No. _____

In the Supreme Court of the United States

BOECHLER, P.C.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 6330(d)(1) of the Internal Revenue Code establishes a 30-day time limit to file a petition for review in the Tax Court of a notice of determination from the Commissioner of Internal Revenue. 26 U.S.C. § 6330(d)(1). The question presented is:

Whether the time limit in Section 6330(d)(1) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Boechler, P.C. hereby states that it is neither owned by a parent corporation, nor is there a publicly held corporation owning ten percent (10%) or more of its shares.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Boechler, P.C. v. Commissioner, No. 19-2003, United States Court of Appeals for the Eighth Circuit, judgment entered July 24, 2020 (967 F.3d 760), rehearing denied November 17, 2020.

Boechler, P.C. v. Commissioner, No. 18578-17 L, United States Tax Court, judgment entered February 15, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Boechler, P.C. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals (App. 1a-12a) is reported at 967 F.3d 760. The order of the court of appeals denying rehearing and rehearing en banc (App. 16a-17a) is unreported. The Tax Court decision dismissing the petition for review for lack of jurisdiction (App. 13a-15a) is unreported.

JURISDICTION

The court of appeals entered judgment on July 24, 2020. App. 1a. On November 17, 2020, the court of appeals denied petitioner's timely motion for rehearing and rehearing en banc. App. 16a-17a. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from, *inter alia*, the order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the petition appendix. App. 18a-42a.

INTRODUCTION

This Court has spent more than a decade trying to bring discipline to what legal rules are properly characterized as "jurisdictional." The Court has repeatedly held that statutory time limits are quintessential claim-processing rules—not limitations on a court's subject-matter jurisdiction—

unless Congress has clearly indicated to the contrary. And this Court has articulated a "readily administrable bright line" rule to identify those rare circumstances where a time limit will be treated as jurisdictional: there must be a "clear[] state[ment]" in the statute. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). In recent years, the Court has granted certiorari nearly every Term to reaffirm those principles when lower courts have gone astray and, with only few exceptions, has declared a variety of legal rules nonjurisdictional.[1]

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[1] *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (2019) (Title VII's charge-filing requirement nonjurisdictional); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 16-17, 22 (2017) (limit on extensions of time to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(5)(C) nonjurisdictional); *United States v. Kwai Fun Wong*, 575 U.S. 402, 409-10 (2015) (Federal Tort Claims Act time limits nonjurisdictional); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 148-49 (2013) (Medicare time limit for appeal to Provider Reimbursement Review Board nonjurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (requirement that a certificate of appealability indicate the specific issue to be challenged nonjurisdictional); *Stern v. Marshall*, 564 U.S. 462, 479 (2011) (carve-out for "personal injury" claims in bankruptcy statute nonjurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438-41 (2011) (time limit to file appeal to Veterans Court nonjurisdictional); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (Antiterrorism and Effective Death Penalty Act statute of limitations nonjurisdictional); *Dolan v. United States*, 560 U.S. 605, 610-11 (2010) (statutory deadline for ordering restitution nonjurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (requirement that copyright be registered before filing suit nonjurisdictional); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71-72 (2009) (proof of conferencing requirement before National Railroad Adjustment Board arbitration nonjurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S.

The Eighth Circuit went astray here. In a split decision, the court of appeals held that the 30-day deadline to file a petition for review in the Tax Court of a notice of determination from the Commissioner of Internal Revenue is the rare "jurisdictional" time limit that deprives the Tax Court of authority to equitably toll the filing deadline. That decision deepens an existing conflict between the Ninth and D.C. Circuits—a conflict the Commissioner himself has acknowledged. It cannot be reconciled with this Court's cases. And it incorrectly resolved an important and recurring issue that may disproportionately impact pro se and low-income taxpayers. This Court's review is warranted.

STATEMENT OF THE CASE

1. This case concerns the timeline that governs Tax Court review of determinations made by the Commissioner of Internal Revenue in connection with "collection due process hearings." One way the Internal Revenue Service (IRS) collects outstanding tax obligations is by filing a lien on the taxpayer's property or by seizing the property by levy. *See* 26 U.S.C. §§ 6321, 6331. In 1998, as a result of perceived IRS abuses during the collection process and to increase fairness to taxpayers, Congress established "collection due process hearings." *See* IRS

500, 504-05, 516 (2006) (Title VII provision exempting employers with fewer than 15 employees nonjurisdictional); *Eberhart v. United States*, 546 U.S. 12, 15-16 (2005) (per curiam) (federal criminal rules setting forth time limits for new trial nonjurisdictional); *Scarborough v. Principi*, 541 U.S. 401, 411-12 (2004) (filing deadlines for fee applications under Equal Access to Justice Act nonjurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 452-54 (2004) (filing deadlines for objecting to debtor's discharge in bankruptcy nonjurisdictional).

Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998); S. Rep. No. 105-174, at 67 (1998) (purpose was to "afford taxpayers due process in collections" and "increase fairness to taxpayers"); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 85-87 (2004) (recounting testimony before Congress that the IRS was abusing taxpayers during the collection process). The purpose of these collection due process hearings was to provide a procedural safeguard to taxpayers "before the IRS deprives them of their property." S. Rep. No. 105-174, at 67; *see also id.* ("[T]he IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing . . . .").

The collection due process regime operates as follows. If the IRS determines that a taxpayer owes a tax debt and the taxpayer fails to pay it on time, the United States automatically receives a lien on the taxpayer's property and may collect the debt by levy. 26 U.S.C. §§ 6321, 6331. But before it can carry out the levy (or file a notice of its lien), the IRS must first give notice to the taxpayer and advise the taxpayer of her right to a hearing. *Id.* §§ 6320(a), 6330(a). The taxpayer may then request a hearing before the IRS Office of Appeals. *Id.* §§ 6320(b), 6330(b).

Section 6330(c) explains which "[m]atters" are to be "considered at [the] hearing." *Id.* § 6330(c); *see also id.* § 6320(c) (cross-referencing Section 6330(c)). The IRS must prove that it fulfilled all the necessary procedural requirements to levy on the taxpayer's property. *Id.* § 6330(c)(1). The taxpayer, in turn, can raise "any relevant issue relating to the unpaid tax or the proposed levy." *Id.* § 6330(c)(2)(A). Such matters

may include the underlying tax liability (in certain circumstances); "offers of collection alternatives" (such as installment plans or offers in compromise); and any other "challenges to the appropriateness of [the IRS's] collection actions." *Id.* § 6330(c)(2).

After the hearing, the IRS Office of Appeals issues a "determination." *Id.* § 6330(c)(3). And that is when the Tax Court filing deadline at issue comes into play:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

Id. § 6330(d)(1); *see also id.* § 6320(c) (cross-referencing Section 6330(d)). Until the taxpayer has exhausted all of her appeals, the IRS may not carry out the levy (subject to a good-cause exception). *Id.* § 6330(e).

2. Petitioner is a small law firm in Fargo, North Dakota. Court of Appeals Joint Appendix (CAJA) 2, 5. On June 5, 2015, the IRS sent petitioner a letter noting a discrepancy in its 2012 tax filings. *Id.* at 6. Specifically, the IRS claimed that petitioner had failed to file copies of its employees' W-2s with the Social Security Administration, along with required IRS Form W-3. App. 2a; CAJA 6. Petitioner did not respond within 45 days, and the IRS imposed a 10% intentional disregard penalty in the amount of $19,250. App. 2a; CAJA 6.

On July 28, 2016, the IRS mailed petitioner a notice of intent to levy on its property to collect the penalty, plus interest. App. 2a; CAJA 10. On November 1, 2016, petitioner timely requested a

collection due process hearing before the IRS Office of Appeals under Section 6330(b)(1). App. 2a; CAJA 5. Petitioner explained that it had in fact previously provided the missing forms. CAJA 5. Petitioner also argued that the penalty was excessive and would cause significant hardship. *Id.*

A collection due process hearing was held by telephone on May 19, 2017. *Id.* at 7. On July 28, 2017, the IRS Office of Appeals mailed petitioner a notice of determination sustaining the proposed levy. App. 2a. The notice of determination was not delivered until July 31, 2017. *Id.* Under Section 6330(d)(1), petitioner had 30 days from July 28 to file its petition for review with the Tax Court. Because the 30th day (August 27) fell on a Sunday, the deadline was Monday, August 28. 26 U.S.C. § 7503. Petitioner mailed its petition one day late, on August 29, 2017. App. 2a; *see also* 26 U.S.C. § 7502(e) (establishing "date of mailing" rule).

3. In the Tax Court, the Commissioner moved to dismiss for lack of jurisdiction based on petitioner's failure to meet the 30-day filing deadline. In response, petitioner argued that Section 6330(d)(1) is not jurisdictional, and requested an evidentiary hearing to establish its entitlement to equitable tolling. CAJA 32-43, 48-49. The Tax Court agreed with the Commissioner and dismissed the case. App. 13a, 15a. The court explained that it had "repeatedly" held that the filing deadline in Section 6330(d)(1) is jurisdictional. *Id.* at 15a (citing *Gray v. Commissioner*, 138 T.C. 295, 299 (2012)). And the court rejected petitioner's request for equitable tolling on that basis alone. *Id.* (citing *Guralnik v. Commissioner*, 146 T.C. 230, 237-38 (2016)).

4. In a split decision, the Eighth Circuit affirmed. App. 1a-12a.

a. The majority acknowledged that this Court "has 'repeatedly held that filing deadlines ordinarily are not jurisdictional'" and instead should be considered claim-processing rules presumptively subject to equitable tolling. *Id.* at 3a (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013)). The majority also recognized that "Congress must do something special, beyond setting an exception-free deadline, to tag a [time limit] as jurisdictional and so prohibit a court from tolling it." *Id.* at 4a-5a (alteration in original) (quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015)). And it agreed that this Court's decisions require a "clear statement" from Congress. *Id.* at 4a. But the majority believed that Section 6330(d)(1) met that standard. Relying on the Ninth Circuit's decision in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), the majority concluded that "[t]he parenthetical '(and the Tax Court shall have jurisdiction with respect to such matter)' is clearly jurisdictional and renders the remainder of the sentence jurisdictional." App. 6a. The phrase "*such matter*" in that parenthetical, the majority reasoned, must necessarily refer to a petition that is filed within 30 days of the IRS's determination. *Id.* at 6a-7a.

The majority acknowledged that the D.C. Circuit had reached the opposite conclusion regarding the filing deadline in 26 U.S.C. § 7623(b)(4)—which "includes an identically worded parenthetical as the one found in § 6330." App. 5a. But the majority found the Ninth Circuit's analysis more "persuasive." *Id.* at 6a. "While there might be alternative ways that Congress could have stated the jurisdictional nature

of the statute more plainly," the majority believed that Congress had "spoken clearly enough to establish that § 6330(d)(1)'s 30-day filing deadline is jurisdictional." *Id.* at 7a-8a.

Because the court of appeals affirmed the Tax Court's determination that the deadline was jurisdictional, it did not consider whether Section 6330(d)(1)'s filing deadline would otherwise be subject to equitable tolling or whether petitioner's circumstances would warrant such tolling. *See id.* at 8a n.3.

b. Judge Kelly concurred in part and concurred in the judgment. *Id.* at 10a. Judge Kelly believed the panel was bound by a prior circuit decision to treat the deadline in Section 6330(d)(1) as jurisdictional. *Id.* at 10a-11a. Although she felt bound to affirm the Tax Court's jurisdictional holding for that reason, Judge Kelly was "not convinced the statute contains a sufficiently clear statement to justify this result." *Id.* at 12a. Judge Kelly explained that the court's decision represented "an unusual departure from the ordinary rule that filing deadlines are 'quintessential claim-processing rules.'" *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). She emphasized that the court's ruling could have "'drastic' consequences for litigants." *Id.* (quoting *Henderson*, 562 U.S. at 435). And she shared her "concern[]" that "the burden may fall disproportionately on low-income taxpayers." *Id.*

5. Petitioner filed a petition for rehearing en banc. Rehearing was denied, but with three judges (Judges Loken, Colloton, and Kelly) voting to grant. App. 16a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether a 30-day deadline to file a petition for review with the Tax Court is the rare "jurisdictional" time limit that deprives the Tax Court of authority to equitably toll the filing deadline. More than a decade of this Court's precedents plainly answer that question in the negative. Time and again, the Court has reaffirmed that—absent a clear statement to the contrary—statutory time limits are nonjurisdictional claim-processing rules presumptively subject to equitable tolling. Congress did nothing special in Section 6330(d)(1) to depart from that rule.

The Eighth Circuit's split decision nevertheless cloaks the 30-day filing deadline with jurisdictional significance. That decision deepens an existing divide between the Ninth and D.C. Circuits—giving rise to what even the Commissioner has characterized as a square conflict. On the merits, the D.C. Circuit got it right: nothing about the phrasing of Section 6330(d)(1)'s time limit clearly establishes the deadline's jurisdictional status. And because the issue recurs with some frequency, impacts low-income and pro se taxpayers, and results in harsh consequences, deciding whether the 30-day deadline is jurisdictional is of paramount importance. This Court's review is warranted.

I. The Eighth Circuit's Decision Deepens An Existing Circuit Split

The Eighth Circuit's decision deepens an existing conflict among the courts of appeals. The Eighth and Ninth Circuits have now held that Section 6330(d)(1) creates a jurisdictional filing deadline. The D.C. Circuit reached the opposite conclusion with respect

to another Tax Court filing deadline with functionally identical language. And other courts of appeals have issued (or will issue) decisions that only further add to the confusion. The conflict is entrenched, ripe, and ready for the Court's review.

A. There Is A Conflict Between The Eighth And Ninth Circuits And The D.C. Circuit

In *Duggan v. Commissioner*, the Ninth Circuit held that Section 6330(d)(1)'s deadline is jurisdictional. 879 F.3d 1029, 1035 (9th Cir. 2018). The Ninth Circuit recognized that Section 6330(d)(1) does not provide "the clearest statement possible." *Id.* at 1034. But the court deemed the text sufficiently clear because "the filing deadline is given in the same breath as the grant of jurisdiction." *Id.*; *see also id.* (reading Section 6330(d)(1) to "confer[] jurisdiction on the Tax Court if (and only if) a petition for review is filed in that court within thirty days of the IRS's determination").

The following year, the D.C. Circuit interpreted materially identical statutory language and disagreed. In *Myers v. Commissioner*, a majority of the D.C. Circuit held that 26 U.S.C. § 7623(b)(4) does not create a jurisdictional filing deadline. 928 F.3d 1025, 1034-36 (D.C. Cir. 2019). *But see id.* at 1038 (Henderson, J., concurring in part and dissenting in part). Section 7623(b) requires the IRS to pay awards to whistleblowers who bring tax violations to its attention. 26 U.S.C. § 7623(b). The IRS may authorize an award of 10-30% of the proceeds of any collection undertaken as a result of a whistleblower's involvement, *id.* § 7623(b)(1)-(2), but has discretion to reduce or deny awards for whistleblowers who "planned and initiated" the actions leading to

underpayment, *id.* § 7623(b)(3). A whistleblower aggrieved by the award amount (or its denial) may then seek Tax Court review of the IRS's determination. And the provision governing that review, Section 7623(b)(4), states:

> Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

Id. § 7623(b)(4).

The D.C. Circuit recognized that the Ninth Circuit had previously found the materially identical language in Section 6330(d)(1) to be jurisdictional. *Myers*, 928 F.3d at 1036. But the D.C. Circuit disagreed with the Ninth Circuit's conclusion that the deadline is jurisdictional simply because it appears in the same subsection as the jurisdiction-conferring language. *Id.* Carefully parsing the parenthetical's language in context, the D.C. Circuit reasoned that "the type of appeal to which 'such matter' refers is most naturally identified by the subject matter of the appeal—namely, 'any determination regarding an award under paragraph (1), (2), or (3)'—and not by the requirement that it be filed 'within 30 days of such determination.'" *Id.* at 1035. Recognizing that "the [Supreme] Court has demanded an unusually high degree of clarity to trigger the 'drastic' 'consequences that attach to the jurisdictional label,'" *id.* (quoting *Henderson*, 562 U.S. at 435), the D.C. Circuit held that the deadline in "'[t]his case is scarcely the exceptional one,' . . . in which a filing period ranks as a jurisdictional bar," *id.* (alteration in original)

(quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013)). Having found that Section 7623(b)(4) is not jurisdictional, the D.C. Circuit concluded—based on the presumption established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)—that the statutory deadline was subject to equitable tolling. *Myers*, 928 F.3d at 1036-37.

In the split decision below, the Eighth Circuit disagreed with the D.C. Circuit and aligned itself with the Ninth Circuit. App. 5a-6a.

B. This Is A Square Split

The circuit conflict is well recognized. *See, e.g.*, National Taxpayer Advocate, *Annual Report to Congress 2020*, at 171 (Dec. 31, 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf (noting that the "split" "could prompt the Supreme Court to review the issue"); Bryan T. Camp, *New Thinking about Jurisdictional Time Periods in the Tax Code*, 73 Tax Law. 1, 36-40 & nn.146 & 149 (2019); Kristen A. Parillo, *Whistleblower Deadline Isn't Jurisdictional, D.C. Circuit Holds*, Tax Notes Federal (2019, online). And it cannot be explained by the different Internal Revenue Code provisions at issue. The Eighth Circuit acknowledged that the D.C. Circuit had come to a different conclusion about the "identically worded parenthetical," but found the Ninth Circuit's analysis more "persuasive." App. 5a-6a. The D.C. Circuit likewise observed that its decision in *Myers* was "in some tension" with *Duggan*. *Myers*, 928 F.3d at 1036.

The Commissioner himself sought rehearing en banc in *Myers* on the basis of the (then, more shallow) split between the Ninth and D.C. Circuits. As the Commissioner explained in his unsuccessful

rehearing petition, "[i]t is simply not possible to reconcile the decision in [*Myers*] with *Duggan*." Commissioner En Banc Pet'n 11, *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019) (No. 18-1003); *see also id.* at 1 (stating that the "holding" in *Myers* "conflicts with the Ninth Circuit's decision in *Duggan* . . . which held that a virtually identical time limit in I.R.C. § 6330(d)(1) . . . is jurisdictional").

Petitioner fully agrees. The D.C. Circuit's statutory analysis cannot be reconciled with the Eighth and Ninth Circuit's reading of near identical language. The result being that a District of Columbia taxpayer appealing an IRS collection due process determination can receive the benefit of equitable tolling while taxpayers in the Eighth and Ninth Circuits cannot.[2] That is a square split under any definition.

C. Further Percolation Will Only Exacerbate The Confusion

Further percolation on the question presented will do more harm than good. The three court of appeals' decisions have thoroughly aired both sides of this statutory interpretation issue. Yet this petition is the Court's first opportunity to address the conflict. *See*

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[2] Petitioner is not aware of any post-*Myers* collection due process case in the Tax Court presenting the jurisdictional issue where appellate venue would lie in the D.C. Circuit (and no such case has been appealed to the D.C. Circuit). But when the Tax Court does confront such a case, it would be obliged to follow *Myers*, not its own precedent holding Section 6330(d)(1) jurisdictional. *See Friedel v. Commissioner*, No. 11239-19W, 2020 WL 5569697, at *2 (T.C. Sept. 17, 2020) (following D.C. Circuit precedent where that court "is the appellate venue for this case"); *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970).

Commissioner v. Myers, No. 19A674 (U.S.) (Solicitor General received two extensions of time in which to file a petition for a writ of certiorari, but ultimately declined to seek review). And while another appeal raising the same question presented is currently pending before the Second Circuit, oral argument has not been scheduled. *See Castillo v. Commissioner*, No. 20-1635 (2d Cir.).

In the meantime, significant confusion persists. Five other courts of appeals have referred to Section 6330(d)(1)'s filing deadline as jurisdictional in passing or implied that the deadline might be jurisdictional.[3] None of those cases actually presented the issue for decision. But that has not stopped the Commissioner from telling courts that these circuits have "consider[ed]" the question presented and "agreed" that the filing deadline is jurisdictional. *Boechler* Appellee's Opp. to En Banc Pet'n 13; *see also, e.g.*, *Castillo* Appellee Br. 19-20, ECF No. 57.

This Court should intervene now to bring much-needed uniformity to this area of the law.

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[3] *See Kaplan v. Commissioner*, 552 F. App'x 77, 78 (2d Cir. 2014) (affirming Tax Court's dismissal of petition for lack of jurisdiction and holding that actual notice of the determination is not required under Section 6330(d)(1) when the determination is sent by certified mail to taxpayer's last known address); *Gray v. Commissioner*, 723 F.3d 790, 792-94 (7th Cir. 2013) (affirming Tax Court's dismissal of petitions for lack of jurisdiction and holding that the 30-day deadline in Section 6330(d)(1) applied, rather than different statutory deadlines); *Boyd v. Commissioner*, 451 F.3d 8, 10-11 (1st Cir. 2006) (affirming Tax Court dismissal of petition for lack of jurisdiction and holding that a determination must issue before taxpayer may petition the Tax Court); *Springer v. Commissioner*, 416 F. App'x 681, 682-83 (10th Cir. 2011) (same); *Tuka v. Commissioner*, 348 F. App'x 819, 820-21 (3d Cir. 2009) (per curiam) (same).

II. The Eighth Circuit's Decision Conflicts With This Court's Precedents And Is Wrong

Review is also warranted because the Eighth Circuit aligned itself with the wrong side of the split. This Court has made clear that statutory time limits are quintessential claim-processing rules presumptively subject to equitable tolling unless Congress has clearly indicated to the contrary. And Section 6330(d)(1) is not the "rare statute of limitations that can deprive a court of jurisdiction." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

A. This Court's Precedents Establish A High Bar Before A Time Limit Will Be Treated As Jurisdictional

It is well settled that statutory time limits are presumptively subject to equitable tolling. *See Irwin*, 498 U.S. at 95-96. That is true whether the defendant is a private party or the Government. *See id.*; *Kwai Fun Wong*, 575 U.S. at 407-08. But this presumption will not apply if the time limit is jurisdictional. *Kwai Fun Wong*, 575 U.S. at 408. As this Court has explained, "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson*, 562 U.S. at 434. A jurisdictional time limit is not subject to equitable tolling, must be considered sua sponte, and can be raised at any time—including on appeal—to get a case dismissed. *See Auburn Reg'l*, 568 U.S. at 153.

Because of the "untoward consequences" that attach to the jurisdictional label, this Court has "'tried in recent cases to bring some discipline to the use' of the term 'jurisdiction.'" *Id.* (quoting *Henderson*, 562

U.S. at 435). "[C]laim-processing rules," for example, "should not be described as jurisdictional." *Henderson*, 562 U.S. at 435. "These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* And, "[t]ime and again," this Court has "described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Kwai Fun Wong*, 575 U.S. at 410 (quoting *Henderson*, 562 U.S. at 435).

To be sure, Congress can decide to brand a time limit jurisdictional and impose all of the "[h]arsh consequences" that follow. *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019). But Congress must do so in clear terms. Under this Court's "readily administrable bright line" rule, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006), a "time bar[]" will be treated as jurisdictional "only if Congress has 'clearly state[d]' as much," *Kwai Fun Wong*, 575 U.S. at 409 (alteration in original) (quoting *Auburn Reg'l*, 568 U.S. at 153); *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 n.9 (2017). "'[A]bsent such a clear statement, . . . "courts should treat the restriction as nonjurisdictional."'" *Kwai Fun Wong*, 575 U.S. at 409-10 (alterations in original) (citations omitted). Although Congress does not have to use "'magic words,'" "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* at 410 (citation omitted); *see also Fort Bend Cnty.*, 139 S. Ct. at 1850 (Congress must "'clearly state[] that a [prescription] count[s] as jurisdictional,'" so that courts and litigants "'will not be left to wrestle

with the issue'" (first brackets added) (citation omitted)).

Applying that "clear statement rule," this Court has "made plain that most time bars are nonjurisdictional." *Kwai Fun Wong*, 575 U.S. at 410. Indeed, this Court has not found a single statutory filing deadline sufficiently clear to qualify as jurisdictional under that rule.

B. Section 6330(d)(1) Is Not The Rare Jurisdictional Time Limit

Section 6330(d)(1) states: "The person [who sought a due process hearing] may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d)(1). Nothing in the text, context, history, or purpose of Section 6330(d)(1) "indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar." *Kwai Fun Wong*, 575 U.S. at 410.

1. As an initial matter, the mere fact that the deadline and the jurisdictional grant are both located in Section 6330(d)(1) does not mean that the deadline is "jurisdictional." This Court has repeatedly rejected such "proximity-based argument[s]." *Auburn Reg'l*, 568 U.S. at 155; *see also Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975); *Gonzalez v. Thaler*, 565 U.S. 134, 143-47 (2012). As the Court has admonished, "[a] requirement we would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Auburn Reg'l*, 568 U.S. at 155.

So while there is no dispute that *something* in Section 6330(d)(1) has jurisdictional significance, it must be clear and unequivocal that this something is the 30-day time limit. It is not.

Section 6330(d)(1) does not expressly condition the Tax Court's "jurisdiction" on compliance with the 30-day filing deadline. As the D.C. Circuit held, nothing in the sentence's structure "'conditions the jurisdictional grant on the limitations period, or otherwise links' those separate clauses." *Myers*, 928 F.3d at 1035 (quoting *Kwai Fun Wong*, 575 U.S. at 412).

The Ninth Circuit read Section 6330(d)(1)'s "plain language" to "confer[] jurisdiction on the Tax Court if (and only if) a petition for review is filed in that court within thirty days of the IRS's determination." *Duggan*, 879 F.3d at 1034. But the provision's "plain language" does not say that—the word "if" does not appear at all. The Ninth Circuit relied heavily on an analogy to a different statute, 26 U.S.C. § 6015, governing a different deadline for appealing to the Tax Court. *See Duggan*, 879 F.3d at 1033. In contrast to the provision at issue here, Section 6015(e)(1)(A)—often referred to as the "innocent spouse" provision—states that an individual "may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section *if such petition is filed*" by certain time deadlines. 26 U.S.C. § 6015(e)(1)(A) (emphasis added). That subparagraph expressly conditions the Tax Court's jurisdiction on whether ("if") the petition is filed within a certain time frame. *See Nauflett v. Commissioner*, 892 F.3d 649, 652-53 (4th Cir. 2018) (holding Section 6015(e)(1)(A) time limit to be jurisdictional under clear-statement rule);

Rubel v. Commissioner, 856 F.3d 301, 304-05 (3d Cir. 2017) (same); *Matuszak v. Commissioner*, 862 F.3d 192, 196 (2d Cir. 2017) (same). Section 6330(d)(1) does not.[4]

The Eighth Circuit, for its part, pointed to the parenthetical's use of the phrase "*such matter*," reasoning that the antecedent must be "a petition to the tax court that: (1) arises from 'a determination under this section' *and* (2) was filed 'within 30 days' of that determination." App. 6a-7a (second emphasis added). But there is no reason to assume the second qualification. And read in context, the phrase "such matter" is best understood to refer to *the subject matter of the petition*. A near-identical phrase, "[s]uch [m]atters," appears in the title to the prior subsection (c), which details what "[m]atters" are to be considered at the due process hearing itself. 26 U.S.C. § 6330(c); *see supra* at 3-4. Subsection (d), in turn, refers both to the "determination" and the "petition" for review. *Id.* § 6330(d)(1). The Tax Court thus has jurisdiction to consider "such matter"—*i.e.*, everything "considered at [the] hearing" (*id.* § 6330(c)), and addressed in the determination or the petition for review (*id.* § 6330(d)(1)). Or as the D.C. Circuit explained it in analyzing the language of Section 7623(b)(4), "the type of appeal to which 'such matter' refers is most naturally identified by the subject matter of the appeal—namely, 'any

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[4] Whether Section 6015(e)(1)(A)'s filing deadline is jurisdictional is not at issue here. But it certainly does not follow that the filing deadline in Section 6330(d)(1) should be read in kind. The grammatical structures of the two provisions are entirely different, and a plain reading of one does not control the other.

determination regarding an award under paragraph (1), (2), or (3)'—and not by the requirement that it be filed 'within 30 days of such determination.'" *Myers*, 928 F.3d at 1035.

2. The nonjurisdictional reading of the filing deadline is reinforced by the structure of Section 6330(d)(1). The jurisdictional grant is separated from the rest of the provision by parentheses and is introduced by the word "and," signifying a new independent clause. *See* William Strunk Jr. & E.B. White, *The Elements of Style* 5-7, 90 (4th ed. 2000) (independent clauses are "grammatically complete" sentences and may be "joined by a coordinating conjunction"). And the filing deadline is separated from the rest of the sentence by commas. That is, the jurisdictional grant and the time limit appear in distinct clauses, and the provision does not expressly condition jurisdiction on the time limit or otherwise link the two.[5]

3. There are good reasons why Congress would not have wanted to attach such "drastic" jurisdictional consequences to the 30-day filing deadline in Section 6330(d)(1). App. 12a (Kelly, J., concurring in part and concurring in the judgment). Section 6330 is an important procedural safeguard for taxpayers: it is the taxpayer's only opportunity to

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[5] The Eighth Circuit majority cited Section 6330(e)(1) in passing (App. 7a), but the Commissioner did not rely on that subsection in making its statutory interpretation argument on appeal. For good reason. Although Section 6330(e)(1) limits the Tax Court's jurisdiction to grant certain injunctive relief to "timely" appeals, it defines the court's jurisdiction only "under this paragraph" (meaning, paragraph (e)(1)), and does not define what "timely filed" means—leaving open the possibility that a petition deemed timely by way of equitable tolling could qualify.

challenge the IRS's actions *before* collection, which could entail the loss of a home, a car, or a savings account. *See supra* at 4. Thirty days is also a relatively short period of time to file a petition for review compared to other Tax Court filing deadlines. *Cf.* 26 U.S.C. § 6213(a) (90 days for U.S. addressees and 150 days for foreign addressees to petition the Tax Court for redetermination of a deficiency); *id.* § 6015(e)(1) (90 days for taxpayers denied "innocent spouse" treatment to seek Tax Court review); *id.* § 7345 (no deadline at all to petition for review of an IRS certification of a "seriously delinquent tax debt," in either the Tax Court or district court).

4. The Eighth Circuit accordingly erred in branding the 30-day deadline as jurisdictional. As this Court has repeatedly held, the "general rule" is that nonjurisdictional time limits are subject to equitable tolling. *Kwai Fun Wong*, 575 U.S. at 412; *see also Irwin*, 498 U.S. at 95-96 (time requirements "are customarily subject to 'equitable tolling'"). The Eighth Circuit did not separately consider whether that presumption can be overcome here. And the only court of appeals to have considered that question has concluded that it cannot. *See Myers*, 928 F.3d at 1036-37 (holding that Section 7623(b)(4) is subject to equitable tolling). Although this Court would not need to reach this secondary issue (*see infra* at 28), the D.C. Circuit was correct.

The presumption in favor of equitable tolling is especially strong here because the provision at issue was enacted in 1998—eight years after this Court's decision in *Irwin*. *See Holland v. Florida*, 560 U.S. 631, 646 (2010) (explaining that the presumption in favor of equitable tolling is "reinforced" for post-*Irwin* statutes). Nothing in the Internal Revenue Code

suggests that Section 6330(d)(1)'s time limit is completely inflexible or that equitable tolling is otherwise unavailable. *See* 26 U.S.C. § 6330(d)(1) (taxpayer "*may*" petition the Tax Court "within 30 days" (emphasis added)); *cf. Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019) (finding "clear intent to compel rigorous enforcement" where federal rules "single[d] out" time limit "for inflexible treatment"). Indeed, the whole purpose of the collection due process regime was to provide more process to taxpayers before the IRS can seize their property by levy. *See supra* at 3-4. Taxpayers navigating this petition for review procedure are often not "sophisticated," "repeat players"; rather, the majority are "laymen" representing themselves pro se. *See Myers*, 928 F.3d at 1036-37. And any suggestion that equitable tolling is incompatible with the collection due process regime is belied by the recommendation of the National Taxpayer Advocate—an official within the IRS—that Congress adopt an *express* equitable tolling provision applicable to the deadline at issue. *See infra* at 24-25; *cf. United States v. Brockamp*, 519 U.S. 347, 352-53 (1997).

III. The Question Presented Is Important And This Case Is An Ideal Vehicle

The question presented is an important and recurring issue, that may disproportionately impact low-income and pro se taxpayers, and that leads to unfair and inequitable outcomes. And this case presents an ideal vehicle for the Court's review.

1. This is an important and recurring issue. The National Taxpayer Advocate has found that appeals from collection due process hearings were the single most litigated issue in the Tax Court in 2020. *See*

Annual Report to Congress 2020, *supra* at 162, 183. In fact, appeals from such hearings "have been one of the federal tax issues most frequently litigated in the federal courts since 2001." *Id.* at 184. Of the 27,844 collection due process hearings requested in 2020, 1,185 resulted in petitions to the Tax Court. *Id.* at 185.

As for the specific jurisdictional question presented, five courts of appeals have been presented with that issue in just the last three years. *See* App. 3a-10a; *Duggan*, 879 F.3d at 1031-35; *Myers*, 928 F.3d at 1033-36; *Cunningham v. Commissioner*, 716 F. App'x 182, 183-84 (4th Cir. 2018) (affirming on other grounds without deciding whether Section 6330(d)(1) is jurisdictional); *Castillo*, No. 20-1635 (2d Cir.) (oral argument not yet scheduled). The Tax Court itself has "repeatedly held" that the 30-day time limit in Section 6330(d)(1) is jurisdictional, further reinforcing how often this specific issue arises. *Guralnik v. Commissioner*, 146 T.C. 230, 235 & n.6 (2016) (citing cases).[6]

And because of the two provisions' close similarity, resolving the statutory interpretation issue in this case would also decide the status of the Section 7623(b)(4) filing deadline for review of IRS whistleblower decisions. As the Commissioner emphasized in asking the D.C. Circuit to grant en banc review in *Myers*, because Tax Court decisions reviewing whistleblower determinations can only be

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[6] The Tax Court's longstanding position that it lacks jurisdiction to review untimely Section 6330(d) petitions also surely deters many taxpayers from filing petitions for review that are untimely, even if there are compelling reasons for the delay.

appealed to the D.C. Circuit, that court's holding created binding precedent for all IRS whistleblower cases nationwide. *Myers* Commissioner En Banc Pet'n 2, 19; *see also* 26 U.S.C. § 7482(b)(1). The Commissioner also characterized the issue as one of "exceptional importance." *Myers* Commissioner En Banc Pet'n 1. Again, petitioner agrees.

So does the IRS National Taxpayer Advocate. Citing the uncertainty created by conflicting lower court decisions, the National Taxpayer Advocate has recommended that Congress amend the Internal Revenue Code to provide much needed clarity on the jurisdictional status of certain Tax Court deadlines, including Section 6330(d)(1). *See* National Taxpayer Advocate, *2021 Purple Book* 100-02 (Dec. 31, 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook.pdf; (citing the decision below, *Duggan*, and *Myers*); National Taxpayer Advocate, *2020 Purple Book* 85-87 (Dec. 31, 2019), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook.pdf (citing *Duggan* and *Myers*); National Taxpayer Advocate, *2019 Purple Book* 88-90 (Dec. 31, 2018), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook.pdf. As noted above, the Advocate's recommendation sides with the D.C. Circuit and asks Congress to expressly provide that the deadlines are *not* jurisdictional and that equitable tolling *is* available. *2021 Purple Book*, *supra*, at 101-02; *see also 2020 Annual Report to Congress*, *supra*, at 170 (noting that while *Myers*

"addresses the problem for whistleblowers, it does not solve the problem for taxpayers in other contexts").[7]

2. As Judge Kelly highlighted in her concurrence, the issue appears to arise most often for low-income and pro se taxpayers. App. 12a. A majority of the taxpayers who file petitions seeking review of collection due process hearings are proceeding pro se. *Annual Report to Congress 2020*, *supra*, at 188. In 2020, nearly two-thirds (61%) of taxpayers who litigated their collection due process petitions were unrepresented, and the vast majority were individuals rather than businesses (over 90%). *Id.*; *see also id.* at 166 ("The dollars at issue, along with the taxpayer's income level, are two key determinants of whether a taxpayer obtains representation to navigate the litigation process."). And the National Taxpayer Advocate has emphasized that "[u]nrepresented taxpayers, in particular, may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late." *2021 Purple Book*, *supra*, at 101.

3. The repercussions are indeed severe. For taxpayers facing levy who have not prevailed in their due process hearing, the Tax Court is the only judicial forum in which they may challenge the IRS's actions before having their property taken to cover the taxes or penalties they allegedly owe. *Id.* ("The sanction for failing to commence suit in the Tax Court" within the

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[7] Given the split in the circuits, Congress's failure to act thus far cannot be understood as ratification of any particular judicial interpretation of Section 6330(d)(1). The D.C. Circuit has interpreted materially identical language to be nonjurisdictional, and a rational Congress would not intend the same language to carry two different meanings.

prescribed deadline "is severe: taxpayers lose their day in that court, which may be the only prepayment forum.").

There is also no doubt that "[t]reating the [Internal Revenue Code] time limits for bringing suit as jurisdictional, and not subject to equitable doctrines, leads to unfair outcomes." *Id.* Take the facts of the *Castillo* case currently before the Second Circuit. During Josefa Castillo's collection due process hearing, she argued that the IRS mistakenly placed a lien on her property for over $80,000 of unpaid tax debt she did not owe, due to an administrative error. *Castillo* Appellant Br. 6-9, ECF No. 41. After the hearing, the IRS mailed a notice of determination to Ms. Castillo's *former* attorney, whose authorization to receive documents she had revoked months earlier. *Id.* And while the IRS also attempted to mail the notice to Ms. Castillo, it was never delivered, and USPS records showed that it remained "in transit." *Id.* at 9. Ms. Castillo and her actual attorney did not discover that the determination had issued until months after the 30-day deadline had lapsed. *Id.* at 8-10. But even though Ms. Castillo indisputably never received the determination, the Tax Court dismissed her untimely petition for lack of jurisdiction. *Id.* at 9-11.

Ms. Castillo's case—though appalling—is far from unique. Certain aspects of Section 6330(d)(1)'s deadline (which is already short) and past IRS practice can set traps for unwary taxpayers. For example, the 30-day deadline starts from the date the IRS mails the notice of determination, regardless of when the taxpayer receives it. And the Internal Revenue Code's "timely mail[ed]" rule—which considers a petition to be filed on the date it is

postmarked—does not apply to all forms of mailing. *See* 26 U.S.C. § 7502; *Guralnik*, 146 T.C. at 238-41; *see also, e.g.*, *Sarrell v. Commissioner*, 117 T.C. 122, 123-26 (2001) (IRS mailed notice of determination to taxpayer in Israel; it arrived on Day 25; petition was mailed on Day 30 because of intervening Israeli holidays, but was not considered "timely mailed" due to the foreign postmark).

The phrasing of the notice of determination itself can also confuse taxpayers. *See Annual Report to Congress 2020*, *supra*, at 186 (raising concern about whether the IRS mailings "provide adequate notice to identify when the 30-day period to petition the court following receipt of a Notice of Determination begins"). Indeed, "[t]he IRS itself occasionally provides *inaccurate* information regarding the filing deadline to a taxpayer, and taxpayers have been harmed by relying on that erroneous information." *2021 Purple Book*, *supra*, at 101 (emphasis added); *cf. Nauflett*, 892 F.3d at 652-54 (equitable tolling did not apply to innocent-spouse case despite spouse's reliance on erroneous IRS advice regarding the filing deadline); *Rubel*, 856 F.3d at 306 (same).

4. Finally, this case is a clean vehicle for the Court's review. The court of appeals' answer to the jurisdictional question was dispositive of petitioner's attempt to seek review in the Tax Court. The Eighth Circuit affirmed the Tax Court's dismissal of the petition for review as untimely based entirely on its determination that Section 6330(d)(1) is jurisdictional. *See* App. 8a n.3. The issue is thus squarely presented for the Court's review.

The Eighth Circuit did not separately decide whether, if Section 6330(d)(1) is nonjurisdictional, equitable tolling would be available. Before the panel,

the Commissioner argued that equitable tolling was not available regardless, but he did not press that argument in opposing rehearing. *See Boechler* Appellee's Opp. to En Banc Pet'n. And the only court of appeals to address that secondary issue has concluded that equitable tolling *is* available (with respect to materially identical language). *See Myers*, 928 F.3d at 1036-37.

This splitless issue is not independently worthy of the Court's review. But it is included within the question presented and could either be briefed on the merits or remanded for the Eighth Circuit to decide in the first instance. *Compare Hamer*, 138 S. Ct. at 22 (declining to decide whether claim-processing rule was subject to equitable considerations after deeming it nonjurisdictional), *with Kwai Fun Wong*, 575 U.S. at 412 (deciding that statute allowed for equitable tolling after deeming it nonjurisdictional). Either way, the ultimate question whether petitioner is entitled to equitable tolling would be left for the Tax Court on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 16, 2021

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**UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT**

BOECHLER, P.C., Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Appellee

The Federal Tax Clinic of the Legal Services Center of Harvard Law School, Amicus on Behalf of Appellant(s)

No. 19-2003
Submitted: June 17, 2020
Filed: July 24, 2020

967 F.3d 760

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

ERICKSON, Circuit Judge.

Boechler, P.C. ("Boechler") filed a petition for review of a notice of determination from the Commissioner of Internal Revenue ("IRS"). Under 26 U.S.C. § 6330(d)(1), a party has 30 days to file a petition for review. Boechler filed one day after the filing deadline had passed. The tax court[1] dismissed the petition on the ground that it lacked jurisdiction because the petition was untimely. We have jurisdiction under 26 U.S.C. § 7842 and we affirm.

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[1] The Honorable Lewis R. Carluzzo, Chief Special Trial Judge, United States Tax Court.

I. Background

On June 5, 2015, the IRS sent Boechler a letter noting a discrepancy between prior tax document submissions. The IRS did not receive a response and imposed a 10% intentional disregard penalty. Boechler did not pay the penalty. The IRS mailed Boechler a notice of intent to levy. Boechler timely requested a Collection Due Process ("CDP") hearing but failed to establish grounds for relief on the discrepancy or the unpaid penalty. On July 28, 2017, the Office of Appeals mailed a determination sustaining the levy to Boechler's last known address in Fargo, North Dakota. The notice of determination, delivered on July 31, stated that Boechler had 30 days from the date of determination, i.e. until August 28, 2017, to submit a petition for a CDP hearing.

Boechler mailed a petition for a CDP hearing on August 29, 2017, one day after the 30-day filing deadline had expired. The United States Tax Court received Boechler's untimely petition and the IRS moved to dismiss for lack of jurisdiction. Boechler objected, arguing that the 30-day time limit in 26 U.S.C. § 6330(d)(1) is not jurisdictional, the time limit should be equitably tolled, and calculating the time limit from issuance rather than receipt violates due process. The tax court dismissed the petition for lack of jurisdiction. Boechler appealed.

II. Discussion

We review questions of the tax court's subject matter jurisdiction *de novo*. Martin S. Azarian, P.A. v. Comm'r, 897 F.3d 943, 944 (8th Cir. 2018). The tax court is an Article I court and as such it is a court with "strictly limited jurisdiction." Bartman v. C.I.R., 446 F.3d 785, 787 (8th Cir. 2006) (quoting Kelley v.

Comm'r, 45 F.3d 348, 351 (9th Cir. 1995)). The Supreme Court has "repeatedly held that filing deadlines ordinarily are not jurisdictional" but instead are usually "quintessential claim-processing rules." Sebelius v. Auburn Reg. Med. Ctr., 568 U.S. 145, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (internal quotation marks omitted). That said, a rule that "governs a court's adjudicatory capacity" is jurisdictional and "[o]ther rules, even if important or mandatory . . . should not be given the jurisdictional brand." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011).

We address first the threshold issue of whether the 30-day time limit in 26 U.S.C. § 6330(d)(1) is jurisdictional. The statute provides:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

A few years ago, this court considered § 6330 in the context of whether the tax court's jurisdiction over original notices of determination extended to supplemental notices. Hauptman v. C.I.R., 831 F.3d 950, 952–53 (8th Cir. 2016). In Hauptman, the panel identified two prerequisites for jurisdiction over an initial notice of determination: (1) the issuance of a notice of determination following a CDP hearing, and (2) the taxpayer's filing of a petition challenging that determination within 30 days of the issuance date. Id. at 953 (citing Gillum v. Comm'r, 676 F.3d 633, 647 (8th Cir. 2012); Gray v. Comm'r, 723 F.3d 790, 793 (7th Cir. 2013)); see Tschida v. C.I.R., 57 F. App'x. 715, 715–16 (8th Cir. 2003) (per curiam) (unreported)

(holding that the failure to comply with § 6330(d)(1) deprived the tax court of jurisdiction). Because neither of these factors were at issue in Hauptman the court rejected the argument that the tax court lacked jurisdiction to review supplemental notices. Hauptman, 831 F.3d at 953.

Although the IRS argues that we are bound by Hauptman and required to find § 6330(d)(1) jurisdictional, Hauptman simply did not address jurisdictional issues raised by an untimely filing of a petition. Instead, the gravamen of the holding was limited to the question of whether the tax court's jurisdiction extended to supplemental notices of determination. While persuasive, the jurisdictional test laid out in Hauptman was *obiter dicta* addressing an issue not before the court. See Sanzone v. Mercy Health, 954 F.3d 1031, 1039 (8th Cir. 2020) ("Dicta is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.") (cleaned up). As we are not bound by the dicta of another panel, we must determine if the filing deadline in § 6330(d)(1) is jurisdictional. See id.

As a general principle, a statutory time limit is jurisdictional when Congress clearly states that it is. Musacchio v. United States, —— U.S. ——, 136 S. Ct. 709, 717, 193 L.Ed.2d 639 (2016). Mere proximity to a jurisdictional provision is insufficient. See Sebelius, 568 U.S. at 155–56, 133 S.Ct. 817 (stating that an otherwise non-jurisdictional provision does not become jurisdictional "simply because it is placed in a section of a statute that also contains jurisdictional provisions"). "Congress must do something special, beyond setting an exception-free deadline, to tag a [time limit] as jurisdictional and so prohibit a court

from tolling it." United States v. Kwai Fun Wong, 575 U.S. 402, 410, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015). Even so, Congress does not have to "incant magic words" to make a deadline jurisdictional if the "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." Id. We determine whether Congress made the necessary clear statement by examining "the text, context, and relevant historical treatment of the provision at issue." Musacchio, 136 S. Ct. at 717 (internal quotation marks omitted).

Boechler, relying on Myers v. Commissioner, asserts § 6330(d)(1) is non-jurisdictional. See 928 F.3d 1025 (D.C. Cir. 2019). In Myers, the D.C. Circuit examined whether an untimely filing under 26 U.S.C. § 7623(b)(4), which includes an identically worded parenthetical as the one found in § 6330, deprived the tax court of jurisdiction.[2] Id. at 1033–36. The Myers court noted that § 7623(b)(4) "comes closer to satisfying the clear statement requirement than any the Supreme Court has heretofore held to be non-jurisdictional." Myers, 928 F.3d at 1035. However, the court ultimately held that the statute did not "condition[ ] the jurisdictional grant on the limitations period, or otherwise link[ ] those separate clauses." Id. The D.C. Circuit determined that there was no clear statement that the 30-day limit in § 7623(b)(4) was jurisdictional; instead, it held that

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[2] Section 7623(b)(4) provides: Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

the limit was merely in close proximity to jurisdictional terms referring to the general appeal, not a timely-filed appeal. Id. at 1035.

The IRS directs our attention to the Ninth Circuit's decision in Duggan v. Commissioner, 879 F.3d 1029 (9th Cir. 2018), which held that § 6330(d)(1) is jurisdictional. In that case, the plaintiff also filed his petition for review one day after the filing deadline. Id. at 1031. The Ninth Circuit determined that § 6330(d)(1) "expressly contemplates the Tax Court's jurisdiction" and "makes timely filing of the petition a condition of the Tax Court's jurisdiction." Id. at 1034. The court explained that it was significant that "the filing deadline is given in the same breath as the grant of jurisdiction." Id. In reaching the conclusion that § 6330(d)(1) is jurisdictional, the Ninth Circuit noted "the test is whether Congress made a clear statement, not whether it made the clearest statement possible." Id.

We find the Ninth Circuit's analysis persuasive. The statutory text of § 6330(d)(1) is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional. The provision states: The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter). 26 U.S.C. § 6330(d)(1). The parenthetical "(and the Tax Court shall have jurisdiction with respect to such matter)" is clearly jurisdictional and renders the remainder of the sentence jurisdictional. See Fort Bend Cty. v. Davis, —— U.S. ——, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019).

A plain reading demonstrates that the phrase "*such matter*" refers to a petition to the tax court that:

(1) arises from "a determination under this section" and (2) was filed "within 30 days" of that determination. See Myers, 928 F.3d at 1039 (Henderson, J., dissenting) (reaching the same conclusion when analyzing the identically worded parenthetical in § 7623(b)(4)); see also 26 U.S.C. § 6330(e)(1) ("The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) . . ."). Unlike other statutory provisions that have been found to be non-jurisdictional by the Supreme Court, § 6330(d)(1) speaks "in jurisdictional terms." Musacchio, 136 S. Ct. at 717 (finding 18 U.S.C. § 3282(a) non-jurisdictional). The use of "*such matter*" "plainly show[s] that Congress imbued a procedural bar with jurisdictional consequences." Kwai Fun Wong, 575 U.S. at 410, 135 S.Ct. 1625. This phrase provides the link between the 30-day filing deadline and the grant of jurisdiction to the tax court that other statutory provisions lack. Cf. Henderson, 562 U.S. at 438, 131 S.Ct. 1197 (finding that a 120-day deadline "[i]n order to obtain review" "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the Veterans Court"); Gonzalez v. Thaler, 565 U.S. 134, 146–47, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) (rejecting the argument that placing a provision in a section containing jurisdictional provisions makes it jurisdictional); Sebelius, 568 U.S. at 154, 133 S.Ct. 817 (finding that the language "may obtain a hearing" does not speak in jurisdictional terms). While there might be alternative ways that Congress could have stated the jurisdictional nature of the statute more plainly, it has spoken clearly enough to establish that

§ 6330(d)(1)'s 30-day filing deadline is jurisdictional.[3] See Duggan, 879 F.3d at 1034; Sebelius, 568 U.S. at 153, 133 S.Ct. 817.

Boechler also contends that counting the 30-day filing deadline from the date of determination rather than the date of receipt is a violation of due process or equal protection under the Fifth Amendment. We review this question of law *de novo*. See Linn Farms and Timber Ltd. P'ship v. Union Pac. R. Co., 661 F.3d 354, 357 (8th Cir. 2011). To satisfy due process, the government must "provide owners notice and opportunity for hearing appropriate to the nature of the case." Id. (internal quotation marks omitted). "The Supreme Court has long held that when the [government] chooses to regulate differentially, with the laws falling unequally on different geographic areas . . . the Equal Protection Clause is not violated so long as there is no underlying discrimination against particular persons or groups. The Equal Protection Clause protects people, not places." Reeder v. Kansas City Bd. of Police Comm'rs, 796 F.2d 1050, 1053 (8th Cir. 1986).

A statutory time limit challenged as an arbitrary and irrational classification that violates due process or equal protection, which does not draw a suspect classification or violate a fundamental right, need only be supported by a rational legislative purpose. See Holder v. Gonzales, 499 F.3d 825, 830–31 (8th

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[3] Because we hold that § 6330(d)(1) is jurisdictional, Boechler is not entitled to equitable tolling. See Kwai Fun Wong, 575 U.S. at 408–09, 135 S.Ct. 1625 (holding that a litigant's failure to comply with a jurisdictional bar deprives a court of all authority to hear a case even if equitable considerations would support extending the prescribed time period).

Cir. 2007) (rejecting claim that a law requiring appeals to be filed in Virginia violated equal protection because non-Virginians are not a protected class); see also United States v. Prior, 107 F.3d 654, 660–61 (8th Cir. 1997) (applying rational basis review to criminal defendant's challenge to statute of limitations as arbitrary in violation of Fifth Amendment). A statutory time period's starting point satisfies rational basis review if it promotes an agency's "fiscal integrity" by insuring a workable deadline and reasonable timeframe. See Boyd v. Bowen, 797 F.2d 624, 626–27 (8th Cir. 1986) (upholding SSA statute of limitations requiring application be made within six months after children reached age of majority). Boechler bears the burden to establish that the filing deadline in § 6330(d)(1) is arbitrary and irrational. Lundeen v. Canadian Pac. R. Co., 532 F.3d 682, 689–90 (8th Cir. 2008).

Boechler argues that the 30-day filing deadline is arbitrary and irrational because it is calculated from the date of determination rather than the date of receipt via certified mail and such a calculation method may result in a 2- or 3-day discrepancy in receipt date depending on where the taxpayer lives in relation to an IRS mailer. However, calculating the filing deadline from the date of determination streamlines and simplifies the complex undertaking of enforcing the tax code. If the IRS were required to wait 30 days from the date that each individual received notice, it would be unable to levy at the statutory, uniform time. Calculating from the date of determination guards against taxpayers refusing to accept delivery of the notice and promotes efficient tax enforcement by ensuring a reasonable and workable timeframe and deadline. Based on these

rational reasons for the calculation method, and Boechler's inability to identify any actual discrimination or discriminatory intent, the 30-day filing deadline from the date of determination does not violate the Fifth Amendment.

III. Conclusion

For the foregoing reasons, we affirm.

KELLY, Circuit Judge, concurring in part and concurring in the judgment.

In 2003, we squarely held that the 30-day filing deadline in 26 U.S.C. § 6330(d)(1) is jurisdictional. See Tschida v. Comm'r, 57 F. App'x 715, 715–16 (8th Cir. 2003) (concluding that "the untimely filing deprived the tax court of jurisdiction"). As an unpublished per curiam opinion, Tschida is not binding precedent, but it is relevant insofar as it has persuasive value. See 8th Cir. R. 32.1A; White v. NFL, 756 F.3d 585, 595 (8th Cir. 2014).

Thirteen years after Tschida was decided, we reached the same conclusion in a published opinion. We explained that, as a "prerequisite[ ] to the tax court's exercise of jurisdiction," "the taxpayer must file a petition challenging [a notice of] determination within thirty days after the determination is issued." Hauptman v. Comm'r, 831 F.3d 950, 953 (8th Cir. 2016) (cleaned up). To support this conclusion, we cited a Seventh Circuit opinion holding that "[u]nless a taxpayer fulfills the statutory prerequisites for invoking the Tax Court's jurisdiction, including filing a timely petition under section 6330(d)(1), the court

must dismiss a petition for lack of jurisdiction." See Gray v. Comm'r, 723 F.3d 790, 793 (7th Cir. 2013).[4]

The court concludes that our statement in Hauptman was dicta because "the gravamen of [Hauptman's] holding was limited to the question of whether the tax court's jurisdiction extended to supplemental notices of determination," not original notices of determination. Ante at 763. But the taxpayer's argument in Hauptman was that the tax court lacked jurisdiction. In resolving that issue, we decided that (1) the tax court had jurisdiction over the original notice of determination and (2) there were no additional requirements for the tax court to acquire jurisdiction over the supplemental notices. See Hauptman, 831 F.3d at 953. I do not think we could have found there was jurisdiction over the supplemental notices without also finding there was jurisdiction over the original notice. See id. (noting that "the same jurisdictional prerequisites apply" to both original and supplemental notices). And we explicitly found that the tax court had jurisdiction over the original notice because both jurisdictional prerequisites were satisfied. See id. Although this issue was not contested by the parties, I believe it was necessary to our decision. See Sanzone v. Mercy Health, 954 F.3d 1031, 1039 (8th Cir. 2020) (stating that dicta is "a judicial comment . . . that is unnecessary to the decision" (cleaned up)).

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[4] Hauptman and Gray were decided after the Supreme Court had adopted a clear-statement rule and "repeatedly held that filing deadlines ordinarily are not jurisdictional." See Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (collecting cases).

As the court notes, deeming the 30-day filing deadline in 26 U.S.C. § 6330(d)(1) jurisdictional is an unusual departure from the ordinary rule that filing deadlines are "quintessential claim-processing rules." See Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). This may have "drastic" consequences for litigants, id., and I am concerned the burden may fall disproportionately on low-income taxpayers, as the amicus suggests. I am not convinced the statute contains a sufficiently clear statement to justify this result. See Myers v. Comm'r, 928 F.3d 1025, 1036 (D.C. Cir. 2019) (holding that the "nearly identical" filing deadline in 26 U.S.C. § 7623(b)(4) is not jurisdictional). But in light of our long-standing precedent, I concur in the court's judgment.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BOECHLER, P.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 18578-17 L
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER OF DISMISSAL

This section 6330(d)[1] case is before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction, filed October 4, 2017. Respondent's motion is based upon the ground that the petition was not filed within the 30-day period prescribed by section 6330(d).

Reciting the relevant procedural history of this case is easily done. In a Notice of Determination Concerning Collection Action(s) Under Sections 6320 and/or 6330, dated July 28, 2017 (notice), respondent determined that a levy is an appropriate collection action with respect to Federal tax liabilities respondent claims to be due from petitioner. A Form

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[1] Unless otherwise noted, section references are to the Internal Revenue Code of 1986, as amended, and Rule references are to the Tax Court Rules of Practice and Procedure, available on the Internet at www.ustaxcourt.gov.

3877 certified mailing list indicates that the notice was sent to petitioner's last known address by certified mail on July 28, 2017. USPS tracking information shows that the notice was delivered to petitioner on July 31, 2017.

As respondent's motion points out, to be timely a petition filed in response to the notice would have to have been filed with, or properly mailed to the Court on or before August 27, 2017, but because that date was a Sunday, the last day to file, or properly mail a petition was instead Monday, August 28, 2017. See sec. 7503. That didn't happen. The U.S. postmark on the envelope containing the petition indicates that the petition was mailed on August 29, 2017. The petition was not received and filed by the Court until September 1, 2017.

In cases such as this one, the Court's jurisdiction depends on the issuance of a valid notice of determination by respondent's Office of Appeals and the timely filing of a petition by the taxpayer in response. Sec. 6330(d)(l); Weber v. Commissioner, 122 T.C. 258, 261 (2004); Sarrell v. Commissioner, 117 T.C. 122, 125 (2001); see Rule 330(b). See generally Rules 330-334.

Petitioner's objection to respondent's motion was filed on November 28, 2017. According to petitioner: (1) the 30-day period prescribed in section 6330(d)(l) is not jurisdictional, but if it is, then (2) section 6330(d)(l) is subject to equitable tolling, and (3) the manner that respondent (not to mention this Court) calculates the 30-day period, that is from the date of mailing rather than the date of receipt, violates petitioner's rights under the 5th Amendment because that method is arbitrary.

None of petitioner's objections are persuasive.

We have repeatedly held that "[t]he 30-day period provided in section 6330(d)(l) for the filing of a petition for review is jurisdictional." Gray v. Commissioner, 138 T.C. 295, 299 (2012). Furthermore, in Guralnik v. Commissioner, 146 T.C. 230, 237-238 (2016), we held that because the statutorily-prescribed filing period is jurisdictional, the period is not subject to equitable tolling, see Auburn Reg'l Med. Ctr., 133 S. Ct. at 824 (a court may not apply equitable tolling to a jurisdictional filing requirement); Pollock v. Commissioner, 132 T.C. 21, 29 (2009) ("If a deadline is jurisdictional, a court may not use equitable tolling to extend it * * * even if the result is harsh."). Lastly, we reject petitioner's claim that the manner by which the 30-day period is calculated is arbitrary and violative of petitioner's 5th Amendment rights. Other than point out how the method affects the filing period, petitioner has not explained why the method is arbitrary. Furthermore, the method reflects the standard and consistent way that various periods provided for under the Internal Revenue Code and other Federal statutes are calculated. See, e.g., 2 U.S.C. 394(a); Rule 25; Fed. R. Civ. P. 6. That being so, it is

ORDERED that respondent's motion is granted and this case is dismissed for lack of jurisdiction upon the ground that the petition was not filed within the period prescribed by section 6330(d).

/s/ Lewis R. Carluzzo

Lewis R. Carluzzo
Chief Special Trial Judge

ENTERED: **FEB 15 2019**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-2003

Boechler, P.C.

Appellant

v.

Commissioner of Internal Revenue

Appellee

The Federal Tax Clinic of the Legal Services Center of Harvard Law School

Amicus on Behalf of Appellant(s)

Appeal from the United States Tax Court
(018578-17L)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Loken, Colloton and Kelly would grant the petition for rehearing *en banc*.

November 17, 2020

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

26 U.S.C. § 6015

§6015. Relief from joint and several liability on joint return

(a) In general

Notwithstanding section 6013(d)(3)—

(1) an individual who has made a joint return may elect to seek relief under the procedures prescribed under subsection (b); and

(2) if such individual is eligible to elect the application of subsection (c), such individual may, in addition to any election under paragraph (1), elect to limit such individual's liability for any deficiency with respect to such joint return in the manner prescribed under subsection (c).

Any determination under this section shall be made without regard to community property laws.

(b) Procedures for relief from liability applicable to all joint filers

(1) In general

Under procedures prescribed by the Secretary, if—

(A) a joint return has been made for a taxable year;

(B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;

(C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement;

(D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement; and

(E) the other individual elects (in such form as the Secretary may prescribe) the benefits of this subsection not later than the date which is 2 years after the date the Secretary has begun collection activities with respect to the individual making the election,

then the other individual shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such understatement.

(2) Apportionment of relief

If an individual who, but for paragraph (1)(C), would be relieved of liability under paragraph (1), establishes that in signing the return such individual did not know, and had no reason to know, the extent of such understatement, then such individual shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to the portion of such understatement of which such individual did not know and had no reason to know.

(3) Understatement

For purposes of this subsection, the term "understatement" has the meaning given to such term by section 6662(d)(2)(A).

(c) Procedures to limit liability for taxpayers no longer married or taxpayers legally separated or not living together

(1) In general

Except as provided in this subsection, if an individual who has made a joint return for any taxable year elects the application of this subsection, the individual's liability for any deficiency which is assessed with respect to the return shall not exceed the portion of such deficiency properly allocable to the individual under subsection (d).

(2) Burden of proof

Except as provided in subparagraph (A)(ii) or (C) of paragraph (3), each individual who elects the application of this subsection shall have the burden of proof with respect to establishing the portion of any deficiency allocable to such individual.

(3) Election

(A) Individuals eligible to make election

(i) In general

An individual shall only be eligible to elect the application of this subsection if—

(I) at the time such election is filed, such individual is no longer married to, or is legally separated from, the individual with whom such individual filed the joint return to which the election relates; or

(II) such individual was not a member of the same household as the individual with

whom such joint return was filed at any time during the 12-month period ending on the date such election is filed.

(ii) Certain taxpayers ineligible to elect

If the Secretary demonstrates that assets were transferred between individuals filing a joint return as part of a fraudulent scheme by such individuals, an election under this subsection by either individual shall be invalid (and section 6013(d)(3) shall apply to the joint return).

(B) Time for election

An election under this subsection for any taxable year may be made at any time after a deficiency for such year is asserted but not later than 2 years after the date on which the Secretary has begun collection activities with respect to the individual making the election.

(C) Election not valid with respect to certain deficiencies

If the Secretary demonstrates that an individual making an election under this subsection had actual knowledge, at the time such individual signed the return, of any item giving rise to a deficiency (or portion thereof) which is not allocable to such individual under subsection (d), such election shall not apply to such deficiency (or portion). This subparagraph shall not apply where the individual with actual knowledge establishes that such individual signed the return under duress.

(4) Liability increased by reason of transfers of property to avoid tax

(A) In general

Notwithstanding any other provision of this subsection, the portion of the deficiency for which the individual electing the application of this subsection is liable (without regard to this paragraph) shall be increased by the value of any disqualified asset transferred to the individual.

(B) Disqualified asset

For purposes of this paragraph—

(i) In general

The term "disqualified asset" means any property or right to property transferred to an individual making the election under this subsection with respect to a joint return by the other individual filing such joint return if the principal purpose of the transfer was the avoidance of tax or payment of tax.

(ii) Presumption

(I) In general

For purposes of clause (i), except as provided in subclause (II), any transfer which is made after the date which is 1 year before the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent

shall be presumed to have as its principal purpose the avoidance of tax or payment of tax.

(II) Exceptions

Subclause (I) shall not apply to any transfer pursuant to a decree of divorce or separate maintenance or a written instrument incident to such a decree or to any transfer which an individual establishes did not have as its principal purpose the avoidance of tax or payment of tax.

(d) Allocation of deficiency

For purposes of subsection (c)—

(1) In general

The portion of any deficiency on a joint return allocated to an individual shall be the amount which bears the same ratio to such deficiency as the net amount of items taken into account in computing the deficiency and allocable to the individual under paragraph (3) bears to the net amount of all items taken into account in computing the deficiency.

(2) Separate treatment of certain items

If a deficiency (or portion thereof) is attributable to—

(A) the disallowance of a credit; or

(B) any tax (other than tax imposed by section 1 or 55) required to be included with the joint return;

and such item is allocated to one individual under paragraph (3), such deficiency (or portion) shall be allocated to such individual. Any such item shall not be taken into account under paragraph (1).

(3) Allocation of items giving rise to the deficiency

For purposes of this subsection—

(A) In general

Except as provided in paragraphs (4) and (5), any item giving rise to a deficiency on a joint return shall be allocated to individuals filing the return in the same manner as it would have been allocated if the individuals had filed separate returns for the taxable year.

(B) Exception where other spouse benefits

Under rules prescribed by the Secretary, an item otherwise allocable to an individual under subparagraph (A) shall be allocated to the other individual filing the joint return to the extent the item gave rise to a tax benefit on the joint return to the other individual.

(C) Exception for fraud

The Secretary may provide for an allocation of any item in a manner not prescribed by subparagraph (A) if the Secretary establishes that such allocation is appropriate due to fraud of one or both individuals.

(4) Limitations on separate returns disregarded

If an item of deduction or credit is disallowed in its entirety solely because a separate return is

filed, such disallowance shall be disregarded and the item shall be computed as if a joint return had been filed and then allocated between the spouses appropriately. A similar rule shall apply for purposes of section 86.

(5) Child's liability

If the liability of a child of a taxpayer is included on a joint return, such liability shall be disregarded in computing the separate liability of either spouse and such liability shall be allocated appropriately between the spouses.

(e) Petition for review by Tax Court

(1) In general

In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)—

(A) In general

In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed—

(i) at any time after the earlier of—

(I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or

(II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and

(ii) not later than the close of the 90th day after the date described in clause (i)(I).

(B) Restrictions applicable to collection of assessment

(i) In general

Except as otherwise provided in section 6851 or 6861, no levy or proceeding in court shall be made, begun, or prosecuted against the individual making an election under subsection (b) or (c) or requesting equitable relief under subsection (f) for collection of any assessment to which such election or request relates until the close of the 90th day referred to in subparagraph (A)(ii), or, if a petition has been filed with the Tax Court under subparagraph (A), until the decision of the Tax Court has become final. Rules similar to the rules of section 7485 shall apply with respect to the collection of such assessment.

(ii) Authority to enjoin collection actions

Notwithstanding the provisions of section 7421(a), the beginning of such levy or proceeding during the time the prohibition under clause (i) is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this

subparagraph to enjoin any action or proceeding unless a timely petition has been filed under subparagraph (A) and then only in respect of the amount of the assessment to which the election under subsection (b) or (c) relates or to which the request under subsection (f) relates.

(2) Suspension of running of period of limitations

The running of the period of limitations in section 6502 on the collection of the assessment to which the petition under paragraph (1)(A) relates shall be suspended—

(A) for the period during which the Secretary is prohibited by paragraph (1)(B) from collecting by levy or a proceeding in court and for 60 days thereafter, and

(B) if a waiver under paragraph (5) is made, from the date the claim for relief was filed until 60 days after the waiver is filed with the Secretary.

(3) Limitation on Tax Court jurisdiction

If a suit for refund is begun by either individual filing the joint return pursuant to section 6532—

(A) the Tax Court shall lose jurisdiction of the individual's action under this section to whatever extent jurisdiction is acquired by the district court or the United States Court of Federal Claims over the taxable years that are the subject of the suit for refund, and

(B) the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection.

(4) Notice to other spouse

The Tax Court shall establish rules which provide the individual filing a joint return but not making the election under subsection (b) or (c) or the request for equitable relief under subsection (f) with adequate notice and an opportunity to become a party to a proceeding under either such subsection.

(5) Waiver

An individual who elects the application of subsection (b) or (c) or who requests equitable relief under subsection (f) (and who agrees with the Secretary's determination of relief) may waive in writing at any time the restrictions in paragraph (1)(B) with respect to collection of the outstanding assessment (whether or not a notice of the Secretary's final determination of relief has been mailed).

(6) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1)(A) with respect to a final determination of relief under this section, the running of the period prescribed by such paragraph for filing such a petition with respect to such final determination shall be suspended for the period during which the person

is so prohibited from filing such a petition, and for 60 days thereafter.

(f) Equitable relief

Under procedures prescribed by the Secretary, if—

(1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either); and

(2) relief is not available to such individual under subsection (b) or (c),

the Secretary may relieve such individual of such liability.

(g) Credits and refunds

(1) In general

Except as provided in paragraphs (2) and (3), notwithstanding any other law or rule of law (other than section 6511, 6512(b), 7121, or 7122), credit or refund shall be allowed or made to the extent attributable to the application of this section.

(2) Res judicata

In the case of any election under subsection (b) or (c) or of any request for equitable relief under subsection (f), if a decision of a court in any prior proceeding for the same taxable year has become final, such decision shall be conclusive except with respect to the qualification of the individual for relief which was not an issue in such proceeding. The exception contained in the preceding sentence shall not apply if the court determines that the

individual participated meaningfully in such prior proceeding.

(3) Credit and refund not allowed under subsection (c)

No credit or refund shall be allowed as a result of an election under subsection (c).

(h) Regulations

The Secretary shall prescribe such regulations as are necessary to carry out the provisions of this section, including—

(1) regulations providing methods for allocation of items other than the methods under subsection (d)(3); and

(2) regulations providing the opportunity for an individual to have notice of, and an opportunity to participate in, any administrative proceeding with respect to an election made under subsection (b) or (c) or a request for equitable relief made under subsection (f) by the other individual filing the joint return.

26 U.S.C. § 6330

§ 6330. Notice and opportunity for hearing before levy

(a) Requirement of notice before levy

(1) In general

No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth—

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax

specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing

In the case of any hearing conducted under this section—

(1) Requirement of investigation

The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing

(A) In general

The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination

The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded

An issue may not be raised at the hearing if—

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding;

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A); or

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.

This paragraph shall not apply to any issue with respect to which subsection (d)(3)(B) applies.

(d) Proceeding after hearing

(1) Petition for review by Tax Court

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the

Tax Court shall have jurisdiction with respect to such matter).

(2) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter.

(3) Jurisdiction retained at IRS Office of Appeals

The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations

(1) In general

Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of

limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal

Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Exceptions

If—

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,

(3) the Secretary has served a disqualified employment tax levy, or

(4) the Secretary has served a Federal contractor levy,

this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

(g) Frivolous requests for hearing, etc.

Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

(h) Definitions related to exceptions

For purposes of subsection (f)—

(1) Disqualified employment tax levy

A disqualified employment tax levy is any levy in connection with the collection of employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a hearing under this section with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served. For purposes of the preceding sentence, the term "employment taxes" means any taxes under chapter 21, 22, 23, or 24.

(2) Federal contractor levy

A Federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor.

26 U.S.C. § 7623

§ 7623. Expenses of detection of underpayments and fraud, etc.

(a) In general

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) Awards to whistleblowers

(1) In general

If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) Award in case of less substantial contribution

(A) In general

In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of information

Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) Reduction in or denial of award

If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is

brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) Appeal of award determination

Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(5) Application of this subsection

This subsection shall apply with respect to any action—

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and

(B) if the proceeds in dispute exceed $2,000,000.

(6) Additional rules

(A) No contract necessary

No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

(B) Representation

Any individual described in paragraph (1) or (2) may be represented by counsel.

(C) Submission of information

No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.

(c) Proceeds

For purposes of this section, the term "proceeds" includes—

(1) penalties, interest, additions to tax, and additional amounts provided under the internal revenue laws, and

(2) any proceeds arising from laws for which the Internal Revenue Service is authorized to administer, enforce, or investigate, including—

(A) criminal fines and civil forfeitures, and

(B) violations of reporting requirements.