No. _____

In the Supreme Court of the United States

Steven T. Waltner and Sarah V. Waltner,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the longstanding "common-law mailbox rule," a properly-addressed and stamped letter is presumed to have been delivered within 1-3 days after it was placed in the mailbox. Under IRC §7502, a document mailed to the IRS or the Tax Court, postmarked on or before the deadline, is considered timely filed. *If* it is sent by certified or registered mail, a written receipt is prima facie evidence of delivery. Since 1954, there has been a split among the circuits as to whether §7502 completely replaced the common-law mailbox rule or merely supplemented it. Adopting the minority view, in 2011 the Treasury Department amended the regulation for §7502 to add an evidentiary rule that, absent a postmark, the proof of purchase of certified or registered mail is the *only* evidence that can create a presumption of timely delivery. Reg. §301.7502-1(e)(2) (the "Regulation").

Petitioners mailed their notice of appeal to the Tax Court five days before their deadline, but the clerk did not docket it. The Court of Appeals dismissed, holding that §7502 and the Regulation prevented that court from considering Petitioners' evidence of early mailing of their notice of appeal because the common-law rule, and that court's own precedent that §7502 shows no Congressional intent to replace that rule, are no longer good law.

The first question presented for review is:

1. Whether the Ninth Circuit incorrectly held, in conflict with precedents in the Third, Eighth, Ninth, and Tenth Circuits, that under 26 CFR §301.7502-1(e) the common-law mailbox rule no longer is available to establish timely filing of tax documents.

QUESTIONS PRESENTED – Continued

Additionally, in their collections due process case below, Petitioners demonstrated for the Tax Court that Respondent committed a fraud upon that court when, among other things, he filed, in response to a court order, perjured declarations and fabricated government documents. For that reason, Petitioners alternatively urged the Court of Appeals to declare the decision of the Tax Court void. However, the Court of Appeals did not address the question.

The second question presented for review is:

2. Did the Court of Appeals have jurisdiction to determine whether the Tax Court decision below was void because it was obtained by fraud on the court?

RELATED CASES

- *Waltner v. Commissioner*, No. 8726-11L, United States Tax Court. Decision entered January 21, 2016.
- *Waltner v. Commissioner*, No. 16-72754, U.S. Court of Appeals for the Ninth Circuit. Opinion entered April 30, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS -- Continued

TABLE OF CONTENTS -- Continued

TABLE OF CONTENTS -- Continued

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES -- Continued

TABLE OF AUTHORITIES -- Continued

TABLE OF AUTHORITIES -- Continued

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES -- Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven T. Waltner and Sarah V. Waltner petition this Court for a Writ of *Certiorari* to review the final judgment of the United States Court of Appeals for the Ninth Circuit holding that it lacked jurisdiction over their appeal because a Treasury Regulation supplanted the common-law mailbox rule and determined that Petitioners' third-party evidence of early-mailing of their Notice of Appeal no longer was sufficient to establish timely delivery.

OPINIONS BELOW

Petitioners have reproduced in their Appendix the Tax Court's final Decision issued January 21, 2016 (A-1), the Ninth Circuit's July 10, 2019 Order denying the petition for rehearing (A-3),[1] and the Ninth Circuit's unpublished Memorandum Opinion issued on April 30, 2019 (A-4).

JURISDICTION

The opinion of the Court of Appeals was entered on April 30, 2019. A timely-filed petition for rehearing was denied on July 10, 2019. The jurisdiction of this Court is invoked under 26 U.S.C. §7482(a)(1)[2] and 28 U.S.C. §1254(1).

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[1] References to the Appendix included with this Petition are designated as "A-__."

[2] Hereinafter, unless otherwise indicated, all section references are to the United States Code, Title 26 ("IRC").

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V (A-7), IRC §7502 (A-7), and Treas. Reg. §301.7502-1(e), (A-10).

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STATEMENT OF THE CASE

In the case below and in *Baldwin v. U.S.,* 921 F.3d 836 (2019) (which had raised the identical mailbox-rule issue and on which the Court of Appeals relied in this case), the Ninth Circuit effectively overturned its opinion in *Anderson, supra,* in which it had aligned itself with opinions of the Third, Eighth and Tenth Circuit Courts of Appeals. *Anderson* is now replaced with the position expressed in the conflicting opinions of the Second and Sixth Circuits, to the absurd and unjust result that, through no fault or negligence of their own, Petitioners lost their right to appeal. The 65-year-old split of authority on the question of whether §7502 and the Regulation replaced the common-law mailbox rule with a more limited evidentiary rule continues to confound.

A. Background proceedings, and events whereby Petitioners' right to appeal was compromised by matters outside of their control.

In 2011, Petitioners petitioned the Tax Court for a redetermination of taxes and civil penalties that the Internal Revenue Service ("IRS") had sought to collect by lien and levy for several tax years. After summary judgment against them, and particularly in light of the recent opinions of the Second Circuit in *Chai v. Commissioner*, 851 F.3d 190 (2017) (holding

the Commissioner to his statutory burdens of production and proof of penalty liability) and the Tax Court in *Graev v. Commissioner,* 149 TC 23 (2017) (adopting *Chai,* which, as one judge pointed out, meant that the Tax Court possibly had been imposing penalties unlawfully for 20 years against hundreds of thousands of taxpayers[3]), Petitioners sought to appeal.

On April 15, 2016, five days before their deadline, Petitioners filed their Notice of Appeal ("NOA") with the Tax Court by the only means that they could afford: U.S. First Class Mail.

Unbeknownst to Petitioners, their appeal was not docketed. Upon eventually discovering that fact after the deadline had passed, they inquired and were told that it never arrived. Whether employees of the Postal Service or of the Tax Court lost or destroyed the NOA is unknown, but its disappearance meant that there was no postmark to establish timely filing. Fortunately, Petitioners had mailed their NOA early enough to arrive on time and they could prove it by other evidence.

Relying on the centuries-old common-law mailbox rule and the Ninth Circuit's precedent, *Anderson v. U.S.*, 966 F.2d 487, 489 (CA9 1992), which holds that the common-law rule was not in conflict with, or replaced by, §7502, Petitioners electronically filed a letter to the Clerk of the Tax Court, a copy of the previously-mailed NOA, and proof of mailing the NOA—including not only Mrs. Waltner's declaration, but also the corroborating Affidavit of Mailing of a disinterested third-party who attested to handing the

[3] 149 TC 23, *31, Holmes, J., concurring in result only.

postage-prepaid envelope addressed to the Tax Court Clerk containing the NOA to a Postal employee at the Scottsdale Post Office (collectively, the "Statement"). [A-15]. The Tax Court struck the Statement from the record because it was not filed by mail. Petitioners re-submitted the Statement by mail. The Tax Court docketed the NOA as having been filed five days after that re-submission was mailed.

The Court of Appeals ordered briefing on the effect of §7502's postmark rule and of the common-law mailbox rule, after which it directed the parties to address in their briefs that court's jurisdiction.

In their briefs, Petitioners argued that the Court of Appeals had jurisdiction to review the case because Petitioners had proven that they mailed the NOA early enough to allow timely physical delivery in due course of the mails and that, therefore—under the common-law mailbox rule, Federal Rules of Appellate Procedure ("FRAP") Rule 13(a), and the Ninth Circuit precedent in *Anderson,* on all of which Petitioners relied—their NOA was timely filed. Petitioners never invoked the protections of §7502, and they explained to the Court of Appeals that the statute was inapplicable in the circumstances of this case.

Petitioners also briefed the Court of Appeals that, in response to a court order, the Commissioner, through his counsel, and three of his employees, had attempted to persuade the Tax Court that he had met his burdens of proof and production in the collections case below by filing with that court perjurious testimony and tampered evidence, including forged government forms and a fabricated administrative file. Petitioners argued that these submissions, most of which are felonies under state and federal law,

worked a fraud on the Tax Court that rendered the court's subsequent judgment void, and they argued that the Court of Appeals has the inherent power to vacate a void judgment, even collaterally. Further, Petitioners argued that no judgment obtained by fraud on the court is in accord with due process.

Relying entirely on the Regulation, the Commissioner urged the Court of Appeals to act in contravention of its precedent in *Anderson* and to disregard Petitioner's uncontroverted evidence of timely mailing, arguing that the postmark rule in §7502 and the Regulation barred Petitioners' appeal because the common-law mailbox rule was abolished in 2011 by the Department of the Treasury.

Petitioners replied that only the Commissioner's failure to correctly interpret §7502 leads to this erroneous contention because (1) §7502 does not apply to the circumstances of this case, and (2) under time-honored canons of statutory construction, and under this Court's analysis in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984), the Regulation is not entitled to judicial deference. Petitioners also pointed out that the Commissioner declined to address—and therefore waived—the due process and fraud on the court issues.

After briefing on jurisdiction and on the merits was completed, the Court of Appeals issued, and published, its decision in *Baldwin, supra,* in which it decided to depart from its prior opinion in *Anderson* and, instead, to defer to the Regulation. In so doing, the Court of Appeals reversed the decision of the Central District of California in *Baldwin* that under *Chevron* the Regulation was invalid.

Two weeks later, the Court of Appeals issued an unpublished memorandum opinion in the case below ("Opinion"), citing *Baldwin,* without considering the due process or fraud on the court issues. The Court of Appeals held that the common-law mailbox rule and *Anderson* were no longer the law [A-5] and that the Treasury Regulation "limited the types of evidence that can prove timely filing." [A-5]. Under the Regulation's supposed requirements, because Petitioners had chosen U.S. Mail rather than the more expensive mailing services such as certified and registered mail and designated delivery services, Petitioners offered "no allowable evidence to prove timely filing" of their NOA. [A-6]. The Court of Appeals dismissed Petitioners' appeal for lack of subject matter jurisdiction.

Petitioners seek a writ of *certiorari*.

B. The basis for jurisdiction in the trial and appellate courts.

The Tax Court had jurisdiction under §6320(c), §6330(d)(1), and *Callahan v. Commissioner*, 130 T.C. 44, 47-49 (2008) to review the administrative determinations by the IRS Office of Appeals following collection due process hearings that it conducted. But the Tax Court's judgment was obtained by fraud on that court that was perpetrated by officers of the court in response to a court order.

Under §7482(a)(1), the Court of Appeals had exclusive jurisdiction to review the final decision of the Tax Court, entered on January 21, 2016, which upheld those administrative determinations.

C. The undisputed facts relevant to jurisdiction and to the questions presented.

1. In their Statement, Petitioners submitted (i) a letter to the Clerk of the Court, (ii) the Declaration of Sarah V. Waltner ("Waltner Declaration") appending (a) a copy of Petitioner's NOA that they had mailed via U.S. Mail on April 15, 2016, and (b) an Affidavit of Mailing signed by John Meissner ("Meissner Affidavit"), a disinterested third-party owner of an authorized mail services center who corroborated the early mailing of the NOA. [A-15; ER28-42].

2. The Commissioner did not contest any fact stated in the Waltner Declaration or the Meissner Affidavit, including Mr. Meissner's corroborating attestation that he personally delivered the duly-addressed and stamped envelope containing the NOA to the postal employee at the Scottsdale Post Office for postmarking on that date. [A-24-25].

3. The Commissioner offered no evidence that the Clerk of the Tax Court denied receiving the April 15, 2016 NOA, and he offered no evidence of non-receipt of the NOA by the due date of April 20, 2016.

4. Petitioners did not seek the protections afforded by §7502.

5. On appeal, the Commissioner did not contest the issues of his fraud on the Tax Court or his actions that deprived Petitioners of their right to due process of law. Response Br. 46, Reply Br. 15-16.

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REASONS WHY THIS PETITION SHOULD BE GRANTED

The Courts of Appeals have adopted conflicting interpretations of §7502 of the Internal Revenue Code. These conflicting interpretations have produced disparate results on the same basic facts. The application of the rules concerning the timely filing of documents and payments with the IRS and the Tax Court is a frequent and recurring matter, and it is one of substantial importance to the administration of the tax laws. Applying those rules frequently determines the substantive outcome of a tax dispute or bars access to judicial review of agency action. Neither the Regulation nor the Ninth Circuit's Opinion in this case (which announced that the court essentially had switched sides within the split among the circuits) has resolved the circuit split. This Court needs to resolve this 65-year-old conflict to avoid continuing uncertainty and to assure just and consistent application of the revenue laws and of the rules of evidence in tax cases. The facts of the case below present the precise issue on which the courts of appeals disagree. Thus, this case provides an ideal opportunity to resolve the circuit split that affects millions of citizens. Review of the decision in this case therefore is warranted.

I. There has long been a split between decisions of the Third, Eighth, Ninth and Tenth Circuits and those of the Second and Sixth Circuits, which split the Ninth Circuit's reversal of its own position only exacerbates.

A. The law prior to enactment of §7502.

Prior to 1954, the time of filing tax documents was determined primarily by the physical delivery rule, set forth by this Court in *U.S. v. Lombardo*, 241 U.S. 73, 76 (1916). The *Lombardo* Court ruled that filing "is not complete until the document is delivered and received." *Id.* The physical-delivery rule governs filings with both the IRS and the Tax Court.

However, under the well-established legal presumption that arises at common law, a letter which is properly sealed, stamped, addressed, and deposited in the U.S. Mails or delivered to the postman is presumed to reach the addressee and to be received by him in due course of the mails.[4] As the Claims Court pointed out in 1967, the common-law mailbox rule and its rebuttable presumption have a venerable history.

> This presumption has been approved by many authorities and has long been recognized by the courts. *See Dunlop v. United States*, 165 U.S. 486, 495, 17 S.Ct. 375, 41 L.Ed. 799 (1897); *Hagner v. United States,* 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884); *Columbian Nat'l Life Ins. Co. v. Rodgers*, 93 F.2d 740, 742 (10th Cir. 1937) and cases there cited; *Central Paper Co. v. Commissioner*, [199 F.2d 902 (CA6 1952)]; *Detroit Automotive Products Corp. v. Commissioner*, 203 F.2d 785 (6th Cir. 1953); *Schultz v. United States*, [132 F.Supp. 953, 132 Ct.Cl. 618 (1955)]; *Arkansas Motor Coaches, Ltd.,*

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[4] "Due course" is generally 1-3 days if sent by First Class Mail. *Charlson Realty, infra,* 384 F.2d 441; USPS Web site.

> *Inc. v. Commissioner*, [198 F.2d 189 (CA8 1952)]; *Borden Co. v. U.S.*, 134 F.Supp. 387, 391 (D.N.J. 1955).

Charlson Realty Company v. U.S., 384 F.2d 434, 444 (Cl.Ct.1967); *accord In re Nimz Transportation, Inc.*, 505 F. 2d 177, 179 (CA7 1974). Indeed, in this Court's decision in *Rosenthal, supra*, in which it first announced the common-law mailbox rule, this Court acknowledged that the rule already was "well-settled" by 1884. 111 U.S. 193; *Hagner*, *supra,* 285 U.S. 430.

While the presumption raised by evidence of timely mailing is rebuttable, it is grounded on the universal premise that government employees properly discharge their duties and on the trust the nation consistently has shown in the U.S. Postal Service. *Charlson Realty, supra,* 384 F.2d 444 ("Postal employees are presumed to discharge their duties in a proper manner." Citations omitted).

> Founded in the early days of our national life [the U.S. Postal Service] has had nearly two centuries of successful operation. Its officials and employees have a natural pride in its accomplishments. It has justly earned the confidence of the people of the United States. It is in no way remarkable that business, both private and governmental, trusts its efficiency in important business and personal transactions of all kinds.

Id. at 447-448 (Jones, Senior judge, concurring).

The presumption of delivery is one of fact and "can only be rebutted by specific facts and not by invoking another presumption." *Arkansas Motor Coaches*, *supra,* 198 F. 2d 191; *Crude Oil Corp. v. Commissioner*, 161 F.2d 809, 810 (CA10 1947)

(remanded to determine issue of fact raised by proof of regular mailing, with no weight given to Commissioner's presumption of correctness); *Central Paper, supra,* 199 F.2d 904 ("The presumption is not rebutted by the fact that the letter might *possibly* have been lost or misplaced by postal employees before delivery to the mail box of The Tax Court." Emphasis the court's.)

In 1952, the Eighth Circuit enunciated the common-law mailbox rule in *Arkansas Motor Coaches, supra* (petition for review of tax deficiency sent to the Tax Court by U.S. Mail six days before the 90-day deadline). The Tax Court had dismissed the case on the ground that the petition, which was received in bad condition and had been delayed, was filed out of time. The Eighth Circuit vacated that order, holding that the petition would be presumed to have arrived at the Tax Court in time and should be filed and docketed for consideration on the merits. 198 F.2d 193.

The Sixth Circuit applied the common-law mailbox rule in *Central Paper Co. v. Commissioner*, *supra,* and again the following year in *Detroit Automotive, supra*. In both cases, the Sixth Circuit held that when mail matter is properly addressed and deposited in the U.S. mails, with postage prepaid, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail. The court found in each case that the Commissioner failed to rebut that presumption, and it reversed the Tax Court's dismissal. *See also Haag v. Commissioner*, 59 F.2d 516, 517 (CA7 1932) (the court found that a letter was mailed to the IRS and therefore was presumed to have been received).

In the year following the enactment of §7502, the Ninth Circuit, without mentioning the statute, applied the common-law mailbox rule in the appeal of a judgment denying recovery in a refund case. The court regarded "the concededly proper and timely mailing of the claims in this instance as positive evidence giving rise to a strong presumption of delivery to the Collector. The showing that a search of the pertinent files in the latter's office revealed no record of the claims having been filed is a purely negative circumstance, insufficient, in our opinion, to rebut the presumption of delivery." *Jones, supra,* 226 F.2d 27.

Under the common-law mailbox rule, the presumption only can assist those who can establish that the document was mailed early enough *to arrive on or before* the deadline. *Philadelphia Marine Trade Association etc. v. Commissioner,* 523 F.3d 140, 149 (CA3, 2008). The common-law mailbox rule does not excuse late filing; it helps to establish whether a paper was mailed in time to arrive by the deadline.

B. The circuits have adopted opposing views as to whether, and to what extent, the law that determines successful filing with the IRS and the Tax Court changed in 1954.

In 1954, Congress added §7502 to the Internal Revenue Code. A judge of the Claims Court called this enactment Congress's "manifest effort to further liberalize the legal presumption incident to the timely mailing of claims and other documents," and found that it in no way affected the common-law mailbox rule enunciated and relied upon in *Arkansas Motor Coaches. Charlson Realty, supra,* 384 F.2d at 446

(Jones, Senior Judge, concurring). "This rule of the effective use of the mails is fair to everyone and unfair to no one." *Id.; accord Philadelphia Marine, supra,* 523 F.3d 149 ("For starters, the text of §7502 does nothing to affect the mailbox rule in cases such as the one before us.")

To those protections already available at common law, Congress added two more safeguards. First, it provided that a properly-addressed and postage-prepaid document mailed to the IRS or the Tax Court shall be deemed timely filed, even if it was received after that deadline, so long as the postmark showed that it was mailed before—or on—the deadline. §7502(a). The statute excuses late-delivery under these circumstances. By its terms, though, the statute applies only in cases where the tax documents in question actually were delivered.

Subsection (c) further provides conditionally that, "if" registered mail was used instead of regular mail, the registration receipt would be rebuttable evidence of date of mailing *and* of delivery. This was an additional rebuttable presumption of delivery that had not been provided under the common-law rule (which, in contrast, does not excuse late delivery and applies only to early-mailed papers to establish delivery in 1-3 days).

In 1958, Congress amended §7502(c) to provide the IRS and the Tax Court with the authority to extend to certified mail the same presumption that already was afforded to registered mail. Treasury exercised that new authority by regulation. *See* Technical Amendments Act of 1958, Pub. L. 85-866 (72 STAT. 1606, 1665 (1958)), sec. 89; Reg. §301.7502-1(c)(2) [A-9].

Thirty years later, as part of the IRS Restructuring and Reform Act of 1998 ("RRA"), Congress again amended §7502 by adding subsection (f) to authorize the IRS to publish rules providing the extent to which the presumption allowed for Certified Mail would be extended to the use of Designated Delivery Services. Public Law 105-206; Taxpayer Bill of Rights 2, Public Law 104-168 (110 Stat. 1452 (1996)), sec. 1210. Subsection (f) provides that the Secretary may designate a delivery service *only* if he determines, among other things, that the delivery service "is at least as timely and reliable on a regular basis as the United States mail." *Id.*

To filers of tax documents, the statute has provided an obvious assist by adding presumptions to those that already were available at common law. The Ninth Circuit considered it a remedial statute. "Congress enacted section 7502 to mitigate the harshness of the old common law physical delivery rule…" which the court said left taxpayers vulnerable to "postal service malfunctioning." *Anderson, supra,* 966 F.2d 490.

The majority of the Courts of Appeals—those for the Third, Eighth, Ninth and Tenth Circuits—adopted the view that, even if a filer cannot avail himself of either of the two presumptions provided by §7502, he still is entitled to raise a rebuttable presumption of timely delivery by way of circumstantial evidence of early mailing. *Estate of Wood v. Commissioner*, 909 F.2d 1155 (CA8 1990); *Anderson, supra*; *Sorrentino v. IRS,* 383 F.3d 1187, 1191 (CA10 2004); *Philadelphia Marine, supra* (CA3 2008). In these Circuits, the "courts have viewed the issue as an evidentiary matter, holding a taxpayer to

a strict standard of proof before invoking a presumption of receipt." *Sorrentino*, 383 F.3d at 1191.

Courts that considered the language of the statute determined that it suggested no Congressional intention to impinge on, let alone to eliminate altogether, the common-law mailbox rule. In *Estate of Wood*, *supra,* the Eighth Circuit explicitly rejected the Government's positions (i) that "absent registration or certification...the taxpayer bears the risk of loss as to any document which the IRS claims not to have actually received," *id*. at 1158, and (ii) that "Congress has completely displaced the common law presumption by the enactment of section 7502." *Id.* at 1160. As the Tenth Circuit pointed out, "[i]nstead, the *Wood* Court read §7502(c) as a 'safe harbor' because Congress intended §7502 to benefit the taxpayer." *Sorrentino, supra,* 383 F.3d 1192.

The *Wood* court applied the "normal rule of statutory construction…that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," and that "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *Wood* at 1160 (citations omitted). The *Wood* court explained:

> Accordingly, for section 7502 to completely displace the common law presumption of delivery, we must find some statutory or legislative indication that Congress so intended.
>
> No such indication exists in the legislative history…. Nor does the statutory scheme indicate that subsection (c) should be read with such exclusivity. This is especially true when we

> suppose, as we must, that Congress knew of the common law presumption of delivery. Thus, as we have indicated, if Congress intended that subsection (c) was to be the exclusive instance in which a presumption of delivery could apply, we think that it would have said so.

Id. at 1160-1161.

Similarly, in *Anderson*, *supra,* the government urged the Ninth Circuit to rule that the provisions of §7502 (i) provide the exclusive options available to those endeavoring to prove timely filing, (ii) limit the type of evidence that is admissible to prove timely mailing, and (iii) establish a statutory mailbox rule that preempts the common-law mailbox rule. The Ninth Circuit rejected all these contentions, holding definitively that "the language of section 7502 does not set forth an exclusive limitation on admissible evidence to prove timely mailing and does not preclude application of the common law mailbox rule." 966 F.2d 487, 489 (1992).

> Furthermore, we agree with the Eighth Circuit that enactment of section 7502 did not displace the common law presumption of delivery. The statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule. Accordingly, we decline to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule.

Id. at 491 (citing *Wood,* 909 F.2d at 1157).

Likewise, in *Sorrentino*, the Tenth Circuit stated that it was "not prepared, based upon §7502's plain language, to hold a taxpayer may *never* prove delivery to the IRS of the 'undelivered [document]' in the absence of a registered, certified, or electronic

mail receipt." *Sorrentino*, 383 F.3d 1193 (emphasis the court's). The Tenth Circuit declined to adopt the view that §7502 abolishes the mailbox rule "because…the present language of §7502 *does not compel* such a result," but held that the taxpayer must corroborate his own testimony with "a meaningful evidentiary showing." *Id.* at 1194 (emphasis the court's). The dissent in *Sorrentino* also agrees that "§7502 does not entirely supplant the common law Mailbox Rule," *Id.* at 1197.

And in 2008, in circumstances similar to those in this case, the Third Circuit, in *Philadelphia Marine*, *supra,* held that §7502 "actually excuses late receipt," and saw "no indication that Congress intended to preempt the mailbox rule for taxpayers who do not seek §7502's protection." *Id*. at 149-150, 152.

Other circuits have wrestled with interpreting §7502. The Fifth Circuit in 1957 interpreted §7502 to be "clear, explicit, and strictly limited," with a "plain and unambiguous meaning," but that court strictly construed it to mean that, despite the fault of government employees in the delay of mailing a prisoner's petition to the Tax Court, the resultant untimely postmark deprived the court of jurisdiction. *Rich v. Commissioner,* 250 F.2d 170, 174 (CA5 1957). The court of appeals acknowledged that the case presented "a grossly inequitable situation," and its dissent considered this construct a "judge-made rule"[5]

[5] The dissent characterized the result as "harsh" and "ridiculous," referring to prior opinions finding "that late arrival of an appeal timely posted did not excuse the delay because the citizen took a *risk* in using the mails, just as he would had he sent it by pony express, freight, steamboat, pirogue, or dirigible." *Rich, supra,* 250 F.2d at 176 (Brown, Circuit Judge, dissenting; emphasis in original). *Compare* this Court's ruling

which was "unrealistic, if not unbecoming to a Government whose own facility (postal system) was thusly so disparaged." *Id.* at 176.

The dissent in *Rich* said about §7502, "properly construed, this Act, conceived out of a purpose to liberalize, should not be interpreted to compel a result so beyond any Congressional expectation." 250 F.2d at 175. The dissent argued that the court's uber-strict interpretation of the statute was contrary to a reasonable view of Congressional intent, and that the court should "permit proof of timely filing to be made by other *conclusive* ways where, for one reason or another, the postmark is not available." *Id.* at 177 (footnote omitted, emphasis in original).

The Fourth Circuit later adopted the view taken by the dissent in *Rich* and expressly declined to follow the majority opinion. *See Curry v. Commissioner*, 571 F.2d 1306 (CA4 1978); *see In re Koehler*, 619 F.2d 548, fn. 2 (1980). The Fourth Circuit rejected the Government's position that §7502 provides the exclusive means of mitigating the 90-day requirement of §6213(a) for filing petitions in the Tax Court.

> Section 7502 was enacted "to eliminate the random distribution of hardships occasioned by variations in postal performance."….It dealt with the problem of late mail delivery, the most common governmental cause of delayed petitions, but there is no indication that this legislation was

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(establishing what courts refer to as "the prison mailbox rule") that "the Court of Appeals had jurisdiction over petitioner's appeal because the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 276 (1988).

> intended to repudiate *Arkansas Motor*'s fundamental rationale that the government should not be allowed to frustrate a taxpayer's access to court.

Curry, supra, 571 F.2d 1308 (citation omitted).

The Second and Sixth Circuits, without citation to the legislative history of the statute,[6] have taken a position that is the opposite of the majority rule: that under §7502, the *only* exceptions to the physical delivery rule are the two conditionally set forth in section (c) of the statute. *See, e.g., Deutsch v. Commissioner,* 599 F.2d 44, 46 (CA2 1979) (holding that the exceptions in §7502 "demonstrate a penchant for an easily applied, objective standard," so if the section is not literally applicable, a taxpayer may not "prove delivery and timeliness by other evidence without benefit of the presumption" that the statute allows); *Miller v. U.S.,* 784 F.2d 728 (CA6 1986) (holding that "the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502"); *Carroll v. Commissioner*, 71 F.3d 1228, 1232-33 (CA6 1995) (common law mail box rule does not apply to save taxpayer's claim).

In *Carroll*, the Sixth Circuit stated, "In this circuit, a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril." *Id*. at 1229. The *Carroll* panel expressed dissatisfaction with the Circuit's prior conclusion that the common law mailbox rule, with its non-statutory presumption of delivery, does not apply in that circuit to save a taxpayer's claim that he placed a return or claim in the ordinary mail.

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[6] *See Estate of Wood, supra*, 909 F.2d 1160.

The *Carroll* panel stated, "[u]nless the Supreme Court or Congress should decide otherwise… *Miller*…will remain good law in the Sixth Circuit." 71 F.3d at 1232.

To the filer's challenge in *Deutsch* that "it is a denial of due process to bar him from proving that he mailed his petition in any way other than provided by section 7502," the Second Circuit responded, without citation, (i) that Congress's rationale in §7502 was "to limit proof of mailing to some type of objective evidence" and (ii) that this supposed rationale finds support in "administrative convenience and the likelihood that a petition never received was never sent." *Deutsch, supra,* 599 F.2d 46.

In 2002, in the Seventh Circuit, a bankruptcy court criticized the Sixth Circuit's decisions in *Miller* and *Deutsch*, and noted that its court of appeals had not yet ruled directly as to "whether §7502 abolished the mailbox rule applicable under earlier cited authority as to tax filings." *In re Payne*, 283 BR 719, 723 (Bankr. N.D. Ill. 2002). Relying on *Estate of Wood, supra,* the bankruptcy court stated, "there is nothing in §7502 which shows that Congress intended to abolish the general mailbox rule. Further, it would be an anomaly to allow the IRS to invoke the mailbox rule [as it had done in at least two cases in the Seventh Circuit], but to refuse application of the same to taxpayers." It held that the statute provides a "safe harbor" to allow debtors in bankruptcy to file timely returns and avoid late-filing penalties. Payne filed too late to avoid those penalties, and thus the safe-harbor provisions were unavailable to him, but the IRS argued for an unrebuttable presumption that Payne never filed his return at all because he did not send his return by certified or registered mail. The

court held, "That position is not supported by the Bankruptcy Code or §7502(c)." *Payne, supra,* 283 BR at 724.

And the Claims Court seems to have drifted from *Charlson Realty*. *See, e.g., Martinez v. U.S.,* No. 09-531T, Opinion (Fed.Cl. January 5, 2012), claiming that there existed a "longstanding Court of Federal Claims precedent that §7502 contains the only exceptions to the physical delivery rule."

Perhaps to groom the public for its eventual attack on the common-law rule, Treasury included rhetoric in its initial regulations implementing §7502 that suggested dire consequences for mailing tax documents by regular mail, including repetition of the word "risk." For example, Reg. §301.7502-1(c)(1)(iii)(A) states: "the sender who relies upon the applicability of section 7502 *assumes the risk* that the postmark will bear a date on or before the last date," and that the filer should see paragraph (c)(2) "to *avoid this risk*" (emphasis added). Subsection (c)(2) claims the arguable benefit that "*the risk* that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail." *Id.* (emphasis added).

This language starkly contradicts Congress's reference in §7502(d) to the consistency and reliability of the U.S. Mail.

In 2011, the IRS issued a final amendment to the §7502 regulations that limited a taxpayer's ability to prove actual delivery to cases where he can establish proof of purchase of registered mail, certified mail, or private delivery services. Reg. §301.7502-1(e)(2) [A-10]. It is this Regulation on which the Ninth

Circuit exclusively relied to support its holding that it lacked subject matter jurisdiction over Petitioners' appeal of this case. Petitioners were not allowed to prove timely mailing of their NOA with anything other than evidence of the purchase of extra mail services that, at the time, Petitioners could not afford.

C. Even if Treasury's stated intention in further amending Reg. §301.7502-1—to guide the Circuits out of their conflict—were a legitimate Treasury function (which it is not), the amendment failed to accomplish that result.

The Ninth Circuit in *Baldwin, supra,* stated, "[i]n August 2011, the Treasury Department *sought to resolve the split* by promulgating an amended version of Treasury Regulation §301.7502-1(e)." 921 F.3d 841 (emphasis added.) *See* Federal Register (69 FR 56377, no. 04-21218) ("[t]he proposed regulations are necessary to provide greater certainty on this issue and to provide specific guidance…on the need to use registered or certified mail to file documents with the IRS and the United States Tax Court to enjoy a presumption of delivery.")

Petitioners argued to the Ninth Circuit that Congress did not authorize Treasury (i) to interpret, let alone to eliminate, the common law by a legislative regulation, (ii) to view the conditional ("if") provisions of §7502 as exclusive ("only") requirements, or (iii) to dictate rules of evidence pertaining thereto. They also argued that Treasury's self-serving act in the guise of resolving a circuit split was presumptuous because that power and

responsibility is exclusively the province of this Court.

But, even if, *arguendo*, Treasury's act were not an encroachment on this Court's authority, the Regulation nevertheless failed to resolve the circuit split. Decisions issued since the Regulation was made final in 2011 demonstrate that the courts remain conflicted as to whether §7502 provides the *exclusive* means of raising a presumption of delivery—even when a filer does not invoke the statute's safe-harbor protections.

The Ninth Circuit is the only appellate court that has given deference to the Regulation. *Baldwin, supra,* 921 F.3d 842-843. Some courts, in light of the Regulation, consider all pre-2011 precedents to be no longer viable. *See, e.g., McBrady v. U.S.*, 167 F.Supp.3d 1012, 1017 (D. Minn. 2016); *Jacob v. U.S.* (E.D. Mich. 2016). Other courts have expressed uncertainty as to the Regulation's validity. *See, e.g., In re Witcher,* No. Case No. 13-00614 (Bankr. D.D.C. 2014) ("If §301.7502-1(e)(2) is invalid," the uncorroborated testimony nevertheless was inadequate to raise the common-law presumption of delivery); *Meinhold v. U.S.* (D. Col. 2015) ("But even if the regulations are disregarded, the question of whether §7502 supplants the common law mailbox rule is rendered moot" by insufficient evidence). In all the cases just cited, the courts found that the evidence introduced was insufficient to raise a presumption of delivery under either the common-law or the statutory exceptions, and thus did not reach the questions of whether they will give deference to the Regulation. *See, e.g., Maine Medical Center v. U.S.,* 675 F.3d 110, 116-118 (CA1 2012) (appellant mailed its refund claim on the date of the deadline, so

the common-law mailbox rule was unavailable, and it did not show a timely postmark for purposes of §7502.)

Finally, last year, two trial courts (in the Fourth and Ninth Circuits) applied the common-law mailbox rule without considering the effect of the Regulation. *Casto v. Branch Banking and Trust Co.* (S.D. W.Va. 2018) (citing *Philadelphia Marine, supra*) (finding that, since the presumption raised had been rebutted, a triable issue of fact existed); *Jones, Bell, Abbott, Fleming & Fitzgerald LLP v. U.S.*, (C.D. Cal. 2018), ¶¶ 12, 31 (held that plaintiff was "not limited to producing either a postmark, a registration, or a certified-mail receipt," but its showing of timeliness was not comparable to that of the taxpayer in *Anderson*).

The Ninth Circuit's opinion in *Baldwin,* on which it relied in dismissing Petitioners' case, states that the "circuit split left the law in an undesirable state, as it allowed similarly situated taxpayers to be treated differently depending on where they lived." *Baldwin, supra,* 921 F.3d 841. However, this accurate description of the *status quo* has not been ameliorated by the Regulation. Therefore, this Court needs to definitively resolve the circuit split.

D. The Ninth Circuit's Opinions in *Waltner* and *Baldwin* only add to the confusion among the Circuits.

In deciding, in *Waltner* and *Baldwin,* that the Regulation supplanted the common-law mailbox rule, the Ninth Circuit departed from its own precedents and from those of the Third, Eighth, and Tenth Circuit Courts of Appeals, making the 4-2 split

among the circuits a 3-3 split. Given that Petitioners in this case produced competent evidence of mailing in time for the NOA to be delivered in 1-3 days, which evidence was corroborated, uncontroverted, and sufficient under *Anderson* to raise the presumption under the common-law mailbox rule, there was no evidentiary ground on which the Court of Appeals could dismiss Petitioners' appeal. Therefore, the dismissal had to be based on that court's new answers to the questions of whether the common-law mailbox rule survived the enactment of §7502 and, more specifically, whether it survived its legislative Regulation. The Ninth Circuit ruled contrary to its own precedent in *Anderson* only because it felt constrained to do so by the deference it felt it owed to the Regulation.

As shown, however, that court's abandonment of its prior, firmly-announced interpretation of §7502 did nothing to add clarity or judicial consistency.

II. This case presents the same facts on which the Circuit Courts of Appeals have disagreed, making it opportune for this Court finally to resolve that conflict.

As in *Philadelphia Marine, supra,* 523 F.3d 147, Petitioners did not rely on §7502's protection, and they produced evidence beyond their own testimony that they mailed the NOA early enough to allow timely receipt by the Tax Court in the regular course of Post Office business. As in *Miller, supra,* 784 F.2d 730 (refund suit) and *Deutsch, supra,* 599 F.2d 46 (petition to Tax Court), in this case there is no postmark or registration receipt that indicates timely mailing of the NOA. Deutsch argued "that it is a denial of due process to bar him from proving that he

mailed his petition in any way other than [as] provided by section 7502." *Id.* Here, Petitioners raised a similar due process challenge, adding that the Regulation unfairly disadvantaged Petitioners because they were indigent.

Petitioners successfully raised the presumption under the common-law mailbox rule by proving facts similar to those in *Anderson,* where the IRS claimed that Anderson's return never was received and Anderson subsequently mailed a copy. Anderson provided her own notarized statement and introduced an affidavit from her friend, who saw Anderson return to the car from the post office without the envelope that had contained the return. Here, Petitioners provided to the Tax Court, which had failed to docket their appeal, a copy of their previously-mailed NOA along with the Waltner Declaration appending the affidavit of a disinterested third party, who swore that he personally handed the envelope containing the NOA to the postman. Thus, the probative value of Petitioners' evidence met or exceeded that which the Ninth Circuit held in *Anderson* was sufficient to raise the presumption under the common-law rule.

As in *Charlson Realty*, *supra*, "It is not claimed in the instant case that the mailing date should be held to be synonymous with the filing date." 384 F.2d 447. As in *Charlson Realty* and *Arkansas Motor Coaches*, 198 F.2d 192, (i) Petitioners here did what was in their power to do to file a timely NOA, (ii) the failure in delivery was caused by employees either in the mail service or at the Tax Court, and (iii) there was no negligence in Petitioners' failure to send the letter by certified or registered mail. "In fact, mail of this type could arrive later than ordinary mail because of

the record keeping required of the postal employees." *Charlson Realty, supra,* 384 F.2d 445. And in this case, the government, so far, has been "permitted to take advantage of the negligence or fault of its own employees to defeat this taxpayer in its efforts to have its day in court." *See Arkansas Motor Coaches*, 198 F.2d 192.

And, as in all cases where the filer's corroborating evidence of early mailing is deemed insufficient to preserve substantive rights, Petitioners have suffered grievous loss of their right to appellate review of a case that they diligently have been prosecuting for eight years.

The facts and the unrebutted extrinsic evidence in this case present this Court with the appropriate opportunity finally to resolve the circuit conflict.

III. This Court should resolve which canon of statutory construction controls the interpretation of statutes that abrogate the common law.

The District Court for the Central District of California, in *Baldwin*, analyzed whether, under *Chevron,* the Regulation is entitled to judicial deference. *Baldwin v. U.S.*, 2017 WL 11129004 (C.D. Cal. Jan. 24, 2017). That court concluded that it is not and that it is invalid. *Id.*

The District Court found no ambiguity in §7502, adding, "Congress did not explicitly authorize the Treasury to interpret what constitutes evidence" and the Regulation "materially alters an otherwise clear statute." *Id.* Finding no ambiguity, the District Court felt no need to proceed to the second step of the *Chevron* analysis. *Id.* Further, the trial court saw in

the statute no Congressional intention to supplant the common-law mailbox rule:

> While the statute made the proof of certified or registered mail sufficient evidence to *conclusively* establish a receipt of the return, there is no indication that it intended to foreclose other evidentiary means that might assist in establishing a presumption of delivery.

Id. (emphasis the court's).

The Ninth Circuit in *Baldwin* only cursorily analyzed the Regulation under this Court's decision in *Chevron,* and failed to analyze the Regulation under the long-held maxim that a statute does not abrogate the common law unless Congress explicitly states its intention to do so by its enactment.[7] The Ninth Circuit simply noted Congress's "silence" concerning the common-law mailbox rule and concluded that both conflicting constructions of the statute were reasonable. *Baldwin, supra,* 921 F.3d 842-843.

This Court now has the opportunity to clarify for the courts that, in circumstances where the common law is at stake, consideration of whether a regulation is entitled to deference first must include a determination that the statute's plain language demonstrates Congressional intent to abrogate the common law.

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[7] *See* McCaffrey, Francis J., Statutory Construction, a Statement and Exposition of the General Rules of Statutory Construction (New York: Central Book Co., 1953), pp. 92-93.

IV. Public policy considerations militate for Supreme Court review and against further delay.

Out of an estimated 59 million tax returns filed in March, 2019, most of which were filed electronically, approximately three million were filed by mail. Treasury Inspector General for Tax Administration, Interim Results of the 2019 Filing Season, Treasury.gov, April 2, 2019. Although it seems unreasonable to assume that, when Congress enacted §7502, it intended for *any* favorable presumptions to be lost in any part of the country, the reality now is that those who live in the Second, Sixth, and (now) Ninth Circuits have a disadvantage as compared to those who live in the circuits where they still may avail themselves of common-law presumptions arising from proof of early-mailing by U.S. Mail.

"Nearly 27,000 petitions were filed in the Tax Court in Fiscal Year (FY) 2017, and over 22,000 or 83 percent were from unrepresented litigants." Taxpayer Advocate Service, 2018 Annual Report to Congress, Volume One, MSP (Most Serious Problem) #20, Pre-Trial Settlements in the U.S. Tax Court, 295-306, 298. The Taxpayer Advocate has reported that petitioners lose in Tax Court an abysmal 88 percent of the time (80 percent if they are represented). Taxpayer Advocate Service, 2009 Annual Report to Congress, Volume One, Section 3, Most Litigated Issues, 403-498, 406. Petitioners have not found statistics about how many appeal their losses, but, by statute, *all* of them have the right to do so. And, as of the time that Petitioners filed their NOA, *all* appellants were required to file their notices of appeal either in person with the Clerk of the Tax

Court (those who live in proximity to Washington D.C.), or by U.S. Mail. §7482; FRAP 13(a)(2).

Thus, millions of citizens are stakeholders in the resolution of the issue presented by this case. The issue of how their documents filed by mail will be treated (and what protection, if any, is afforded by entrusting them to regular mail) is relevant to every person who files documents with the IRS or the Tax Court. As the Ninth Circuit said in the year after §7502 was enacted,

> We take judicial notice of the fact that the overwhelming majority of taxpayers…make their returns and present their claims for refund, and the like, through the mails….Reliance upon the mails as the medium through which such deliveries for filing are made may be said to be all but universal.

Jones v. United States, 226 F. 2d 24, 28 (CA9 1955).

The continuation of the conflict and the uncertainty in the courts threaten the integrity of the tax system and frustrate all three fundamental pillars of tax policy: equity, efficiency, and ease of administration. Moreover, public perception that the IRS has managed to wrest from the people, and for itself, benefits long-established at common law, as well as those conferred upon them by Congress, can be only detrimental to tax morale and compliance, particularly in the Second, Sixth, and, now, Ninth Circuits.

The conflict in the circuits concerning the evidentiary issues and court-access rights that are at stake in, and perfectly illustrated by, this case creates a social and judicial imperative. This Court

should not allow this conflict to continue for even one more year.

V. This Court should clarify the issue that the Court of Appeals failed to consider—the due process implications of the Regulation.

On April 15, 2015, the date Petitioners mailed the NOA and their family's tax returns, Petitioners were insolvent and could not afford to send their NOA and other filings by the substantially more expensive methods. [A-19]. Under Ninth Circuit precedent and the common-law mailbox rule, they considered their right to appeal to be adequately protected by mailing their NOA almost a week before the filing deadline. They did not invoke the protections of §7502 because they had no need to do so, but also because they could not afford to do so.

On appeal, Petitioners expressed concern that, by restricting them to the expensive alternatives of certified or registered mail to avoid the "risk" of First Class Mail, and by robbing them of the presumptions that long have arisen at common law, the Regulation unfairly placed upon Petitioners greater expense, and greater risk, than existed prior to the Regulation's implementation. That increased risk not only was contrary to the intent of Congress to mitigate risk and the impediments to timely filing, but it also created disparity between filers of means and those without means. They argued that the Regulation's restrictive provisions favoring those who could afford the cost of the extra postal services jeopardized their right of access to the Court of Appeals and thus impinged on their Fifth Amendment right to due process of law. But the Ninth Circuit did not address or decide this issue.

> [P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.... a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377, 380 (1971) (unsuccessful attempts to bring divorce actions due to indigency). *See Logan v. Zimmerman Brush Co*., 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.")

This Court should consider and determine whether a restrictive interpretation of §7502, and the express terms of the Regulation, offend due process.

VI. This Court should clarify that, since appellate jurisdiction rests on the jurisdiction of the trial court and on a valid, final judgment, the Ninth Circuit had the power to examine the jurisdiction of the lower court, and any fact that might have rendered the ensuing judgment void.

Petitioners contended that even if it lacked jurisdiction to decide the merits of Petitioners' appeal, the Court of Appeals nevertheless had the power to declare that the trial court's ruling was obtained by fraud on the court. The record shows that the Commissioner submitted both perjured declarations and tampered evidence in response to an order of the Tax Court, thus involving the court in his fraud. Op.Br. 24-27; Rep.Br. 15-16, 20. When, as here, the frauds committed by the government and by

an officer of the court corrupt the very machinery of justice, the resulting decision is void, never becomes final, and can be attacked at any time, even collaterally. *See Billingsley v. Commissioner*, 868 F.2d 1081, 1085 (CA9 1989); *Kenner v. Commissioner,* 387 F.2d 689 (CA7 1968); *Calderon v. Thompson,* 523 U.S. 538, 557 (1998) ("This also is not a case of fraud upon the court, *calling into question the very legitimacy of the judgment*. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238 (1944)." Emphasis added.) A judgment reached without due process of law is also considered to be void and subject to collateral attack.

> We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally…because the United States is forbidden by the fundamental law to take… property without due process of law, and its courts are included in this prohibition.

Bass v. Hoagland, 172 F.2d 205, 209 (CA5 1949).

Clarity in this area is needed to provide redress in cases where, as here, government actors defiled the judicial process.

CONCLUSION

The writ should issue.

Alternatively, the Court should hold this petition, pending its disposition of the petition in *Baldwin, supra*, Docket No. 19-402.

Or, as another alternative, the Court should (a) grant the Petition, (b) vacate the Ninth Circuit's

judgment, and (c) remand the case to that court with instructions to consider the Waltners' appeal.

Respectfully submitted on October 8, 2019,

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APPENDIX

ORDERS

***Waltner v. Commissioner of Internal Revenue,* Tax Court No. 8726-11L, Decision (TC January 21, 2016)**

UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 8726-11L

DECISION

Pursuant to the Court's Order dated April 21, 2015, and the parties' Stipulation of Settled Issues filed December 11, 2015, it is

ORDERED AND DECIDED that respondent may proceed with the collection action, relating to Sarah V. Waltner, as determined in the notice of determination relating to the December 29, 2009, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to 2003, 2004, 2005, 2006, and 2007. It is further,

ORDERED AND DECIDED that respondent may proceed with the collection action, relating to Sarah V. Waltner, as determined in the notice of determination relating to the April 12, 2010, Letter 1058, Notice of Intent to Levy and Notice of Your Right to a Hearing relating to 2006. It is further,

ORDERED AND DECIDED that respondent may proceed with the collection action, relating to Steven T. Waltner, as determined in the notice of determination relating to the May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to 2003, 2004, 2005, 2006, and 2007. It is further,

ORDERED AND DECIDED that respondent may proceed with the collection action, relating to petitioners, as determined in the notice of determination relating to the May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to 2006. It is further

ORDERED AND DECIDED that the determinations set forth in the Notice of Determination issued to petitioner, Steven Waltner, on March 9, 2011, relating to the April 12, 2010, Letter 1058, Notice of Intent to Levy and Notice of Your Right to a Hearing relating to 2003, 2005, 2006, and 2007, and are not sustained.

(Signed) Maurice B. Foley
Judge

Entered: **JAN 21 2016**
Served: Jan 21, 2016

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Waltner v. Commissioner of Internal Revenue,
No. 16-72754, Order on Rehearing (CA9 July 10, 2019)

FILED
July 10, 2019
Molly C. Dwyer Clerk
U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

STEVEN T. WALTNER and SARAH V. WALTNER, *Petitioners-Appellants,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee*.	No. 16-72754 Tax Ct. No. 8726-11L ORDER

Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,[*] District Judge.

Judges Graber and Watford have voted to deny Appellants' petition for rehearing en banc, and Judge Zouhary has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for rehearing en banc is DENIED.

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[*] The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

Memorandum Decision (CA9 April 30, 2019)

Case: 16-72754, 04/30/2019, ID: 11282000, DktEntry: 74-1, Page 1 of 3

FILED
APR 30 2019
Molly C. Dwyer Clerk
U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

STEVEN T. WALTNER and SARAH V. WALTNER, *Petitioners-Appellants,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee*.	No. 16-72754 Tax Ct. No. 8726-11L MEMORANDUM[*]

Appeal from a Decision of the
United States Tax Court

Submitted January 8, 2019[**]
Submission Withdrawn January 15, 2019
Resubmitted April 29, 2019
Pasadena, California
Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,[***] District Judge.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[***] The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

Timely filing of a notice of appeal is "mandatory and jurisdictional." *Melendres v. Maricopa Cty*., 815 F.3d 645, 649 (9th Cir. 2016) (citation omitted). Taxpayers Steven and Sarah Waltner attempt to appeal a Tax Court decision, but that court did not receive their notice of appeal until long after the filing deadline. See 26 U.S.C. §7483. The Waltners claim they mailed an earlier notice before the deadline, but that notice was never delivered.

To support their claim of the earlier mailing, the Waltners offer two pieces of evidence: (1) Sarah Waltner's declaration that, a few days before the deadline, she gave the notice of appeal to a private mail-services center to be mailed to the Tax Court; and (2) an affidavit from the owner of the mail-services center stating that he mailed the notice via United States first-class mail as instructed. Our jurisdiction depends on whether this evidence proves the notice was timely filed.

The law in this circuit has changed with respect to how a taxpayer can prove timely filing of an undelivered tax document, such as a notice of appeal to the Tax Court. Previously, under the common-law mailbox rule, a taxpayer could prove timely filing by testimonial or circumstantial evidence. *See Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992). But a 2011 Treasury regulation replaced that rule and limited the types of evidence that can prove timely filing. *See Baldwin v. United States, No. 17-55115, 2019 WL 1605669, at *3–4 (9th Cir.* 2019). That regulation provides:

> Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated [private

> delivery service]..., are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

26 C.F.R. §301.7502-1(e)(2)(i) (emphases added). Under that regulation, when the government claims that a tax document never arrived at the office where it should have been filed, the only allowable types of evidence to prove timely filing are: (1) direct proof of actual delivery, (2) proof of proper use of registered or certified mail, or (3) proof of proper use of a duly designated private delivery service. As this Court held in *Baldwin*, 2019 WL 1605669, at *5, the regulation is valid under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

Here, the Waltners offer no allowable evidence to prove timely filing. They do not claim to have used registered or certified mail or a duly designated private delivery service. The regulation, therefore, bars consideration of the Waltners' evidence.

> With no evidence of timely filing, we hold that the notice of appeal is untimely. This appeal is dismissed for lack of jurisdiction.

DISMISSED.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V

No person shall … be deprived of … property, without due process of law….

STATUTES

26 U.S.C. §7502

26 U.S.C. §7502—Timely mailing treated as timely filing and paying

(a) General rule

(1) Date of delivery

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements This subsection shall apply only if—

(A) the postmark date falls within the prescribed period or on or before the prescribed date—

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) Postmarks

This section shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

(c) Registered and certified mailing; electronic filing

(1) Registered mail For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail—

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail; electronic filing

The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

(d) Exceptions This section shall not apply with respect to—

(1) the filing of a document in, or the making of a payment to, any court other than the Tax Court,

(2) currency or other medium of payment unless actually received and accounted for, or

(3) returns, claims, statements, or other documents, or payments, which are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing.

. . . .

(f) Treatment of private delivery services

(1) In general

Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

(2) Designated delivery service For purposes of this subsection, the term "designated delivery

service" means any delivery service provided by a trade or business if such service is designated by the Secretary for purposes of this section. The Secretary may designate a delivery service under the preceding sentence only if the Secretary determines that such service—

(A) is available to the general public,

(B) is at least as timely and reliable on a regular basis as the United States mail,

(C) records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery, and

(D) meets such other criteria as the Secretary may prescribe.

(3) Equivalents of registered and certified mail

The Secretary may provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail.

REGULATIONS

26 CFR §301.7502-1(e)

26 CFR §301.7502-1—Timely mailing of documents and payments treated as timely filing and paying.

(a) General rule. Section 7502 provides that, if the requirements of that section are met, a document or payment is deemed to be filed or paid on the date of

the postmark stamped on the envelope or other appropriate wrapper (envelope) in which the document or payment was mailed. Thus, if the envelope that contains the document or payment has a timely postmark, the document or payment is considered timely filed or paid even if it is received after the last date, or the last day of the period, prescribed for filing the document or making the payment. . . . Except as provided in section 7502(e) … section 7502 is applicable only to those documents … and only if the document … is mailed in accordance with paragraph (c) of this section and is delivered in accordance with paragraph (e) of this section.

. . . .

(c) Mailing requirements -

(1) In general. Section 7502 does not apply unless the document or payment is mailed in accordance with the following requirements:

(i) Envelope and address. The document or payment must be contained in an envelope, properly addressed to the agency, officer, or office with which the document is required to be filed or to which the payment is required to be made.

(ii) Timely deposited in U.S. mail. The document or payment must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service….

(iii) Postmark -

(A) U.S. Postal Service postmark. If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. See, however, paragraph (c)(2) of this section with respect to the use of registered mail or certified mail to avoid this risk. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made. Furthermore, if the envelope that contains a document or payment has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

. . . .

(2) Registered or certified mail. If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

. . . .

(e) Delivery -

(1) General rule. Except as provided in section 7502(f) and paragraphs (c)(3) and (d) of this section, section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made.

(2) Exceptions to actual delivery -

(i) Registered and certified mail. In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer,

or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

(ii) Equivalents of registered and certified mail. Under section 7502(f)(3), the Secretary may extend the prima facie evidence of delivery rule of section 7502(c)(1)(A) to a service of a designated PDS, which is substantially equivalent to United States registered or certified mail.

. . . .

(g) Effective date –

. . . .

(4) Registered or certified mail as the means to prove delivery of a document. Section 301.7502-1(e)(2) will apply to all documents mailed after September 21, 2004.

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DOCUMENTS PERTINENT TO JURISDICTION

Petitioners' Statement—Letter to the Clerk, Declaration of Sarah Van Hoey with Petitioners' Notice of Appeal (mailed April 15, 2016) and Affidavit of Mailing

STEVEN T. WALTNER &
SARAH V. WALTNER,

Petitioner(s),

v.

COMMISSIONER OF
INTERNAL REVENUE,

Respondent.

Electronically filed

Docket No. 8726-11L

STATEMENT LETTER TO CLERK OF THE U.S. TAX COURT (WITH EX.)

CERTIFICATE OF SERVICE

SERVED Aug 04 2016

Sarah V. Waltner
1418 N. Scottsdale Rd., #136
Scottsdale, AZ 85257

August 3, 2016

Clerk of the United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Notice of Appeal; Case No. 8726-llL 414441

Dear Clerk:

It has come to my attention that our Notice of Appeal has not been docketed and that this is why I have not heard from the Ninth Circuit, and why the docket of this case does not appear on the Tax Court Web site under "open cases." I filed my Notice of Appeal on April 15, 2016 by U.S. First Class Mail in a postage-prepaid envelope addressed to you. The deadline for filing the Notice of Appeal was April 21, 2016. I understand that the date of postmarking is considered to be the date of filing, but that in the event that the Notice is not actually delivered, then I am required to offer proof that I actually mailed it.

I did not send the Notice by Certified or Registered Mail due to my poverty (I was granted a fee waiver in this case). This was "tax day"—at the same time that I filed my Notice of Appeal, I also had to file Federal, Arizona and California income tax returns for myself and my husband, and Federal and state returns for my daughter. I simply could not afford to use Certified or Registered Mail. I included a return address on all mail, and was recently informed by a U.S. Postal worker that all mail either goes to the addressee or gets returned, and that in the intervening time since I posted this mail, if it got caught in a machine or dropped, it would have been retrieved and delivered by now. His point was that it probably did get delivered to you, and that it likely got lost or damaged after delivery and before getting to the docket clerk. I do not know, but I believe that if it did not get delivered to you at all, then it is likely due to the fact that it was mailed at the time when the U.S. Mail system was overrun by the nationwide mailing of tax returns. In either case, I did all that I could do within my means to get it to you, and regret

that the Rules call for mailing of notices of appeal – had I been allowed to electronically file the Notice, it would have been filed almost a week early.

I have attached my Declaration and a true and correct copy of the Notice of Appeal that was mailed to you on April 15, 2016, along with an Affidavit of Mailing executed by the mail service agent who delivered the Notice to the U.S. Post Office for postmarking and delivery.

Please docket the Notice of Appeal as of the date of mailing, April 15, 2016, or, at least as of the date by which you would have received it, April 21, 2016, so that I can proceed with my appeal to the Ninth Circuit Court of Appeals.

Clerk of the U.S. Tax Court
August 3, 2016
Page 2

When I called the Clerk's office, I was instructed to send this in the form of a letter. If the Tax Court requires that I file a motion, please let me know as soon as possible.

Thank you.

Sincerely,

s/Sarah V. Waltner

Sarah V. Waltner

Encl.: Affidavit of Sarah Waltner
Affidavit of Mailing

———

UNITED STATES TAX COURT

STEVEN T. WALTNER & SARAH V. WALTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 8726-11L

DECLARATION OF SARAH V. WALTNER

1. I am a woman of legal age competent to make this Declaration, which I make in good faith and of my own personal knowledge.

2. I am one of the petitioners in the above-captioned case, wherein I appeared pro se and was granted a fee waiver (Doc. 3).

3. The Petition in this case was filed on April 12, 2011 (Doc. 1).

4. The Decision in this case was entered on January 21, 2016 (Doc. 155).

5. In the almost five (5) years of litigation, I vigorously prosecuted this case and was careful never to miss a filing deadline.

6. Toward the end of the litigation, I uncovered evidence of malfeasance in this case on the part of counsel for the Commissioner, including evidence of perjury and forgery.

7. It is my firm belief that this case was wrongly decided on the facts and the law, and that the Tax Court willfully ignored the evidence of the wrongdoing of the Office of Chief Counsel. I believe that my appeal is in good faith and should be decided

on its merits.

8. It is the desire of the Petitioners to appeal the Decision of the Tax Court in this case, because we think that the issues at stake are of extreme importance to us personally and to the public.

9. I thought that I had timely filed our Notice of Appeal, a true and correct copy of which is attached hereto as Exhibit A. In fact, I did everything within my power and means to file early. My financial condition is poor; it was not within my financial means to pay more than the cost of First Class Mail to file the Notice of Appeal.

10. I also understood that a Notice of Appeal received by the Tax Court is considered filed as of the date of its postmark, including that of First Class Mail.

11. For these reasons, on April 15, 2016, I placed the Notice of Appeal in an envelope with First Class postage pre-paid, and addressed it to the Clerk of the U.S. Tax Court, 400 Second Street, NW, Washington, DC 20217.

12. After showing the document to Mr. John Meissner of the mail center that I use, Mail Enhancement, located at 1418 N. Scottsdale Rd., Scottsdale, Arizona, I tendered the Notice of Appeal, addressed as described above, to him for postmarking and delivery in the U.S. Mails, which he did in his usual and customary manner as described in the Affidavit of Mailing, a true and correct copy of which is attached hereto as Exhibit B.

13. On or just before the same date, April 15, 2016, I also filed five (5) income tax returns, state and federal, for my family. All of these were also sent

by regular First Class Mail, and, to my knowledge, all of them were delivered to the IRS.

14. I was not aware that the Tax Court did not receive the Notice of Appeal, but assumed that it had received it, especially considering the delivery of all of my tax returns. Unaware that the Notice might not have been delivered, I simply waited for communication from the Ninth Circuit Court of Appeals while I worked on other work and family matters.

15. I believed that the U.S. Mails was reliable, which belief I considered to be reasonable. On the U.S. Postal Service and its Inspector General's Web sites, the U.S. Postal Service estimates lost mail volume per year is only between .05% and 1.7% of the approximately 154 billion pieces of mail that it processes annually.

16. When I consulted the docket in one of my other cases on the Tax Court Web site, I did not see Case No. 8726-11L listed in the case list. I did not know why it was not listed there, but assumed it was because it was on appeal. It was not until this week that I clicked on "closed cases," found the docket for Case No. 8726-11L, and checked the docket sheet to discover that our Notice of Appeal was not docketed. I finally understood that it was listed as a "closed" case because the time for filing of the Notice of Appeal had passed.

17. I immediately checked my own records and confirmed that I had indeed mailed the Notice of Appeal on April 15, 2016, six days before it was due.

18. I then telephoned the Clerk of the U.S. Tax Court to inquire about why the Notice of Appeal was not docketed.

19. The Clerk informed me that a search for the Notice of Appeal was unsuccessful, and that the Notice of Appeal was probably not received by the Tax Court.

20. The Clerk stated that I could file my offer of proof of mailing and a copy of the Notice of Appeal with a letter to the Clerk requesting that the Notice of Appeal be docketed.

21. I then confirmed with the mail center that I had, in fact, tendered the Notice of Appeal on April 15, 2016, and that the owner of the business personally delivered the Notice of Appeal that same day to the dock of the U.S. Post Office on Scottsdale Road in Scottsdale and handed it to the postal worker receiving mail. See Ex. B.

22. I sought help from the Post Office in Scottsdale, where I was informed that a properly addressed piece like the Notice would eventually either be delivered as addressed, or would be returned to the sender, and that if neither of these has yet occurred, it was likely that it was delivered as addressed and lost after delivery.

23. Our Notice of Appeal may have been lost after delivery to the Tax Court, or it may have been lost by the Postal Service because of the volume of mail being processed on the date that income tax returns were due to be filed with the IRS.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, and as to those matters stated on belief, I believe them to be true.

Sarah V. Waltner
Sarah V. Waltner

EXHIBIT A

UNITED STATES TAX COURT

STEVEN T. WALTNER & SARAH V. WALTNER, Petitioner(s), v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	))))))))	Docket No. 8726-11L

PETITIONERS' NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Petitioners Steven T. Waltner and Sarah V. Waltner ("Waltners" or "petitioners") hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Decision of this Court entered in the above-captioned proceeding on the 21st day of January, 2016 (Doc. 155) relating to the following Notices of Determination ("NOD"):

(1) NOD relating to the December 29, 2009, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to Sarah V. Waltner for 2003, 2004, 2005, 2006, and 2007;

(2) NOD relating to the April 12, 2010, Letter 1058, Notice of Intent to Levy and Notice of Your Right to a Hearing relating Sarah V. Waltner for 2006.

(3) NOD relating to the May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to Steven Waltner for 2003, 2004, 2005, 2006, and 2007; and

(4) NOD relating to the May 6, 2010, Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing relating to petitioners for 2006.

The Waltners further appeal the underlying orders of the Tax Court as follows:

(1) The 09/06/2011 Order denying petitioners' Motion to Strike Answer (Doc. 008);

(2) The 04/21/2015 Order granting in part respondent's Motion for Summary Judgment and denying petitioners' Motion for Summary Judgment (Doc. 111);

(3) All of the orders issued on 07/16/2015 denying petitioners' Motion to Review Sufficiency of Responses to Petitioners' Request for Admissions (Doc. 117), Motion to Compel Discovery Responses Regarding Interrogatories and Production of Documents (Doc. 118), Motion to Exclude Evidence and to Strike Exhibits in Support of Respondent's Motion for Summary Judgment (Doc. 119), motions to strike declarations and to exclude evidence (Docs. 120-123 and 127), Motion for Leave to Identify Expert Witness and Submit Expert Report Out of Time (Doc. 124), Motion to Reopen Discovery (Doc. 125), Motion to Change Place of Trial (Doc. 16); and

(4) The 01/21/2016 Order denying petitioners' Motion to Impose Sanctions (Doc. 154).

Respectfully submitted this 15th day of April, 2016.

s/Steven T. Waltner
Steven T. Waltner
2825 Hillcrest
Hayward, CA 94542
Telephone: 623-252-9312

s/Sarah V. Waltner
Sarah V. Waltner
1418 N Scottsdale Rd.,
#136
Scottsdale, AZ 85257
Telephone: 623-252-6492

EXHIBIT B

State of Arizona)
) ss.
County of Maricopa)

AFFIDAVIT OF MAILING

I, John Meissner, am over 18 years of age and not a party to the action in which this affidavit is filed. I own and operate Mail Enhancement, an authorized mail services center, located at 1418 N. Scottsdale Road, Scottsdale, Arizona 85257. In my capacity as owner and operator of this business for the past eleven (11) years, I have personal knowledge of the things I am attesting to, am competent to make this Affidavit, and if necessary could, and would, testify competently thereto.

On Friday, April 15, 2016, Sarah Waltner, known to me personally, tendered to me a Notice of Appeal for mailing to the United States Tax Court. I saw the contents of the envelope before Mrs. Waltner sealed it and saw that the Notice of Appeal consisted of three (3) pages and was signed by Mr. and Mrs. Waltner on the last page. Mrs. Waltner addressed the envelope, with postage pre-paid, to the Clerk of the United States Tax Court, 400 Second Street, NW, Washington, DC 20217, and tendered it to me for mailing via U.S. First Class Mail. I delivered the sealed, addressed, and postage pre-paid envelope to the U.S. Postal employee at the dock of the U.S. Post Office located at 1776 N Scottsdale Rd, Scottsdale, Arizona 85257 for deposit in the U.S. Mail and postmarking before the last collection of mail scheduled on that day at that facility.

Mrs. Waltner brought the Notice of Appeal to me

and completed sealing, addressing and adding postage in plenty of time for me to timely deliver the envelope to the U.S. Post Office for postmarking on that date.

The procedure that I followed on that day for the tendering of mail to the U.S. Post Office for postmarking and delivery was consistent with the normal operation of my mail service business. Any delay in receiving the document or failure in delivery was due to a delay in the transmission of the U.S. Mail on the last day for filing of federal and state income taxes, and not due to any failure, mistake, or deviation from normal business procedures on my part.

I declare under penalty of perjury under the laws of the State of Arizona that the above is true, correct, and complete, and that this Affidavit of Service was executed on August 2, 2016 at Scottsdale, Arizona.

John Meissner
John Meissner