No. 20-1472

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The question presented implicates a square circuit split, on an important and recurring question of law, that a divided Eighth Circuit panel got wrong. The Commissioner's arguments against certiorari contradict the government's prior position, ignore the views of the IRS National Taxpayer Advocate, and conflict with this Court's precedent deeming only the "rare" statutory time limit jurisdictional. The Court should grant review.

ARGUMENT

I. There Is An Irreconcilable Split

In urging the D.C. Circuit to grant en banc review in *Myers*, the Commissioner argued that the panel's holding "conflicts with the Ninth Circuit's decision in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), which held that a virtually identical time limit in I.R.C. § 6330(d)(1) . . . is jurisdictional." Commissioner En Banc Pet'n 1, *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019) (No. 18-1003). The Commissioner's position could not have been more clear: "It is simply not possible to reconcile the decision in [*Myers*] with *Duggan*." *Id.* at 11.

The only changes in the last two years are that the conflict is deeper and the Commissioner won below. So the Commissioner now claims the impossible is possible. Specifically, "[u]pon further consideration," the Commissioner believes the government's prior representations "overstated the extent of the disagreement" between the courts of appeals. BIO 24. The divergent results in *Myers* and *Duggan*, he posits, "may reflect differences in the contexts of the two provisions," which "should" cause a court that holds 26 U.S.C. § 7623(b)(4) is *not* jurisdictional to

nonetheless conclude that Section 6330(d)(1) *is* jurisdictional. BIO 24.

The Commissioner was right in 2019 and is wrong now. As the courts have acknowledged, Sections 6330(d)(1) and 7623(b)(4) have "identically worded parenthetical[s]" and are "nearly identical in structure." Pet. App. 5a; *Myers*, 928 F.3d at 1036. Even the Commissioner concedes they are "very similar," and offers no distinction between the provisions' text. BIO 23.

The Commissioner rests instead on "features of the statutory context" and "different statutory purposes." *Id.* But as discussed *infra* at 6-8, neither context nor purpose comes close to establishing that Section 6330(d)(1) is a jurisdictional deadline. More importantly, it is implausible that Congress used materially identical language for two Tax Court filing deadlines, intending only one to be jurisdictional. 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," *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (alteration in original) (citation omitted). Nuanced contextual features and extratextual "purposes" do not supply the requisite clarity.

That is perhaps why no court in the split has distinguished the contrary authority on such tenuous grounds. They have simply acknowledged the conflict and picked a side. *See Myers*, 928 F.3d at 1036; Pet. App. 5a-7a; *id.* at 12a (Kelly, J., concurring in part and concurring in the judgment). And the Commissioner continues to believe the Eighth and Ninth Circuits got it right and the D.C. Circuit got it

wrong. BIO 24. This Court should resolve that disagreement.[1]

II. The Question Presented Is Important

As the petition and amici briefs explain, the question presented is important and recurring. Appeals from collection-due-process hearings are among the most litigated matters in the Tax Court. Pet. 22-23. The specific question whether the 30-day deadline is jurisdictional frequently recurs. *Id.* at 23. And the considerable uncertainty created by conflicting court decisions prompted the IRS National Taxpayer Advocate to urge Congress to address equitable tolling for Tax Court deadlines, including Sections 6330(d)(1) and 7623(b)(4). *Id.* at 24-25 & n.7. Meanwhile, the harsh results of the jurisdictional rule adopted by the Tax Court—and the Eighth and Ninth Circuits—fall most heavily on pro se and low-income taxpayers. *Id.* at 25-27; Pet. App. 12a; *Amici Curiae* Br. of the Federal Tax Clinic at Charles Widger School of Law et al. 2-3, 8-13 ("Tax Clinics Br.").

The Commissioner does not dispute any of that, and the limited arguments he makes are not persuasive.

First, the Commissioner seeks to further distance himself from the call for en banc review in *Myers*. He says the government viewed that jurisdictional question to be one of "exceptional importance" (Myers En Banc Pet'n 1) merely because venue for Tax Court whistleblower decisions lies exclusively in the D.C.

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[1] The Commissioner insists that other courts of appeals have decided this issue and sided with the Eighth and Ninth Circuits. BIO 21. That is incorrect. *See* Pet. 14 & n.3. But the confusion only underscores the need for this Court's review.

Circuit. BIO 24-25. But review of the question presented here would resolve *that* exceptionally important issue too. And regardless, the jurisdictional issue comes up far more often in the context of Section 6330(d)(1), than Section 7623(b)(4). *See Amicus Curiae* Br. of the Ctr. for Taxpayer Rights 5 n.3 ("Ctr. for Taxpayer Rights Br.").

Second, the Commissioner tries to minimize the significance of collection-due-process hearings. He notes that some taxpayers may already have had an opportunity to challenge their tax liability in a deficiency proceeding, and others can obtain review by filing a refund suit after-the-fact. BIO 19-20, 25. But that assessment runs directly counter to Congress's judgment that the collection-due-process regime *is* needed because deficiency proceedings and refund suits were *not* stopping IRS abuses. Pet. 3-4.

And the Commissioner overstates the utility of these alternative proceedings. As he concedes (BIO 19-20), deficiency proceedings are not available to all taxpayers. Which is why Section 6330 expressly allows those who "did not receive any statutory notice of deficiency" or "did not otherwise have an opportunity to dispute such tax liability" to raise those challenges during collection-due-process proceedings. 26 U.S.C. § 6330(c)(2)(B). More fundamentally, the primary purpose of collection-due-process hearings is to allow the taxpayer to challenge the IRS's proposed collection *action—i.e.*, the legality or appropriateness of the lien or levy itself. *See id.* § 6330(c)(2)(A). The taxpayer can, for example, argue for alternatives to levy, including installment payment plans, deferrals of collection due to hardship, substitution of other assets, or offers in compromise. *See id.*; S. Rep. No. 105-174, at 67-68

(1998); National Taxpayer Advocate, *Annual Report to Congress* 183-84 (Dec. 31, 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf. A pre-levy deficiency proceeding or post-levy refund suit is not going to help a taxpayer who loses her primary mode of transportation because her car was wrongly (or unnecessarily) seized to pay a tax debt.

III. The Commissioner's Merits Arguments Are Unpersuasive

The Commissioner dedicates most of his brief to arguing that Section 6330(d)(1) is indeed a "rare" jurisdictional time limit. *Kwai Fun Wong*, 575 U.S. at 410. The Commissioner's merits arguments fail too.

1. To find the clear statement all agree is required (BIO 15), the Commissioner begins with the text of Section 6330(d)(1). Like the Eighth Circuit, he relies primarily on the fact that the 30-day deadline and the jurisdictional grant are located in the same subsection. BIO 10-11, 16-18. But time and again, this Court has said that "proximity" is not enough. *See, e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013).

Recognizing as much, the Commissioner says there is more: the two "are explicitly linked." BIO 10 (citation omitted). Not so. The parenthetical is a new independent clause that does not condition the Tax Court's jurisdiction on compliance with the 30-day deadline. *See Myers*, 928 F.3d at 1035; *cf.* 26 U.S.C. § 6015(e) (using the word "if"). And the most natural antecedent for the parenthetical's phrase "such matter" is the immediately preceding clause, *i.e.*, the "petition" seeking "review of [a collection-due-process] determination." 26 U.S.C. § 6330(d)(1); *see also id.*

§ 6330(c) (referring to "[m]atters" that can be addressed at the hearing and, thus, raised in the petition as well). The 30-day deadline is located in a separate clause farther back in the sentence and separated by commas.

The Commissioner maintains that express conditional language is not necessary. BIO 18-19. But the simplistic example he uses—"Give me $100 by Friday and the baseball tickets are yours"—looks nothing like Section 6330(d)(1), which (among other things) is 33 words long, uses parentheses to set off the independent clause, and is not worded as a command. In any case, the word "and" can also join two independent clauses without making one a condition of the other. For example: "You bring the juice (and I'll bring the soda)." No one would think the second partygoer's obligation hinges on the first's. The point is that jurisdiction under Section 6330(d)(1) is not conditioned on the time deadline—and certainly not unambiguously so.

2. The Commissioner also points to statutory context, but that does not provide the needed clarity either.

He relies on another subsection of the collection-due-process statute, Section 6330(e). That provision explains that any levy actions (along with certain statutes of limitations) must be suspended during the pendency of the taxpayer's collection-due-process hearing and any subsequent appeals. 26 U.S.C. § 6330(e)(1). The provision grants the Tax Court authority to enjoin any levy or proceeding that goes forward in violation of that suspension. *Id.* It then instructs that "[t]he 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)." *Id.* (emphasis added).

The Commissioner argues it would be "incongruous" for Congress to make the Tax Court's jurisdiction to enjoin levy actions contingent on the 30-day deadline, while not so limiting the court's jurisdiction to adjudicate the petition itself. BIO 11-12. But the Commissioner does not explain why Congress would have specified that the Tax Court lacks jurisdiction to award such relief when, according to his reading of Section 6330(d)(1), the court has no jurisdiction to adjudicate late-filed petitions at all. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (statutes should be read to avoid rendering text superfluous). Nor does the Commissioner acknowledge a key textual limitation, which distinguishes the cases he cites interpreting 26 U.S.C. § 6213(a): Section 6330(e) refers to the court's jurisdiction "*under this paragraph*" only.[2] And the Commissioner fails to explain why the word "timely" would not include a petition rendered timely because the 30-day deadline has been equitably tolled. *See* Pet. 20 n.5; *In re Milby*, 875 F.3d 1229, 1235 (9th Cir. 2017) (calling action "timely" when equitable tolling applied). So construed, there is no incongruity.

In a similar vein, the Commissioner argues that treating the 30-day deadline as nonjurisdictional would create practical problems. BIO 12-13, 23, 27. But those practical problems are nothing new. The Internal Revenue Code sets forth general statutory exceptions to its deadlines, which the Commissioner

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[2] The Commissioner also cites cases interpreting 26 U.S.C. § 6015, but that provision is distinguishable too. Pet. 18-19 & n.4.

has extended to cover Section 6330(d)(1). *See* 26 U.S.C. § 7508(a) (taxpayer who is a member of the armed forces serving in a combat zone); *id.* § 7508A(d) (taxpayer affected by a federally declared disaster); IRS Rev. Proc. 2018-58, at 1, 6, 112, https://www.irs.gov/pub/irs-drop/rp-18-58.pdf. Similarly, a petition is considered timely filed if it is postmarked by the deadline, even if it arrives late. 26 U.S.C. § 7502. In all of those situations, the suspension of IRS levy actions and other limitations periods will have to be reinstated *after* the 30-day period lapses. This undermines any inference that Congress could not possibly have intended the scenario the Commissioner presents to come about.

3. The Commissioner also invokes a line of cases where this Court has found a few deadlines jurisdictional *not* because Congress clearly stated as much in text, but based on principles of stare decisis. BIO 9-10. Section 6330(d)(1) has no such pedigree.

The Commissioner argues that when Congress enacted Section 6330 in 1998, courts of appeals had already deemed jurisdictional another Tax Court deadline, 26 U.S.C. § 6213(a). BIO 13-14. But to state the obvious, Section 6213(a) is not Section 6330(d)(1). It is a different statute with different language. And regardless, *this Court* must be the one to hold a particular deadline jurisdictional for the stare decisis exception to apply. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-74 (2010) (Ginsburg, J., concurring in part and concurring in the judgment).

In *Kwai Fun Wong*, the government made a similar—but far stronger—stare decisis argument: that *this Court* had held the Tucker Act's time bar to be jurisdictional; that Congress thereafter adopted

the same language for the time bar in the Federal Tort Claims Act (FTCA); and that the Court should therefore infer that Congress intended to incorporate that prior jurisdictional interpretation. The Court disagreed, finding nothing to support "the Government's claim that Congress . . . wanted to incorporate this Court's view of the Tucker Act's time bar—much less that Congress expressed that purported intent with the needed clear statement." *Kwai Fun Wong*, 575 U.S. at 416-17. The Commissioner does not explain how court of appeals decisions about a differently worded statute could justify a contrary result here.

4. Finally, the Commissioner argues that holding Section 6330(d)(1) jurisdictional would put "the Tax Court on 'equal footing' with another Article I court, the Court of Federal Claims." BIO 14 (citation omitted) (invoking *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-39 (2008)). True, but it would put the Tax Court on *un*equal footing with another Article I court, the Court of Appeals for Veterans Claims. *See Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). So there is no uniformity to maintain. Regardless, *John R. Sand* was not based on the Court of Claims' status as an Article I court, but on the stare decisis considerations already discussed. 552 U.S. at 134-39; *see Kwai Fun Wong*, 575 U.S. at 416.

IV. The Commissioner's Alternative Argument Does Not Present A Vehicle Issue

The Commissioner ends by arguing that review is not warranted because equitable tolling would be impermissible even if Section 6330(d)(1)'s filing deadline is nonjurisdictional. BIO 25-30. The

Commissioner's alternative argument presents no vehicle issue, for three reasons.

First, the Court can grant review to decide the antecedent jurisdictional question without addressing the Commissioner's alternative argument. As this Court has often said, it is a court of review, not first view. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Eighth Circuit did not decide whether equitable tolling would be available if the deadline is *non*jurisdictional; it pretermitted that inquiry by holding the deadline *is* jurisdictional. It would be passing strange if a threshold question could evade this Court's review because the court of appeals answered it incorrectly. Which is perhaps why this Court has previously granted review of a similar question presented in the same posture. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 22 (2017).

Second, if the Commissioner is concerned about the practical import of a decision focused solely on jurisdiction, the solution is for this Court to decide both issues—not deny review altogether. The Court has done that too. *See Kwai Fun Wong*, 575 U.S. at 408 n.2, 412, 420. And contrary to the Commissioner's assertion (BIO 30), the equitable tolling issue is fairly included in the question presented: "[w]hether the time limit in Section 6330(d)(1) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling." Pet. i. The Eighth Circuit held it was the former; petitioner argues it is the latter; and the Commissioner has argued in the alternative that it is neither. If there is any doubt on that score, the Court could add a second question when granting the petition.

Third, an alternative ground for affirmance is no reason to deny review if (as here) it is unlikely to prevail. As the Commissioner concedes (BIO 14-15), the "general rule" is that nonjurisdictional time limits are subject to equitable tolling. *Kwai Fun Wong*, 575 U.S. at 412 (citation omitted). The Commissioner's various arguments do not rebut that presumption.

Many of them repeat the Commissioner's reasons why Section 6330(d)(1) should be considered jurisdictional and fail for reasons already discussed. *See supra* at 7-8. The assertion that equitable tolling would plague the collection-due-process regime with "administrative difficulties" (BIO 27) is further undercut by the judgment of the IRS National Taxpayer Advocate. Pet. 22, 24-25. And the amendment history of Section 6330(d) is not probative either. BIO 28-29. Take the 2006 amendments. Because Congress shifted jurisdiction over collection-due-process appeals entirely to the Tax Court (as opposed to splitting jurisdiction between the Tax Court and district courts), it makes sense that Congress simultaneously eliminated the automatic 30-day safety valve for filing in the "incorrect court." That change sheds no light on whether Section 6330(d)(1) allows for equitable tolling. *Duggan*, 879 F.3d at 1034-35 (finding amendment not probative).

The Commissioner also places heavy reliance on *United States v. Brockamp*, 519 U.S. 347 (1997), which held that the deadline for filing a refund claim could not be equitably tolled. But that decision cannot be read to preclude equitable tolling for *any* provision in the tax code. *See Volpicelli v. United States*, 777 F.3d 1042, 1046 (9th Cir. 2015) (rejecting *Brockamp* argument in context of another tax deadline). The *Brockamp* Court relied on a combination of factors,

e.g., the deadline was set forth in "unusually emphatic form," there were six express exceptions, and the time limit was reiterated in the form of "substantive limitations on the amount of [refund] recovery." 519 U.S. at 350-52. Section 6330(d) has none of those features. *See* Ctr. for Taxpayer Rights Br. 13-15.

One final note: the Commissioner briefly asserts that "substantial doubt exists" about whether equitable tolling is warranted in petitioner's own case. BIO 29-30. But the Tax Court forestalled that inquiry by adhering to its precedent holding Section 6330(d)(1) jurisdictional. Pet. 6. And contrary to the Commissioner's suggestion, petitioner is not asking this Court to decide that undeveloped, factbound question. It should be left for the courts below (and, really, the Tax Court) on remand.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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