had to address was whether IRS's interpretation of Section 7502 controls or whether *Anderson* does.

### 3. The District Court Concluded that *Anderson* Controls

The district court concluded that the "regulation is in direct conflict with Ninth Circuit precedent"—*Anderson*—"which allows credible extrinsic evidence of mailing to create a presumption of receipt." App.38a.

However, IRS argued that because "any prior judicial constructions of [§ 7502] are superseded by reasonable agency interpretations of ambiguous statutes" under the *Brand X* doctrine, the agency's regulation should get "*Chevron* deference." App.38a.

The district court saw "no statutory ambiguity" in Section 7502 and held that IRS's 2011 Regulation "materially alters an otherwise clear statute." App.39a. Because the court found "that § 7502 is not ambiguous," it granted "no deference … to the Treasury Department's interpretation of the statute." App.40a.

*Anderson* therefore controlled, the court explained. App.40a. The court permitted the Baldwins to present extrinsic evidence proving the date when the tax-refund claim was postmarked. Since the "credibility of each party's evidence is for a jury to weigh, and is not a determination made at summary judgment," the court denied IRS's motion for summary judgment and ordered the parties to proceed to trial "with respect to the timely filing of their refund claim." App.41a.

### 4. The Baldwins Proved Their Claim Was Postmarked June 21, 2011

The court conducted a bench trial. App.3a. At trial, the Baldwins proved that their assistant had mailed the refund claim to IRS "via regular mail at the … post office," and that it "would have arrived at the IRS service center in the ordinary course well before the October 15, 2011 deadline." App.18a. IRS "offer[ed] no affirmative evidence calling into question that the [Baldwins] mailed [the refund claim] … on June 21, 2011." App.18a.

Thus, the court found "*credible*" the Baldwins' evidence that the refund claim "was indeed mailed on" June 21, 2011, and that IRS "failed to rebut the presumption of delivery." App.19a–20a (emphasis added); see *Anderson*, 966 F.2d at 492 ("The district court's conclusion that the government failed to rebut the presumption of delivery was, in essence, a credibility determination.").

The court reiterated that the common-law mailbox rule applied because Section 7502 "did not displace the common law presumption of delivery" dictated by the rule. App.19a (quoting *Anderson*, 966 F.2d at 491). The common-law rule, the court explained, states that "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." App.20a (citing *Rosenthal*, 111 U.S. at 193–94).

Therefore, the Baldwins had "met the requirements of 28 U.S.C. § 1346, and ha[d] further demonstrated that they are entitled to a tax refund of $167,663." App.22a. The court also awarded attorneys' fees and costs to the Baldwins as the prevailing parties. App.24a–31a.

IRS appealed from the district court's judgment and its order awarding fees and costs to the Baldwins—two cases that the Ninth Circuit consolidated.

### C. The Ninth Circuit Concluded that *Brand X* Required It to Give *Chevron* Deference to IRS's Amended Regulation

In the Ninth Circuit, IRS argued that the district court erroneously rejected the government's deference argument—that its Regulation barred application of *Anderson*'s common-law mailbox rule. App.10a. It claimed that the district court erred in viewing Section 7502 "as unambiguously supplementing, rather than supplanting, the common-law mailbox rule, thus leaving no room for the agency to adopt the construction of the statute reflected in [the Regulation]." App.10a.

The Baldwins argued that because Section 7502 is unambiguous, *Brand X* does not switch on *Chevron* deference for IRS's Regulation. App.10a. They also argued that if the court applies *Brand X* and affords *Chevron* deference, IRS still cannot repeal common law unless the statutory language the agency is construing clearly and explicitly repeals the common-law rule. The common-law presumption canon, which is a traditional tool of statutory construction applied at *Chevron* Step One, dictates this result. App.12a. Finally, they argued that IRS should not be permitted to simply override the Ninth Circuit's *Anderson* decision under the *Brand X* doctrine. App.13a.[5]

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[5] The Baldwins also argued, using traditional tools of interpretation, that the default common-law mailbox rule applies because Section 7502 applies when a tax document is sent before, but received after, the applicable due date. They argued, because the statute does not address a situation where, as here, IRS claims it never received the document, the default common-law mailbox rule should apply. See *Storelli v. Commissioner*, 86 T.C. 443, 447 (1986) ("The provisions of section 7502(a) are applicable, however, only if

The Ninth Circuit concluded that "IRC § 7502 is *silent* as to whether the statute displaces the common-law mailbox rule," App.11a (emphasis added), and it further concluded that statutory silence triggers the *Brand X* doctrine under which courts "employ the familiar two-step analysis under *Chevron*[.]" App.10a.

In a single paragraph, without employing any traditional tools of statutory construction, the court decided at *Chevron* Step One that Section 7502 is "silent." App.11a. Then proceeding immediately to *Chevron* Step Two, again in a single paragraph, the court held that IRS's "construction of the statute is reasonable." App.12a.

In sum, the Ninth Circuit held that IRS's Regulation "is valid and applicable" under *Brand X*. Thus, the "exclusive" way left for the Baldwins to prove that the refund was postmarked June 21, 2011 was to produce a registered-mail or certified-mail receipt. 26 C.F.R. § 301.7502-1(e)(2). In other words, because they had mailed their refund by regular mail, the Regulation gave them no way to prove the postmark date. Therefore, the Baldwins' tax-refund claim was deemed not "timely filed" under the Regulation. Consequently, they could not maintain the tax-refund suit, having failed to overcome sovereign immunity. App.15a. No longer being

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the petition is delivered."). The Ninth Circuit rejected that argument. App.13a–14a.

They had also argued that the Regulation, which was promulgated in August 2011—two months after they mailed their refund claim—does not apply for that reason. The 2011 Regulation provides that it "will apply to all documents mailed after September 21, 2004." App.14a (quoting 26 C.F.R. § 301.7502-1(g)(4)). The court rejected the Baldwins' argument, concluding that the retroactivity provision of the Regulation complies with IRC § 7805(b), "which authorizes the Treasury Secretary to make regulations retroactively applicable as far back as the date of their proposal." App.14a–15a.

"prevailing parties," the court also reversed the Baldwins' attorneys'-fees award. App.15a.

The Ninth Circuit's decision thus depended on the *Brand X* doctrine, and on the question of what, if any, deference a federal agency's statutory construction should receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation like the common-law presumption canon. The Baldwins present precisely those questions here.

## REASONS FOR GRANTING THE PETITION

### I. RECONSIDERATION OF *BRAND X* IS LONG OVERDUE

Lower-court judges have urged this Court to revisit *Brand X*. The Court should grant certiorari and overrule *Brand X* because it erodes *stare decisis*, it is unworkable, and it was wrongly decided. Further, reconsidering *Brand X* need not have any effect on the applicability or validity of *Chevron* or *Kisor*. As the district court explained, without *Brand X*, the Baldwins clearly get their money back.

#### A. *Brand X* Subverts *Stare Decisis*

*Brand X* enables agencies to circumvent *stare decisis*. It empowers agencies to take out precedents they do not like via regulation—even ones like *Anderson* (1992), *Rosenthal* (1884), and the centuries-old common-law mailbox rule. The agencies may then replace unfavorable precedents by providing only cursory justification—not "special justification"—for the changes. Adherence to and judicial respect for *stare decisis*, therefore, should actually compel discarding *Brand X*.

*Brand X* allows agencies to undercut predictability, stability, fair notice to parties like the Baldwins, reasonable reliance, and settled expectations—values that *stare decisis* and the Due Process Clause protect. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Any departure from *stare decisis* "demands special justification—something more than an argument that the precedent was wrongly decided." *Id.* (cleaned up).

The Baldwins' case illustrates the fair notice problem especially well. In light of longstanding common law, a decades-old statute, and the then two-decade-old *Anderson* decision, the Baldwins had every reason to expect that they would be able to rely on extrinsic evidence (should it become necessary) to prove they mailed their return on time. Instead, thanks to the workings of *Brand X*, the Ninth Circuit allowed IRS in one swoop to erase the common law, the statute, and the court precedent simply by passing a new regulation—*after* the Baldwins had already filed their return. Such palpable unfairness is diametrically opposite to *stare decisis* values like fair notice and reasonable reliance.

Even if that were not so, *stare decisis* should not be a bar to overruling *Brand X*. "The ultimate touchstone of constitutionality is the Constitution itself and not what [this Court has] said about it." *Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring). *Stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

Further, *Brand X* itself did not address the constitutional objections that the Baldwins raise here. It cannot, therefore, be said that this Court has rejected these constitutional arguments by adhering to *Brand X* for 14 years. Cases such as *Brand X* "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality). In fact, *Brand X* has "no precedential effect" on whether the doctrine it established is constitutional. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Because the constitutional arguments were "not … raised in briefs or argument nor discussed in the opinion of the Court … [it] is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Although Justice Scalia flagged the *Brand X* decision as "probably unconstitutional," none of the parties presented the constitutional arguments the Baldwins raise here. 545 U.S. at 1017. Nor did the *Brand X* majority discuss these constitutional concerns. Therefore, *stare decisis* cannot excuse this Court from considering the constitutionality of *Brand X* deference now.

Moreover, *Brand X*'s constitutionality is not susceptible to percolation or burgeoning circuit splits. "It is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The lower courts simply must follow the mandates emanating from this Court. Therefore, it is particularly telling that a growing number of court of appeals judges—and Members of this Court—have nonetheless called upon the Court to reconsider *Brand X*.

There is no reason to "perpetuate[]" a faulty "practice" just because it has been around for 14 years; in fact that experience shows that such decisions "should be terminated, not perpetuated." *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 231 (N.J. 1952).

In sum, *Brand X* supplies a mechanism for subverting *stare decisis* to federal agencies. The Court should grant certiorari to reconsider *Brand X* because the "special justification" needed to overturn this precedent is that *Brand X* itself does enormous damage to *stare decisis*. The "special care" this Court—and the courts of appeals—take to preserve their precedents dictates that *Brand X* should not be kept on the books. *Kisor* at 2418.

### B. *Brand X* Is Unworkable

*Brand X* is unworkable in practice. Before *Brand X*, courts seldom explicitly stated whether a statute is silent, truly ambiguous, or unambiguous. Such missing assessments makes *Brand X* unworkable. Judges had no inkling that they must utter the "magic words"—"ambiguous" or "unambiguous"—"in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia sharply criticized the workability of *Brand X* in his *Home Concrete* concurrence. Before *Brand X*—and even "pre-*Chevron*"—no one was aware of the "utility (much less the necessity) of making the ambiguous/nonambiguous determination" during the "judicial-review analysis." *Home Concrete*, 566 U.S. at 493. Even assuming that an ambiguous statute impliedly "delegate[s] gap-filling authority to an agency," that hardly resolves situations where a pre-*Brand X* decision did not even make the "ambiguous/nonambiguous determination." *Id.* at 488.

What's more, the delegation of gap-filling authority is absent when a statute is *silent*—as much as, if not more

than, when the statute is unambiguous. If the rule were to the contrary, every instance of Congressional silence would turn into an open-ended delegation of gap-filling authority to agencies with no limiting principle. Such statutory "silence" cannot be an "invitation to regulate." *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit). Thus, *Brand X* transgressed the Constitution when it concluded that statutory "silence suggests … that the [agency] has the discretion to fill the consequent statutory gap." 545 U.S. at 997. The court below took it a step further and said that because *Anderson* was silent as to whether Section 7502 is silent, ambiguous, or unambiguous, the agency's permissible reading trumps court precedent under *Brand X*. App.13a.

However, even assuming Section 7502 is silent as to whether it was intended to displace the common-law mailbox rule, such silence should also compel the conclusion that the common law still applies. See *Arangure v. Whitaker*, 911 F.3d 333, 337 n.2, 339 (6th Cir. 2018). Silence in this context does not create a gap for the administrative agency to fill. It forms the basis for a statutory rule of construction—the common-law presumption canon—which, as explained below, makes Section 7502 clear. That is precisely what the Ninth Circuit had previously determined in *Anderson*. 966 F.2d at 491.

*Anderson* (1992), which predated *Brand X* (2005), did not use the magic words "ambiguous," "unambiguous," or "silent." Instead, it simply ruled, based on a straightforward reading of the text of Section 7502 that the "postmark" date of a tax document sent by "United States mail" can be proved by presenting credible extrinsic evidence. But the court below concluded—based on an extremely sparse statutory-construction analysis—that Section 7502 is "silent" as to whether it supplements or

supplants the common-law mailbox rule. App.11a.[6] Because *Anderson* did not expressly "hold … that our interpretation of the statute was the *only* reasonable interpretation," the court below deferred to IRS's 2011 amended Regulation. App.13a (emphasis in original). But the court also acknowledged that *Anderson* "made clear that our decision … filled a statutory gap" with the common-law mailbox rule. App.13a.

*Brand X* presumably applies only to a "reasonable reading of an ambiguous statute" but not when the statute is unambiguous. *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). Except by the court below, App.11a, *Brand X* has not been applied in statutory-silence situations, and if this Court's statement in *Eurodif* is any indication, it should probably not apply in statutory-silence situations because there is "no statutory uncertainty to be resolved." 555 U.S. at 315.

More importantly, *Brand X* is unworkable because it provides no assurance that following the rule of law and conforming one's conduct accordingly will lead to predictable consequences. Litigants like the Baldwins are doomed if they comply with court precedent, common law, or the statute. The Baldwins did not know, at the time they made the fateful decision to mail their refund claim by regular U.S. mail, that they needed to predict whether IRS might change its interpretation of Section 7502. Tasking the Baldwins to be omniscient is the antithesis of a workable rule of law.

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[6] Every court, in addition to the court below, that has expressly evaluated whether Section 7502 is silent, ambiguous, or unambiguous has said that the statute is "silent" as to how a taxpayer may prove the postmark date. *Sorrentino*, 383 F.3d at 1193; *Carroll*, 71 F.3d at 1231; *Lewis v. United States*, 942 F. Supp. 1290, 1293 (E.D. Cal. 1996).

At the time the Baldwins mailed their refund claim in June 2011, IRS's now-current rule—allowing only registered or certified mail receipts to prove the postmark date—was not the law of the land. The law, as it stood in June 2011 was the Ninth Circuit's *Anderson* decision. Deferring to IRS under *Brand X* in such situations would mean that the Baldwins erred in complying with established circuit precedent and erred in not complying with IRS's *proposed rule* when they mailed their refund claim by regular U.S. mail.

*Brand X* thus demotes federal-court opinions into mere advisory opinions and promotes even federal-agency *proposed* rules into governing law. See *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 531 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone") (Under *Brand X*, court rulings are "necessarily provisional and subject to correction when the agency chooses to adopt its own interpretation of the statute" and when "[a]gencies alone can speak … as to what the law means."). Such a rule is in direct tension with the most basic high-school-level understanding of rule-of-law precepts: "fair notice, reasonable reliance, and settled expectations." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

The Court should grant certiorari to reconsider *Brand X* and provide a workable—and Constitutional—standard for litigants and lower courts to follow.

### C. *Brand X* Was Wrongly Decided

The Court should grant certiorari in this case to revisit *Brand X* because it violates due process, Article III judicial independence, separation of powers guarantees of the Constitution, and it undermines the judiciary's role to say what the law is.

### 1. *Brand X* Denies Due Process and Impairs Judicial Independence Under Article III

Deferring to the agency's interpretation of a statute when such construction overrides prior court precedent violates the Due Process Clause by commanding judges to exhibit bias toward government litigants. *Brand X* deference "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of power leads to "more than a few due process … problems." *Id.* at 1155.

*Brand X* removes the judicial blindfold. It requires judges to display systematic bias favoring agency litigants—and against counterparties like the Baldwins. *Brand X* deference thus "embed[s] perverse incentives in the operations of government" and requires courts to "bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Authority*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). The "risk of arbitrary conduct is high" and *Brand X* puts "individual liberty … in jeopardy" because "an agency can change its statutory interpretation with minimal justification and still be entitled to full deference." *Id.* at 280. It is a denial of due process when judges "engage in systematic bias in favor of the government … and against other parties." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016).

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Brand X* institutionalizes a regime of

systematic judicial bias by requiring courts to "defer" to agency litigants especially where the agency litigant, as here, openly ignores or disregards prior court precedent. *Brand X* thus forces judges to abandon their own judgment about what the law is and instead consciously substitute the legal judgment of one of the litigants before them.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [them]." 28 U.S.C. § 453. And federal judges are ordinarily very scrupulous about living up to these commitments. Nonetheless, under *Brand X*, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold and precommit to favoring the government agency's position.

Whenever *Brand X* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's last-in-time interpretation of the law. Indeed, judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729, 1734 (2018) (Kagan., J., concurring).

Judges also abandon their duty of independent judgment when they "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but *first*." *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (emphasis added). Under *Brand X*, "the agency is free to expand or change the obligations upon our citizenry without any change in the statute's text." *Id.* That truth is especially obvious here because Section 7502(a) has *not* changed in relevant part since 1954. And

the common-law mailbox rule was considered "settled" well before 1884. *Rosenthal*, 111 U.S. at 193.

Other judges have also properly refused to abdicate their judicial duty. In *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812, 823 (8th Cir. 2017) (*en banc*), criticizing *Brand X*, the majority explained that applying *Brand X* "would leave the Board free to disregard any prior Supreme Court or court of appeals interpretation of the NLRA." Thus, refusing to abandon judicial independence, the *MikLin* majority withheld *Brand X* deference from the NLRB's new interpretation that had effectively "overruled" this Court's and the Eighth Circuit's decisions. *Id.* at 821.

*Brand X* mandates that the government litigant win as long as its preferred interpretation of the regulation seems "permissible," even if it is wrong. Here, IRS's interpretation is the exact *opposite* of long-standing, well-reasoned decisions of several federal appellate courts. It casually discards a centuries-old common-law mailbox rule. It is also contrary to the plain meaning of an Act of Congress that echoed settled common law. Worse still, IRS demanded—and received—*Brand X* deference to its Notice of *Proposed* Rulemaking issued in 2004, 69 Fed. Reg. 56377-01 (Sep. 21, 2004). App.14a. The Regulation, 26 C.F.R. § 301.7502-1 (pre- and post-2011 versions reproduced at App.52a–77a), was not amended until the Notice of Final Rulemaking was issued in August 2011—two months *after* the Baldwins had already mailed their refund claim. 76 Fed. Reg. 52561-01 (Aug. 23, 2011). The Baldwins were unable to order their actions in advance to conform with the law. That violates fundamental rule-of-law precepts.

In addition to the abundant criticism already noted, several jurists have explicitly urged this Court to revisit *Brand X*. See *Gutierrez-Brizuela* at 1150–51 (2015)

(Gorsuch, J., concurring) ("semi-tam[ing]" "some of *Brand X*'s more exuberant consequences"); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Garfias-Rodriguez*, 702 F.3d 504 (*en banc*) (Kozinski, J., "disagreeing with everyone" & Reinhardt, J., dissenting); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (per Berzon, J., dissenting, joined by Pregerson, Fisher, Paez, JJ.). "[E]xecutive agencies" should not be "permitted to … reverse court decisions like some sort of super court of appeals." *Gutierrez-Brizuela* at 1150. The Court should therefore grant certiorari to revisit *Brand X* and restore due process and judicial independence.

### 2. *Brand X* Violates the Constitution's Separation of Powers

In *Kisor v. Wilkie*, Justice Gorsuch, joined by Justices Thomas, Alito, and Kavanaugh, criticized *Brand X*: "if an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really determines what the regulation means?" 139 S. Ct. at 2433 (Gorsuch, J., concurring in the judgment) (cleaned up). Justice Thomas, who authored *Brand X*, criticized it later and explained that it "raises serious separation-of-powers questions," "is in tension with Article III's Vesting Clause," and "Article I's [Vesting Clause]." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Such concerns are especially valid in this case where an Article II agency amended its regulation to overrule Article III court decisions, settled common law, and the plain text of an Article I act of Congress.

The Constitution provides foundational rules for the operation of our government. Congress writes the laws. The Executive Branch enforces them. The Judiciary

independently interprets them. But *Brand X* threatens to consolidate all three functions in a single administrative agency—here, IRS—and to contravene both the laws written by Congress and prior judicial interpretations of those laws.

The Constitution establishes a system of separated powers: "[T]o avoid the possibility of allowing politicized decisionmakers to decide cases and controversies about the meaning of existing laws, the framers sought to ensure that judicial judgments 'may not lawfully be revised, overturned or refused faith and credit by' the elected branches of government." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Neither an Executive Department official "nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." *Hayburn's Case*, 2 U.S. 409, 410 n.* (1792). Hence, when the Treasury Secretary nullifies *Anderson*, that action is every bit as unconstitutional as was the War Secretary's action revising the decision of a federal court in *Hayburn's Case*. *Id.*

"Yet this deliberate design, this separation of functions aimed to ensure a neutral decisionmaker for the people's disputes, faces more than a little pressure from *Brand X*." *Gutierrez-Brizuela* at 1150; see also *De Niz Robles* at 1171 & n.5 (collecting pertinent authority). *Brand X* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution." *Gutierrez-Brizuela* at 1149.

Justice Scalia, joined by Justices Souter and Ginsburg in part, dissented in *Brand X*. Justice Scalia called the majority's decision "not only bizarre" but "probably

unconstitutional." 545 U.S. at 1017. Indeed, "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *Id.* But that is precisely what *Brand X* endorses. The agency that "is party to the case in which the Court construes a statute … [is] able to disregard that construction and seek"—and obtain—"*Chevron* deference for its contrary construction the next time around." *Id.*

*Brand X* "emphatically" undermines "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court should grant certiorari to resolve this "serious separation-of-powers" problem with *Brand X*. *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring).

### D. Overruling *Brand X* Need Not Affect the Applicability or Constitutionality of *Kisor* or *Chevron*

*Brand X* is somewhat unique among government-litigant-bias doctrines. While *Chevron* and *Kisor* are triggered where a court construes a statute or regulation issued sometime in the past, *Brand X* deals with the order of events reversed. The clear difference is this: *Brand X* requires not merely judicial deference to agency interpretation, but also judicial acquiescence in agency non-deference to judicial interpretation. It is thus a direct assault on judicial authority. If agency action abrogates an earlier-in-time *court decision*, *Brand X* switches on *Chevron* deference in favor of the government litigant. *Brand X* being such a "bizarre" beast, 545 U.S. at 1017, it can be overruled without necessarily affecting the applicability or validity of *Chevron* or *Kisor*.

## II. ALTERNATIVELY, THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER THE *BRAND X* DOCTRINE PERMITS AN AGENCY TO DISREGARD TRADITIONAL STATUTORY-CONSTRUCTION TOOLS

Even if this Court is reluctant to repudiate *Brand X*, it still should at least clarify when the case applies.

### A. The Court Should Clarify that the First Analytical Step Before Applying *Brand X* Should Be Rigorously Applying Traditional Tools of Statutory Construction to a Statute's Text

The "cursory" statutory-construction analysis employed by the court below is a classic example of "reflexive deference" that this Court should grant certiorari to reject. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The lower court's scant statutory-interpretation analysis ignored the traditional, "ordinary tools of statutory construction," *id.*, the effect of which was to endorse IRS's interpretation that ignored, among other canons of construction, the common-law presumption canon, and the *contra proferentem* canon that applies to tax laws. *Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537, 547 (1956) ("[A] question as to the meaning of a taxing act [is] to be read in favor of the taxpayer."). Even if legislative history were to play a role in this step-one textual analysis (*Anderson* had evaluated Section 7502 using traditional tools in detail, and also using legislative history), that history also points to the speciousness of IRS's argument.[7]

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[7] Congress enacted Section 7502 "to mitigate the harsh inequities of a literal adherence to the filing requirements … . Under that section a [tax document] is 'deemed' filed as of the date of the U.S. postmark stamped on the envelope in which it is mailed."

This Court has not crafted "explici[t]" instructions about statutory-construction analysis under *Brand X*, which has left lower courts in a state of confusion. *Arangure*, 911 F.3d at 339–40. Granting certiorari in this case will enable the Court to alleviate that confusion.

Consider, for instance, the common-law presumption canon. Where, as here, there is "statutory silence in the face of existing common law," "courts presume that general statutory language incorporates established common-law principles … unless a statutory purpose to the contrary is evident." *Id.* at 337 n.2, 339. So, "silence" cannot be automatically equated with "ambiguity." *Id.* at

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*Wells Marine, Inc. v. Renegotiation Bd.*, 54 T.C. 1189, 1192–93 (1970). The Tax Court has long followed the common-law mailbox rule: "To establish that a return has been timely filed, we require reliable testimony or other corroborating evidence of the circumstances surrounding the return's preparation and mailing." *Hyler v. Commissioner*, 84 T.C.M. 717, 2002 WL 31890047 at *11 (2002). In 2010, a year before IRS amended the Regulation, the Tax Court had once again held that "extrinsic evidence is admissible" under 26 C.F.R. § 301.7502-1(c)(1). *Van Brunt v. Commissioner*, T.C. Memo. 2010–220, 100 T.C.M. (CCH) 322 (2010). Repeatedly failing to obtain favorable decisions from the courts, IRS instead promulgated the Regulation and got rid of the court decisions it did not like on this topic.

Section 7502, however, is

> Totally devoid of any language to indicate that Congress intended a registered or certified mailing to be the exclusive means of proving a postmark. Indeed, the House and Senate Reports specifically state with respect to an amendment to IRC § 7502 that 'the taxpayer, of course, could also establish the date of mailing by other competent evidence (besides registered or certified mail receipts).'

Kenneth H. Ryesky, *Tax Simplification: So Necessary and So Elusive*, 2 Pierce L. Rev. 93, 121 & n.192 (2004) (quoting S. Rep. No. 90-1014, at 19 (1968); H.R. Rep. No. 90-1104, at 14 (1968)).

338. "[N]or does it automatically mean that a court can proceed to *Chevron* step two," as the lower court did here. *Id.*

The common-law presumption canon is "not based on a normative judgment that the common law is better as a policy"; "[r]ather, it is based on a descriptive judgment: Congress legislates against a common-law backdrop and presumably does not intend to reject that backdrop with general statutory language." *Id.* at 343.[8] It would indeed be hard to come by "an interpretive tool more traditional than the centuries-old common-law presumption." *Id.* (cleaned up). This Court expressed the same principle over two centuries ago: "The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 623 (1812); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. Rev. 109 (2010) (discussing the common-law presumption canon); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2120 (1990) ("When the relevant interpretive norm is part of an effort to discern legislative instructions, *Chevron* is uncontroversially subordinate to that norm"). Although this Court has "a canons first

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[8] Here, for example, Congress knew how to override the common-law mailbox rule (or restrict mailing methods to registered or certified mail) in Section 7502—but it did neither. See, *e.g.*, 10 U.S.C. § 1566(g)(2) (requiring actual delivery); 52 U.S.C. §§ 30104(a)(2)(A)(i), (a)(4)(A)(ii), (a)(5) (abrogating the common-law mailbox rule, restricting mailing methods); 42 U.S.C. §§ 1395w-112(b)(4)(A)(iii), (b)(4)(D)(iv) (preserving the common-law mailbox rule for payments, but not for claims). See also 39 U.S.C. § 404 (the postal service follows the common-law mailbox rule); Supreme Court Rule 29; Fed. R. App. P. 25; Fed. R. Bankr. P. 8011; 38 U.S.C. § 7266 (following the common-law mailbox rule).

rule, … it has not said so *explicitly*." *Arangure*, 911 F.3d at 339–40 (collecting cases; cleaned up; emphasis added).

Due to lack of explicit instructions from this Court, lower courts inconsistently apply *Brand X*. For example, some courts have concluded that the "common-law presumption canon qualifies as a 'traditional tool' of statutory interpretation." *Arangure* at 342. The Sixth Circuit, *Arangure* shows, gives no deference to agency interpretations in derogation of the common law. Nor do the Second, Fifth, Ninth, Eleventh, and D.C. Circuits.[9]

The court below, departing from these courts, and previous panels of the Ninth Circuit, upheld IRS's interpretation in derogation of the common law. The court declared the common-law presumption canon merely a "dueling principle[] of statutory interpretation," on par with IRS's "equally permissible construction of the statute." App.12a. In effect, the court below performed *no*

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[9] See, *e.g.*, *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018) (8 U.S.C. § 1401 incorporates the common law presumption of legitimacy); *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 369–70 (5th Cir. 2018) ("absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses"); *United States v. Garcia-Santana*, 774 F.3d 528 (9th Cir. 2014) (courts use common law at *Chevron* Step One); *Lagandoan v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004) (Congress can override the common-law presumption with express language; without express language, Congress is presumed to legislate against the background of the common law); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1292 (11th Cir. 2016) ("*Chevron* step one" "analysis ends" "[b]ecause Congress indicated by its silence that … the common law governed"); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017) (whether a "worker" is an "employee" or "independent contractor" is a question "of pure common-law agency principles involving no special agency expertise that a court does not possess"; "this particular question under the [NLRA] is not one to which we grant the Board *Chevron* deference or to which the *Brand X* framework applies").

traditional-tool analysis to determine whether Section 7502 is ambiguous, unambiguous, or silent, and instead jumped straight to *Chevron* Step Two and concluded that IRS's interpretation was "permissible." *Id.* That shortcut approach collapses the whole *Brand X–Chevron* inquiry into a single step: *Chevron* Step Two.

But *Brand X* did not endorse this game of hopscotch that skips the traditional-tool analysis. The Court should grant certiorari to clarify that courts must conduct a thorough analysis of the statutory text using traditional tools of statutory construction to determine whether the statute is truly ambiguous, unambiguous, or silent.

### B. The Court Should Specify that *Brand X* Is Not a Magic-Words Review of the First-in-Time Court's Decision

The Court should also grant certiorari to indicate that the *Brand X* analysis does not turn on whether the first-in-time court characterized the statute as silent, ambiguous, or unambiguous. That is because pre-*Brand X* courts seldom if ever expressly categorized statutes as silent or (un)ambiguous. Instead, the *Brand X* Step One analysis should look at whether the first-in-time court performed a traditional-tool analysis regardless of whether it expressly placed the statute in one of these three silos. If the first-in-time court did resort to such analysis, then that first-in-time decision, and not the later-in-time agency interpretation, should control. In other words, federal agencies should not be able to trump judicial decisions that have scrupulously applied traditional tools of statutory construction.

The court below, instead, performed a cursory magic-words review. It said, because *Anderson* was silent as to whether Section 7502 is silent, ambiguous, or

unambiguous, the court will defer under *Brand X* to the agency's permissible or reasonable reading of the statute. App.13a.

*Home Concrete* indicates why this clarification is sorely needed. There, the Court had to evaluate whether a Treasury Regulation interpreting a statute trumped a prior Supreme Court decision—*Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958)—interpreting the tax statute. In *Colony* the Court had written that "it cannot be said that the language is unambiguous." 357 U.S. at 33. The *Home Concrete* majority relied on this standard to conclude that the statute is "now unambiguous," 566 U.S. at 489 (cleaned up), and declined to defer under *Brand X* to IRS's regulation. In other words, the outcome turned on how the first-in-time court chose to characterize the statute on the silent–ambiguous–unambiguous continuum.

However, the "now unambiguous" formulation in Justice Breyer's majority opinion also seems to suggest that a court confronted with the question of whether *Brand X* applies should look to *how* the first-in-time court (*Colony*) analyzed the text of the statute, not the *label* the court used. *Home Concrete* concluded that when a prior decision "makes clear" that it is filling a statutory gap, the statute then becomes "unambiguous" and there is "no gap to fill," and consequently the courts should not defer to the agency's later-in-time interpretations attempting to re-fill that already-filled gap. 566 U.S. at 489–90.

Furthermore, any permissibility or reasonableness of agency interpretation is at its lowest ebb when the agency does not invoke or depend on the agency's "substantive expertise." *Kisor*, 139 S. Ct. at 2417. IRS has no "substantive" or "special" "expertise" in the common law. *FedEx*, 849 F.3d at 1128; see also *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 761 (8th Cir. 1982) (NLRB

has no "special expertise" in "common law agency principles"); *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–93 (10th Cir. 1978) (the "basis for deference ebbs" when the "interpretive issu[e] … fall[s] more naturally into a judge's bailiwick," such as "elucidat[ing] … a simple common-law property term").

This Court has confirmed that "[s]tatutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). It simply cannot be that Congress abrogated common law in Section 7502 (its plain words reveal the opposite), and it cannot be that Congress, through ambiguity or silence, authorized IRS to abrogate the longstanding common-law mailbox rule. Cf. *Rios v. Nicholson*, 490 F.3d 928, 931–32 (Fed. Cir. 2007) ("Congress did not intend to abrogate the common-law mailbox rule" by enacting 38 U.S.C. §§ 7266(c)(2), (d)); *Savitz v. Peake*, 519 F.3d 1312, 1315 (Fed. Cir. 2008) (concluding that 38 U.S.C. § 7105(b)(1) did not supplant or "abrogate" the common-law mailbox rule).[10] Thus, if *Brand X* survives, it should apply at most in rare instances where the meaning of the statute truly cannot be ascertained using ordinary statutory-construction methods.

If this Court is unwilling to overrule *Brand X*, it could at least follow the approach the Court took in *Kisor*. A rigorous analysis employing ordinary statutory-interpretation tools should resolve this case and many other *Brand X* cases. The only "reflexive" portion of a court's analysis should be to turn to statutory construction at the first step. The Court should grant certiorari to make it clear once and for all that courts' first resort is

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[10] The Third, Eighth, Ninth (under *Anderson*), and Tenth Circuits have concluded that Section 7502 supplements and does not supplant the common-law mailbox rule. See *supra* n.4.

analyzing the applicable statute using ordinary tools of statutory construction, including canons of construction.

## III. THIS CASE IS AN ATTRACTIVE VEHICLE TO RESOLVE THE CRITICALLY IMPORTANT QUESTION OF WHETHER *BRAND X* SHOULD BE OVERRULED OR CABINED

This case is an ideal vehicle to answer the questions presented. The district court applied *Anderson* instead of the later-in-time Regulation. The Ninth Circuit, per *Brand X*, deferred to the later-in-time Regulation and discarded *Anderson*. If the district court is right, the Baldwins win; if the Ninth Circuit is right, the Baldwins lose. The questions, therefore, are cleanly presented and outcome-determinative.

Further, this case has well-developed facts entered into the record after a full-fledged bench trial, which makes it an ideal vehicle. No further facts need to be developed; no procedural-posture problems exist like the ones which crop up in cases coming up to this Court upon grants of motions to dismiss.

The *Brand X* questions are front and center, and when answered, would resolve the case. They are also critically important questions that affect *every single* tax document filed with IRS—that's at least as many tax documents as there are taxpayers in the Nation. It is thanks to Section 7502 that the date "April 15" has obtained such cultural significance, and perhaps notoriety too, as "Tax Day." IRS's website, for example, says: "File on: April 15th," When to File, IRS (May 1, 2019), https://bit.ly/2kl0LrM, and clarifies further, "Your return is considered filed on time if the envelope is properly addressed, postmarked, and deposited in the mail by the due date." *Id.* IRS's argument against the Baldwins

based on its amended Regulation that registered or certified mail receipts are "the exclusive means to establish … evidence of delivery" suggests otherwise. 26 C.F.R. § 301.7502-1(e)(2)(i), App.74a.

Justice Story once refused to defer to a Treasury Department interpretation of an Act of Congress when Treasury had argued that its construction is "entitled to great respect." Justice Story said, "the judicial department has … the solemn duty to interpret the laws; and … in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *United States v. Dickson*, 40 U.S. 141, 161–62 (1841). Justice Story had it right, and the *Brand X* doctrine has it wrong. The Baldwins' case is an optimal vehicle to discard the *Brand X* doctrine—or at least narrow it considerably.

## CONCLUSION

The writ should issue.

Respectfully submitted, on September 23, 2019.

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