No. 20-1472

In The
Supreme Court of the United States

BOECHLER, P.C.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE CENTER FOR TAXPAYER RIGHTS AND THE NATIONAL CONSUMER LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Center for Taxpayer Rights is a Section 501(c)(3) non-profit organization that promotes taxpayer rights in the United States and abroad. The Center also seeks to educate the public and government officials about the role that taxpayer rights play in promoting trust in systems of taxation.

The Center's Executive Director is Nina E. Olson. She was appointed under Section 7803(c)(1)(B)[2] as the IRS National Taxpayer Advocate and served in that position from 2001 to 2019. As National Taxpayer Advocate, Ms. Olson represented taxpayers' interests and perspectives within the IRS and before Congress.

The National Consumer Law Center is a Section 501(c)(3) non-profit legal research and advocacy organization whose mission is to protect the rights of low-income, financially distressed, and elderly consumers nationwide, including the right to access to the courts. For over fifty years, NCLC has been a leading source of legal and public policy expertise on consumer issues

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[1] Both parties have consented in writing to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. Aside from *amici*, the only person that contributed to the preparation or submission of this brief was Harvard University, of which the Tax Clinic is a part. Harvard University paid the costs of printing this brief.

[2] Unless otherwise indicated, all section references in this brief are to the Internal Revenue Code, codified in Title 26 of the U.S. Code.

for Congress, state legislatures, agencies, courts, and consumer advocates.

Because low-income taxpayers frequently miss filing deadlines, even when acting in good faith and with adequate due diligence, *amici* believe that the low-income taxpayer community would benefit were this Court to rule that Section 6330(d)(1) is nonjurisdictional and subject to equitable tolling.

SUMMARY OF ARGUMENT

Amici have read Boechler's opening brief. *Amici* fully agree with the brief's conclusion that the filing deadline in Section 6330(d)(1) is nonjurisdictional.

Amici's brief focuses on equitable tolling. This brief concludes with common examples of situations where equitable tolling could apply in Tax Court cases (under its collection due process ("CDP"), deficiency, and innocent spouse jurisdictions).

This Court's case law makes clear that Section 6330(d)(1) is not the kind of exceptional statute for which equitable tolling is unavailable. Equitable tolling provides a necessary prerequisite for justice when low-income taxpayers – often representing themselves *pro se* – miss Tax Court filing deadlines through no fault of their own.

As this Court has previously explained, federal statutes of limitations are presumptively subject to equitable tolling. Nothing in the text, structure, or

purpose of Section 6330(d)(1) rebuts that presumption. Rather, there are "good reasons to believe" that Congress would have "*want[ed]* the equitable tolling doctrine to apply" in Section 6330(d)(1) cases. *Cf. United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (emphasis added).

The Tax Court, a judicial tribunal with a majority of *pro se* filers, exemplifies the kind of judicial tribunal where equitable tolling has traditionally been applied.

A comparison of the statute construed by this Court in *Brockamp* to that construed in *Holland* v. *Florida*, 560 U.S. 631 (2010), shows that Section 6330(d)(1)'s filing deadline acts far more like the deadline found in *Holland* to be subject to equitable tolling than the deadline found in *Brockamp* not to be subject to equitable tolling. CDP is an equitable area of the Tax Code, and it was enacted after this Court's creation of the presumption in favor of tolling. Therefore, under *Holland*, 560 U.S. at 646, the presumption in favor of tolling is doubly-"reinforced."

Despite regular government arguments to the contrary, a sentence from *dicta* in the *Brockamp* opinion does not require this Court to bar equitable tolling from any part of the Tax Code. Collection of tax liability under the Code regularly occurs with equity explicitly in mind.

ARGUMENT

The last two IRS National Taxpayer Advocates have for some time argued that Section 6330(d)(1) and related statutes are or should be subject to equitable tolling. As then-National Taxpayer Advocate Olson explained in her 2017 Annual Report to Congress:

> Unrepresented taxpayers in particular may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation. . . . [T]he right to a fair and just tax system requires that [equitable] doctrines be available to taxpayers in the rare cases they would apply.

1 *Nat'l Taxpayer Advocate 2017 Annual Report to Congress* 291 (2017).[3] The current National Taxpayer Advocate has similarly explained that "[t]reating the [Internal Revenue Code's] time limits for bringing suit as . . . not subject to equitable doctrines[ ] leads to unfair outcomes." *Nat'l Taxpayer Advocate 2021 Purple Book* 101 (2021).

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[3] This quote derives from the portion of the annual report proposing legislative changes and entitled Legislative Recommendation #3 ("Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling. . . ."), at 283-92. In her recommendation (at 287), she relied, in part, on what is known as the "Taxpayer Bill of Rights," enacted in 2015, at Section 7803(a)(3), which promises taxpayers "the right to appeal a decision of the Internal Revenue Service in an independent forum" (subparagraph (E)) and "the right to a fair and just tax system" (subparagraph (J)).

These unfair outcomes are not required by – indeed, they are incompatible with – existing law. This Court's equitable tolling precedents make clear that Section 6330(d)(1) is the kind of statute that is subject to equitable tolling.

Access to the Tax Court in CDP matters *a lot* – because the Tax Court is the only place where a court reviews the IRS's proposed levies *before* the actual harm occurs – a vital issue for low-income taxpayers, small businesses, etc.

Congress requires IRS Independent Office of Appeals employees in CDP to take into consideration "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." Section 6330(c)(3)(C). In CDP hearings, taxpayers are requested to submit financial income and asset disclosure forms so that the Appeals Officers can evaluate how each possible collection alternative might apply on the individual facts of the case. Thus, CDP is an equitable area of the Internal Revenue Code. It would be perverse to think that Congress wanted the Tax Court CDP filing deadline – a deadline in an equitable area – to prohibit equitable tolling. The Tax Court's and Eighth Circuit's jurisdictional holdings in this case undermine the congressional intent to expand taxpayer protections.

I. UNDER THIS COURT'S PRECEDENTS, SECTION 6330(d)(1)'S DEADLINE IS SUBJECT TO EQUITABLE TOLLING.

"It is hornbook law that limitations periods are 'customarily subject to equitable tolling' unless tolling would be 'inconsistent with the text of the relevant statute.'" *Young* v. *United States*, 535 U.S. 43, 49 (2002) (quoting *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990), and *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998)). This "rebuttable presumption" applies in "suits against the United States" as well as against private parties. *Irwin*, 498 U.S. at 95-96. This Court "presume[s]" that Congress drafts limitations periods "in light of [the] background principle" that tolling is generally available. *Young*, 535 U.S. at 49.

Congress can rebut *Irwin*'s presumption of equitable tolling in one of two ways.

First, when Congress makes a time bar "jurisdictional," a court must enforce that bar "even if equitable considerations would support extending the prescribed time period." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 408-09 (2015). Boechler correctly argues in its brief that Congress did not make the Section 6330(d)(1) deadline jurisdictional.

Second, even when a time bar is not jurisdictional, a statute's text and context may collectively make clear that equitable tolling is not available. That is not the case here.

A. Section 6330(d)(1)'s Text Supports the Availability of Equitable Tolling.

Statutory text can rebut the presumption in favor of equitable tolling. But, it does not do so here.

In *Brockamp*, this Court faced the issue of whether the 3-year time limit for filing an administrative tax refund claim in Section 6511 was subject to equitable tolling. Without discussing whether the time period was jurisdictional (and apparently assuming that it was not), this Court held that, even if the *Irwin* presumption applied to this time period, a combination of factors would rebut any presumption that equitable tolling could apply: (1) the time limits were set forth in an "unusually emphatic form"; (2) the statute set forth the limitations in a "highly detailed technical manner," by reiterating the limitations period in multiple subsections; (3) the statute specified numerous exceptions to the filing deadline, which did not include equitable tolling;[4] (4) the granting of equitable tolling would require tolling substantive limitations on the amount of recovery, for which there was no direct precedent (*see* Section 6511(b) lookback amount limitations); and (5) granting equitable tolling could create serious administrative problems by forcing the IRS to respond to

[4] The exceptions are laid out at Sections 6511(c) (for extensions signed by the parties), (d)(1) (for bad debts and worthless securities), (d)(2) (for net operating loss or capital loss carrybacks), (d)(3) (for foreign tax credits), (d)(4) (for certain other credit carrybacks), (d)(5) and (d)(7) (for certain self-employment taxes), (d)(6) (for certain income recaptured under qualified plan terminations), and (d)(8) (when uniformed services retired pay is reduced as a result of award of disability compensation).

large numbers of late claims. *Brockamp*, 519 U.S. at 350-53.

In *Holland*, this Court revisited *Brockamp* when addressing whether the 1-year statute of limitations for asking a federal district court to engage in *habeas* review of a state death penalty conviction was subject to equitable tolling. *Holland*, 560 U.S. at 634. In distinguishing the *habeas* statute from the one in *Brockamp*, this Court found that the presumption in favor of equitable tolling was not rebutted because: (1) the language of the limitations provision was not unusually emphatic; (2) the statute did not "reiterate" its time limitation; (3) the one exception the statute enunciated (tolling during state collateral review proceedings) was a necessary procedural measure to account for exhaustion of state remedies; (4) the application of equitable tolling would not affect the substance of a *habeas* petitioner's claim; and (5) the subject matter at issue, *habeas corpus*, pertains to an area in which equitable considerations often factor (which "reinforced" the presumption in favor of tolling), unlike the area of refund claim administration. *Holland*, 560 U.S. at 635, 646-47. This Court also noted that, although generous limitations periods may factor in overcoming the *Irwin* presumption, *see Beggerly*, 524 U.S. at 48 (12-year period), the period of one year was not particularly long. *Holland*, 560 U.S. at 647. This Court also established that a statute enacted post-*Irwin* was subject to a "reinforced" *Irwin* presumption, since Congress was likely aware at enactment that courts would apply the *Irwin* presumption when interpreting the statute. *Id*. at 646.

Here, the language of Section 6330(d)(1) does not rebut the presumption of equitable tolling.

First, Section 6330(d)(1)'s text is not "unusually emphatic." *Holland*, 560 U.S. at 646. Section 6330(d)(1) provides only that a taxpayer "may, within 30 days of a determination under [Section 6330], petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." Section 6330(d)(1). That is no more "emphatic" than AEDPA's description of a "1-year period of limitation" applicable to habeas petitions. *Cf. Holland*, 560 U.S. at 643.

Second, Section 6330(d)(1) is not written in "highly technical" language that does not easily admit of "implicit exceptions." *Cf. Holland*, 560 U.S. at 646. Rather, Section 6330(d)(1) uses the ordinary language of statutes of limitations everywhere: if a taxpayer wishes to file a tax court petition, he must do so "within 30 days of a determination." Although Section 6330(d) does provide for one statutory exception to its general rule (as does the statute involved in *Holland*) – tolling the statute of limitations with respect to persons who are "prohibited by reason of a case under [the Bankruptcy Code] from filing" for CDP petitions – that one exception is a far cry from the comprehensive list of statutory exceptions set forth by Section 6511 in *Brockamp*. *See Brockamp*, 519 U.S. at 351-52. This Court has already allowed a bankruptcy deadline that has a single statutory exception to be equitably tolled. *Young* v. *United States*, *supra*.

Third, Section 6330(d)(1) does not repeat its statute of limitations again and again. *Holland*, 560 U.S. at 646. Rather, like the AEDPA statute of limitations, it is contained in one subsection spanning a mere two lines of the U.S. Code. *Cf. id.*

Fourth, Section 6330(d)(1) is part of an equitable area of the Tax Code, CDP, and was enacted subsequent to the *Irwin* presumption. Thus, as in *Holland*, Section 6330(d)(1)'s deadline is subject to a doubly-reinforced presumption in favor of equitable tolling.

Fifth, there is nothing in Section 6330(d)(1) that, like Section 6511(b), provides a substantive limit on the amount of taxes involved in a CDP suit.

Finally, the *Brockamp* court emphasized that, because the IRS issues "more than 90 million refunds" every year, reading an equitable tolling requirement into Section 6511 would have created "serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims." 519 U.S. at 352. By contrast, though, the total number of CDP cases filed in the Tax Court is orders of magnitude smaller – *i.e.*, in the 12-month period ended May 31, 2020, there were 1,185 CDP petitions filed in the Tax Court. *Nat'l Taxpayer Advocate 2020 Annual Report to Congress* 185 (2020). As set forth in an analysis of the 101 CDP cases filed in the month of January 2018 (set forth in the Center for Taxpayer Rights' *amicus* brief at the *certiorari* stage at page 9), only five of those petitions were filed late (or a year included in the petition involved a late filing). Only one of those petitions

involved facts that might give rise to an argument for equitable tolling. Thus, even if the allowance of equitable tolling of the CDP petition filing deadline encouraged each month a few more late-filed petitions arguing for equitable tolling, the administrative impact on the IRS would be *de minimis*.

In *Volpicelli* v. *United States*, 777 F.3d 1042, 1044-46 (9th Cir. 2015), the Ninth Circuit conducted a similar statutory comparison to *Brockamp*'s statute when it held that the filing deadline in Section 6532(c) for Section 7426 wrongful levy suits brought in district court is entitled to equitable tolling.

Section 6630(d)(1)'s text thus strongly supports the availability of equitable tolling for its filing deadline.

B. Section 6330(d)(1)'s Context Supports the Availability of Equitable Tolling.

1. Section 6330(d)(1) Is Not an Internal Appeal Deadline and Impacts Mostly *Pro Se* Litigants.

In *Sebelius* v. *Auburn Regional Med. Cntr.*, 568 U.S. 145 (2013), this Court held that the *Irwin* presumption does not apply in all tribunals. In *Auburn*, the Court found the 180-day statutory deadline for Medicare providers to file for an administrative hearing is not subject to equitable tolling. *Auburn*, 568 U.S. at 158-59. The Court noted that it generally applied the *Irwin* presumption in favor of equitable tolling to filing deadlines in Federal courts and had never before

applied the *Irwin* presumption to an agency's internal appeal deadline. *Id*. The Court distinguished the statute at issue from the types of "remedial" statutory schemes where the *Irwin* presumption had been applied, including schemes which were "'unusually protective of claimants'" and schemes where "'laymen, unassisted by trained lawyers, initiate the process.'" *Id*. at 159-60 (citations omitted). Instead, the Court pointed out that the statutory scheme in question involved "'sophisticated' institutional providers assisted by legal counsel" that were "repeat players who elect to participate in the Medicare system. . . ." *Id*. (citation omitted). The Court thus found that the *Irwin* presumption did not apply to "administrative appeals of the kind here considered." *Id*.

It would be a mistake to interpret *Auburn* too broadly. The Court did not hold that *Irwin* never applied in non-Article III entities. That this Court did not intend to create a broad rule is evident from *Kwai Fun Wong*, 575 U.S. at 408-09, where this Court subsequently held that under the Federal Tort Claim Act, the 2-year period in which to file an administrative tort claim with a Federal agency was subject to the *Irwin* presumption.

Section 6330(d)(1) does not set an "internal appeal deadline." *Cf.* 568 U.S. at 158. The Tax Court is not an adjudicatory body within an agency, but is a court of record under Article I of the Constitution. Section 7441.

Moreover, Section 6330 – unlike the statute at issue in *Auburn* – does not involve sophisticated, repeat-player litigants who have "elect[ed] to participate" in a government program. Most taxpayers who file CDP petitions in the Tax Court do so *pro se*. *See, e.g.*, *Nat'l Taxpayer Advocate 2020 Annual Report to Congress* 188 (2020) (reporting that in the year ended May 31, 2020, 68% of the CDP cases that were litigated were *pro se*). "Over 75 percent of the petitioners who file with the Court are self-represented (pro se)." U.S. Tax Court Congressional Budget Justification Fiscal Year 2021 (Feb. 10, 2020) at 22.

Addressing this issue in *Myers* v. *Commissioner*, 928 F.3d 1025, 1037 (D.C. Cir. 2019) (involving the filing deadline under Section 7623(b)(4) for Tax Court whistleblower award petitions), the D.C. Circuit agreed that the Tax Court was not the kind of tribunal in which equitable tolling would be barred.

2. Section 6330's Subject Matter Is Equitable.

Independently, Section 6330's subject matter – unlike that of the statute at issue in *Brockamp* – is equitable. CDP is suffused with equitable determinations. The central purpose of CDP is to allow taxpayers a forum to "raise *any* relevant issue" as to why the IRS should forbear from levying – an essentially equitable inquiry. Section 6330(c)(2)(A) (emphasis added); *cf. Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of

the Chancellor to do equity and to mould each decree to the necessities of the particular case."). And as a result, CDP requires the IRS to ask multiple distinctively equitable questions:

- In a CDP hearing, an IRS Appeals Officer must consider "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." Section 6330(c)(3)(C). This balancing test is essentially an equitable determination.

- A taxpayer in CDP may raise, *inter alia*, "appropriate spousal defenses" to liability. Section 6330(c)(2)(A)(i). These spousal defenses typically implicate the so-called "innocent-spouse" provisions of Section 6015, which provide for innocent-spouse relief only if it would be "inequitable" not to relieve a spouse from joint and several liability. Section 6015(b) and (f).

- A taxpayer in CDP may offer the IRS a "collection alternative." Section 6330(c)(2)(A)(iii). Those collection alternatives can include offers-in-compromise, some of which are based on a taxpayer's inability to make full payment and others of which are grounded in equity and public policy as applied to the particular assessed taxes. 26 C.F.R. Section 301.7122-1(b)(3).

3. The Fact That Section 6330(d)(1) Is Contained in the Tax Code Does Not Preclude the Equitable Tolling of Its Deadline.

After noting that the subject matter of refund claims involved "tax collection," this Court in *Brockamp* observed, in passing *dicta*, that "[t]ax law . . . is not normally characterized by case-specific exceptions reflecting individualized equities." 519 U.S. at 352.

First, the government has tried to take this *Brockamp* sentence and expand it to ask lower courts to hold that there can be no equitable tolling anywhere in the Tax Code. To date, the government has been unsuccessful in this argument. In *Volpicelli*, the Ninth Circuit wrote: "The Court may in time decide that Congress did not intend equitable tolling to be available with respect to any tax-related statute of limitations. But that's not what the Court held in *Brockamp*." 777 F.3d at 1046. *Accord Flight Attendants Against UAL Offset* v. *Commissioner*, 165 F.3d 572, 577 (7th Cir. 1999) (*dicta*; case involved Tax Court pension plan declaratory judgment jurisdiction at Section 7476). *Myers* also allowed the equitable tolling of the Section 7623(b)(4) Tax Court filing deadline.

Second, the government has not been consistent in its argument. In *Doe* v. *United States*, 398 F.3d 686 (5th Cir. 2005), the Fifth Circuit rejected a *government* attempt to subject the assessment statute of limitations at Section 6501 – one that runs against the government – to equitable tolling.

Third, while this Court's *Brockamp dicta* appears intended to indicate that there are many exceptions, the *dicta* allows a person with a casual understanding of tax law to miss its equitable aspects. Congress has kept adding equitable provisions to the Tax Code after the *Brockamp* decision.

The following shows how much equity there was in tax collection before *Brockamp*:

1. Under the doctrine of "equitable recoupment" – available in the district court and the Court of Federal Claims – overpayments of taxes that are time-barred from refund under Section 6511 can be applied to reduce timely tax assessments where the taxpayer would be otherwise taxed inconsistently on the same transaction. *Stone* v. *White*, 301 U.S. 532 (1937); *Bull* v. *United States*, 295 U.S. 247 (1935).

2. In *Enochs* v. *Williams Packing & Navigation Co*., 370 U.S. 1 (1962), this Court recognized a judicial equitable exception to the anti-injunction act of Section 7421(a). In *Williams Packing*, this Court stated that, despite the words of the act, "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable, and under the [*Miller* v. *Standard*] *Nut Margarine* [*Co*., 294 U.S. 498 (1932),] case, the attempted collection may be enjoined if equity jurisdiction otherwise exists." *Id*. at 7.

3. In *United States* v. *Rodgers*, 461 U.S. 677 (1983), this Court considered whether Section 7403 empowered a district court to order the sale of a family home in which a delinquent taxpayer had an interest at the time he incurred his tax indebtedness. The taxpayer's spouse (who did not owe any of that indebtedness) also had a Texas "homestead" right. This Court held that "district courts may exercise a degree of equitable discretion in § 7403 proceedings." *Id.* at 709.

4. In 1971, Congress enacted an "innocent spouse" provision at Section 6013(e) to mandate relief from joint and several income tax liability in the case of certain large omissions of unreported income. Sec. 411, Pub. L. 98-369, 98 Stat. 790. The statute directed relief for an innocent spouse if a number of conditions were met, including that "taking into account all . . . facts and circumstances, it is *inequitable* to hold the other spouse liable for the deficiency in tax." Former Section 6013(e)(1)(C) as originally adopted, before later amendment. (Emphasis added.)

5. In 1984, Congress amended the estimated tax penalty provision to provide for a waiver "with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstance the imposition of such addition to tax would be *against equity and good conscience*." Section 6654(e)(3)(A). (Emphasis added.) The Tax Court has granted the waiver in equitable cases of serious illness (AIDS) and/or mental

disability. *Meyer* v. *Commissioner*, T.C. Memo. 2003-12; *Shaffer* v. *Commissioner*, T.C. Memo. 1994-618; *Carnahan* v. *Commissioner*, T.C. Memo. 1994-163.

6. The late-filing and late-payment penalties at paragraphs (1), (2), and (3) of Section 6651(a) have long had "reasonable cause and not willful neglect" exceptions. This Court, in *United States* v. *Boyle*, 469 U.S. 241 (1985), indicated that these exceptions are likely met in equitable situations. In *Boyle*, this Court noted that the IRS, in most cases, did not impose the penalties when the circumstances that caused the taxpayer to file or pay late were beyond the taxpayer's control. *Id*. at 248 n.6.

7. In 1986, Congress amended Section 6404 by adding a subsection (e) that allowed the IRS to abate interest attributable to an error or delay of an IRS officer or employee in performing a "ministerial" act. Sec. 1563(a), Pub. L. 99-514, 100 Stat. 2762. Congress said it did "not intend that this provision be used routinely to avoid payment of interest." S. Rep. 99-313 at 208. Rather, Congress intended the section to be used in instances in which an error or delay in performing a ministerial act resulted in the imposition of interest, and the failure to abate the interest "would be widely perceived as grossly unfair"; *id*. – *i.e.*, where it would be perceived as inequitable. In 1996, Congress expanded the interest abatement authority to include an error or delay in performing a "managerial" act. Sec. 301(a)(2), Pub. L. 104-168, 110 Stat. 1457.

8. The IRS has had long-standing power to provide taxpayers with extensions to file their tax returns; *see* Section 6081(a); and with extensions to meet election deadlines – deadlines that can either be in the area of tax collection or in the substantive calculation of the assessable amount of tax. One of the current regulations at 26 C.F.R. Section 301.9100-1 *et seq*. governing requesting such so-called "9100 relief" lists acceptable excuses, including: "Failed to make the election because of intervening events beyond the taxpayer's control." 26 C.F.R. Section 301.9100-3(b)(1)(ii). This sentence essentially acts as a blanket equitable exception. Moreover, the regulations even provide for certain automatic extensions that affect substantive tax liability – including extending (1) the 15-month time limit in which to file an exemption application for a Section 501(c)(3) organization under Section 508, (2) the time limit in which to elect to be treated as a homeowner's association under Section 528, and (3) the time limit in which to elect to adjust basis on partnership transfers and distributions under Section 754. 26 C.F.R. Section 301.9100-2(a)(2).

One of the provisions described above, waiving the estimated tax penalty, and one described below, waiving the IRA rollover, contain explicit directions to the IRS to apply equity to time deadlines. In sum, even before this Court's 1997 *Brockamp* opinion, both through explicit Congressional authorization and judicial and regulatory exceptions, the collection and even imposition of taxes often involved equitable determinations.

Since 1997, Congress has increasingly called on the IRS and the courts to make equitable determinations in tax collection and liability matters.

1. In 1998, Congress implemented a partial overruling of *Brockamp*, amending Section 6511 to add a new subsection (h) providing for a suspension of its deadlines "during the period of such individual's life that such individual is financially disabled." Subsection (h) defines "financially disabled" as arising from a medically-determinable physical or mental impairment meeting certain requirements. Sec. 3202(a), Pub. L. 105-206, 112 Stat. 740-41. Congress, in the Conference Committee Report, called this provision a form of "equitable tolling." H.R. Rep. No. 105-599, at 255 ("The [provision] permits equitable tolling of the statute of limitations. . . .").

2. In 1998, Congress repealed Section 6013(e) and implemented a greatly-expanded "innocent spouse" provision at Section 6015. Sec. 3201(a), Pub. L. 105-206, 112 Stat. 734-40. Section 6015(b) retained the condition of the former Section 6013(e) that, "taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax." Section 6015(b)(1)(D). Congress provided for even broader relief by adopting Section 6015(f). Subsection (f) provides that "if – (1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or deficiency . . . ; and (2) relief is not available to such individual under subsections (b) or (c),

the Secretary may relieve such individual of such liability." In 2005, the National Taxpayer Advocate (Ms. Olson) reported to Congress that the IRS was receiving approximately 50,000 requests for relief under Section 6015 a year. *Nat'l Taxpayer Advocate 2005 Annual Report to Congress* (2005) at 329. This is a significant amount of equitable tax collection determinations being made annually – indeed, more than all petitions filed in the Tax Court under all of its jurisdictions annually. For comparison, for the fiscal year ended 2005 (which was typical of pre-COVID years), taxpayers filed 23,551 Tax Court deficiency petitions under Section 6213(a), 700 Tax Court CDP petitions under Section 6330(d)(1), and 587 Tax Court innocent spouse petitions under Section 6015(e)(1)(A). H. Dubroff & B. Hellwig, "The United States Tax Court – An Historical Analysis" (2d ed. 2014) at 907.

3. In 1998, Congress enacted new standards and procedures for offers-in-compromise under Section 7122 by which taxpayers and the IRS can compromise assessed liabilities with finality. Sec. 3462, Pub. L. 105-206, 112 Stat. 764-67. Language in the Conference Committee Report encouraged the IRS to consider "factors such as *equity*, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration." H.R. Rep. No. 105-599, at 289 (emphasis added). The IRS later adopted regulations providing that, even when an individual taxpayer could pay his or her income taxes in full, "the IRS may

compromise to promote effective tax administration where compelling public policy or *equity considerations* identified by the taxpayer provide a sufficient basis for compromising the liability. Compromise will be justified only where, due to exceptional circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and *equitable* manner." 26 C.F.R. Section 301.7122-1(b)(3)(ii) (emphasis added). In the fiscal year ended September 30, 2020, taxpayers submitted 44,809 offers-in-compromise to the IRS; in the same period, the IRS accepted 14,288 offers. IRS Data Book, 2020 at 57, available at www.irs.gov.

4. In 1998, Congress also created CDP, which, as noted above, is really a place where the IRS is expected to do equity with individual taxpayers, looking at each person's ability to pay and various collection alternatives. Sec. 3401, Pub. L. 105-206, 112 Stat. 746-50. In the fiscal year ended September 30, 2020, the Independent Office of Appeals received 25,334 taxpayer requests for CDP hearings. IRS Data Book, 2020 at 62 (Table 27).

5. In a provision actually affecting the computation of assessable tax – not tax collection – in 2001, Congress amended the IRA provisions to allow the IRS to waive the 60-day window in which to roll over an IRA distribution "where the failure to waive such requirement would be *against equity or good conscience*, including casualty, disaster, or other events beyond the reasonable control of

the individual subject to such requirement." Section 408(d)(3)(I), added by sec. 644, Pub. L. 107-16, 115 Stat. 123 (emphasis added).

6. In 2014, Congress further expanded judicial equity in tax collection when it resolved a Circuit split by amending Section 6214(b) to provide that "the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims." Sec. 858, Pub. L. 109-280, 120 Stat. 1020.

Amici hope that this Court will indicate in its opinion that, notwithstanding the above-quoted *dicta* in *Brockamp*, there is no *per se* prohibition against consideration of equitable considerations in appropriate provisions in the Tax Code.

For these reasons, Section 6630(d)(1)'s context also supports the availability of equitable tolling in CDP cases before the Tax Court.

II. THERE ARE TYPICAL LATE FILINGS IN THE TAX COURT AS TO WHICH EQUITABLE TOLLING COULD EXPECT TO APPLY.

The Tax Court did not entertain any evidence on what circumstances in this case might give rise to equitable tolling, given the Tax Court's view that the CDP petition filing deadline is jurisdictional. This section discusses typical situations where equitable

tolling would be expected to apply if Tax Court filing deadlines could be tolled. Since there are only a modest number of CDP cases where tolling would apply, the section includes cases that arise under the Tax Court's deficiency and innocent spouse provisions, as well.

There are three common grounds for equitable tolling:

> There may be equitable tolling (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Mannella v. *Commissioner*, 631 F.3d 115, 125 (3d Cir. 2011) (cleaned up).

All of these grounds periodically occur in the case of Tax Court filing deadlines.

A. The IRS Sometimes Actively Misleads Taxpayers About Tax Court Filing Deadlines.

The IRS sometimes makes mistakes, and these mistakes can actively mislead taxpayers into filing Tax Court petitions on the wrong dates.

Sometimes, the IRS misleads taxpayers by sending notices with the wrong dates. For example, because of COVID-19 interruptions to IRS operations, the IRS

belatedly sent out millions of notices in 2020 without changing dates thereon. *See Nat'l Taxpayer Advocate 2020 Annual Report to Congress* v (2020) ("Millions of taxpayers received late notices bearing dates that had passed and, in many cases, response deadlines that also had passed."). These included notices giving taxpayers the right to request a CDP hearing. *See* IRS Memorandum for Director, Campus Collection and Director, Field Collection, Control No. SBSE-05-0920-0063 (Sept. 3, 2020). Although it is not known whether any of these misdated notices specifically caused a taxpayer to miss a Tax Court filing deadline under Section 6330(d)(1), the possibility for confusion is obvious.

In other cases, an IRS employee instructs a taxpayer to file a petition on the wrong date. For example, in *Rubel* v. *Commissioner*, 856 F.3d 301 (3d Cir. 2017), the IRS gave a taxpayer an incorrect deadline for filing a Tax Court petition in written correspondence. *Id.* at 303-04. Likewise, in *Matuszak* v. *Commissioner*, 862 F.3d 192 (2d Cir. 2017), an IRS employee orally gave an unrepresented taxpayer the wrong last date to file a petition. *Id.* at 193-94. In *Nauflett* v. *Commissioner*, 892 F.3d 649 (4th Cir. 2018), an employee of the IRS's Taxpayer Advocate Service orally gave another unrepresented taxpayer an incorrect final filing date. *Id.* at 650-51. Although these cases arose in the innocent spouse context, rather than under Section 6330, they illustrate the contexts in which a failure to allow for equitable tolling can be outcome-determinative for litigants.

The IRS sometimes sends letters to taxpayers with misleading or confusing language – language that at least arguably could support an equitable tolling claim. CDP provides a particularly apt example. Section 6330(d)(1) allows petitions to the Tax Court "within 30 days of a determination under this section"; *i.e.*, within 30 days after a notice of determination has been issued. For some time after the 1998 enactment of CDP, the IRS notice of determination (the "ticket to the Tax Court") closely tracked the statutory language, stating: "If you want to dispute this determination in court, you must file a petition with the United States Tax Court for a redetermination *within 30 days from the date of this letter*." *See Jones* v. *Commissioner*, T.C. Memo. 2003-29 at *3 (language from notice issued in 2001; emphasis added). But at some point, the IRS changed the language in its model notice of determination to suggest that taxpayers had *31* days, rather than 30 days, to file a petition: "if you want to dispute [your] determination in court," this language read, "you must file a petition with the United States Tax Court within a 30-day period beginning the day *after* the date of this letter." *See, e.g.*, *Duggan* v. *Commissioner*, 879 F.3d 1029, 1034 (9th Cir. 2018) (reprinting the language; emphasis added). At least eight *pro se* taxpayers, confused by this language, mailed petitions to the Tax Court on the 31st rather than the 30th day after the notice was mailed.[5]

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[5] Along with the petitioner in *Duggan*, the relevant cases are: *Cunningham* v. *Commissioner*, 716 F. App'x 182 (4th Cir. 2018); *Swanson* v. *Commissioner*, T.C. Docket No. 14406-15S (order

To be clear, none of these cases are ones in which individual taxpayers are definitely entitled to equitable tolling if that doctrine was available. In one of the Section 6330(d)(1) cases described above, for example, the Fourth Circuit found that the IRS language was not confusing enough to justify equitable tolling. *Cunningham* v. *Commissioner*, 716 F. App'x 182 (4th Cir. 2018). But the Ninth Circuit declined to even consider the taxpayer's equitable-tolling arguments, reasoning that Section 6330(d)(1)'s deadline was jurisdictional. *Duggan*, 879 F.3d at 1034.

B. Extraordinary Circumstances Sometimes Prevent Taxpayers From Meeting Tax Court Filing Deadlines.

In other cases, taxpayers experience extraordinary circumstances that prevent them from timely filing petitions with the Tax Court. Such cases present another set of scenarios in which a taxpayer might be deserving of equitable tolling.

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dated Jan. 14, 2016); *Pottgen* v. *Commissioner*, T.C. Docket No. 1410-15L (order dated Mar. 4, 2016); *Wallaesa* v. *Commissioner*, T.C. Docket No. 1179-17L (order dated Apr. 20, 2017); *Saporito* v. *Commissioner*, T.C. Docket No. 8471-17L (order dated May 31, 2017); *Integrated Event Management, Inc.* v. *Commissioner*, T.C. Docket No. 27674-16SL (order dated May 31, 2017); *Protter* v. *Commissioner*, T.C. Docket No. 22975-15SL (order dated Sept. 26, 2017). In *Swanson*, the Tax Court did not mention the argument that the taxpayer was misled by his notice's language. But an examination of the notice contained in the Tax Court's files shows that Mr. Swanson, in explanation of his late filing, quadruple-underlined the words "day after" in his notice of determination.

Sometimes, taxpayers cannot file timely petitions with the Tax Court because they do not timely receive mail from the IRS. For example:

- In *Atuke* v. *Commissioner*, T.C. Docket No. 31680-15SL (order dated Apr. 15, 2016), a notice of determination under Section 6330(d)(1) was mailed to a taxpayer residing in Nairobi, Kenya. The notice did not arrive in Kenya until after the taxpayer's 30-day window to petition the Tax Court had passed. The Tax Court dismissed the taxpayer's case for lack of jurisdiction without considering arguments for or against equitable tolling.

- In *Castillo* v. *Commissioner*, T.C. Docket No. 18336-19L (order dated Mar. 25, 2020), the IRS mailed a notice of determination to a taxpayer's last known address. The USPS lost the notice and never delivered it. The Tax Court dismissed the taxpayer's case for lack of jurisdiction. *Castillo* is currently pending in the Second Circuit, on hold pending the outcome in *Boechler*.

- In *Sarrell* v. *Commissioner*, 117 T.C. 122 (2001), Appeals issued a CDP notice of determination on March 30, 2001, addressed to a taxpayer in Israel. The taxpayer asserted that because of intervening Jewish holidays, including Passover and Holocaust Memorial Day, and slow rural mail delivery in Israel, he did not receive the notice until April 24, 2001. He also asserted additional holidays including Israeli Memorial Day and Israeli Independence Day further delayed the mailing of the

> petition to the Court. He furnished the Court with a copy of what appeared to be an Israel Postal Authority receipt indicating that he mailed his petition to the Court on Monday, April 30, 2001 (the 30th day, after applying the extension rule of Section 7503 for weekends and holidays). The Court received and filed his petition on May 7, 2001. The Tax Court dismissed the proceeding for lack of jurisdiction because the Section 7502 timely mailing rules do not apply to a foreign postmark.[6]

These are paradigmatic cases of "inadequate notice" where equitable tolling is at least possibly appropriate. *Baldwin Cty. Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam).

In other cases, taxpayers experience serious illnesses or other life events that reasonably prevent them from filing petitions within Section 6330(d)(1)'s 30-day filing window. For example, in *Dunlap* v. *Commissioner*, T.C. Docket No. 816-18L (order dated Mar. 15, 2018), a taxpayer claimed that a "severe family illness" caused her to file a late Tax Court CDP petition. The Tax Court did not investigate the taxpayer's allegation, since it maintained that Section 6330(d)(1)'s

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[6] Given the mail delays currently occurring in the United States, it is not just taxpayers overseas who face the problem. U.S. Rep. Bill Pascrell, Jr. (D-NJ-09), the Chairman of the House Ways and Means Subcommittee on Oversight, has asked the IRS for information to assess how systemic mail delays at the USPS may impact IRS operations, tax filings and refunds for Americans. *See* Press Release, U.S. Rep. Bill Pascrell, Jr., Pascrell Probes Mail Delay Impact on IRS and Tax Refunds (Oct. 26, 2021), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=4904.

deadline was jurisdictional. If the taxpayer *had* in fact experienced a severe family illness, this illness could have given the Tax Court good cause to toll Section 6330(d)(1)'s statute of limitations. *Cf. Boyle*, 469 U.S. at 243 n.1 (1985) (explaining that "death or serious illness of the taxpayer or a member of his immediate family" can amount to reasonable cause for exclusion from a late filing penalty).

Other extraordinary circumstances prevent taxpayers from timely filing necessary documents with the IRS or the Tax Court. Consider *Mannella* v. *Commissioner*, 631 F.3d 115 (3d Cir. 2011). In *Mannella*, a taxpayer filed with the IRS a request for innocent spouse relief four to six months out of time set by an IRS regulation. *Id.* at 119. She filed out of time because her husband had hidden from her IRS mail arriving in the house, which prevented her from becoming aware of the outstanding joint debt. *See id.* Although *Mannella* is not itself an equitable tolling case involving the filing of a Tax Court petition, its facts illustrate the kind of scenarios that might give rise to equitable tolling. *See id.*

The ongoing COVID-19 pandemic offers many additional examples of circumstances in which equitable tolling might potentially be appropriate. For example, a person hospitalized and intubated due to COVID-19 for more than 30 days could not plausibly be expected to file a Tax Court petition while in the ICU. *Mutatis mutandis* for a taxpayer caring for a very sick child or relative.

In short: equitable tolling is at least arguably appropriate when "extraordinary circumstances . . . [stand] in the way of timely filing." *Menominee Indian Tribe of Wis.* v. *United States*, 577 U.S. 250, 251 (2016). A significant number of these cases arise in the context of Section 6330(d)(1).

C. *Pro Se* Taxpayers Sometimes Timely File Tax Court Petitions in the Wrong Forum.

Pro se taxpayers not infrequently timely mail their Tax Court petitions to the IRS office that issued their notice of deficiency or determination. In the case of veterans benefits denials that should be appealed to the Article I Court of Appeals for Veterans Claims, the courts allow equitable tolling under similar circumstances. *See, e.g.*, *Bailey* v. *Principi*, 351 F.3d 1381, 1382 (Fed. Cir. 2003); *Santana-Venegas* v. *Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002).

For example:

- In *Haitsuka* v. *Commissioner*, T.C. Docket No. 14495-15L (order dated Oct. 9, 2015), a taxpayer with limited English proficiency timely mailed a CDP petition to the IRS. The IRS sent the petition back to him, and he mailed it to the Tax Court.
- In *Gitman* v. *Commissioner*, T.C. Docket No. 5804-19 (order dated Aug. 8, 2019), the taxpayer timely mailed a deficiency petition to the Tax Court's New York City courtroom

instead of the Clerk in Washington, D.C., and it did not get to the Clerk's Office within the 90-day period of Section 6213(a).

- In *Islam* v. *Commissioner*, T.C. Docket No. 14099-19S (order dated Feb. 28, 2020), the taxpayers – who speak English as a second language – timely mailed a deficiency petition to the IRS, but it was not received by the Tax Court within the 90-day period of Section 6213(a).
- In *Rosenthal* v. *Commissioner*, T.C. Docket No. 18392-19S (order dated Dec. 26, 2019), the taxpayers erroneously but timely mailed their deficiency petition to the IRS Laguna Nigel office that issued their notice. Weeks later, the office forwarded their petition to the Tax Court.

In each case, the Tax Court dismissed the petition for lack of jurisdiction. Cases like *Rosenthal* are common enough that the IRS has formally instructed its employees to quickly forward timely petitions erroneously sent to the IRS onwards to the Tax Court. *See* Internal Revenue Manual Section 4.8.9.25.1 (July 9, 2013).

Finally, another provision in the Internal Revenue Manual, which provides guidance to IRS employees, relating to timely filing in the wrong forum in CDP, undermines the government's argument that the IRS would have severe administrative problems dealing with equitable tolling of the Section 6330(d)(1) filing deadline.

In her opposition to the petition for certiorari in this case (at page 27), the Solicitor General wrote:

> Allowing equitable tolling for Section 6330(d)(1) petitions would significantly delay the IRS's collection of taxes. Without equitable tolling, a clear end date exists for the period during which the IRS is prohibited from collecting by levy: the date when the 30-day filing period in Section 6330(d)(1) expires. If equitable tolling were allowed, a delinquent taxpayer might be able to prolong the suspension period by filing a tardy petition in the Tax Court and then seeking to excuse that failure to file a timely petition on equitable-tolling grounds.

Section 6330(a) provides a different 30-day period in which the taxpayer can request a CDP hearing at the IRS Independent Office of Appeals. Section 7502 provides that a timely mailed document is considered timely filed if received after the due date, but only if the envelope bearing the filing is "properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed." Section 7502(a)(2)(B).

Notices of Intent to Levy ("NOILs") – one of the two "tickets" to CDP hearings – are issued either by individual IRS Revenue Officers assigned to collect taxes from the taxpayer or by the IRS computers. NOILs typically show addresses (1) of the office issuing the NOIL, (2) where Forms 12153 hearing requests should be mailed, and (3) where the taxpayer may send payments. These multiple addresses are confusing,

and taxpayers frequently mail the Form 12153 to one of the wrong addresses. *See Webber* v. *Commissioner*, T.C. Docket No. 14307-18L (order dated June 7, 2019), where the IRS moved to dismiss a Tax Court case because the taxpayer timely mailed his CDP request erroneously to the payment address.

The judge complained of the confusion created by the NOIL having multiple addresses. The IRS withdrew its motion to dismiss and subsequently, the IRS amended the Internal Revenue Manual to provide that if the taxpayer timely mailed the Form 12153 to any address shown in the NOIL or timely mailed the form to the Revenue Officer handling the taxpayer's case it would accept the form as timely. Internal Revenue Manual Section 8.22.5.3.1 (Aug. 31, 2020).

IRS computers may be programmed to start levying shortly after the 30-day period in Section 6330(a) expires without receipt of a Form 12153 at the correct address, and IRS employees may take time notifying the Office of Appeals of a timely filing in the wrong place. Because the IRS can easily deal with this by retroactively treating the request as timely, stopping collection, and recalculating the collection statute of limitations, the IRS should not be heard in this case when it argues that there would be serious administrative problems with allowing equitable tolling of the Section 6330(d)(1) Tax Court filing deadline or in general allowing equitable tolling anywhere in the Tax Code.

And, of course the Tax Court has ample power to deter the filing of late petitions containing frivolous assertions of equitable tolling. *See* Section 6673(a)(1)(A) (authorizing the Tax Court to impose penalties of up to $25,000 for petitions filed "primarily for delay").

As shown by the cases in Section II, petitioners present the Tax Court with a small but steady number of cases that merit equitable tolling.

CONCLUSION

For these reasons, this Court should hold that Section 6330(d)(1)'s filing deadline is both not jurisdictional and subject to equitable tolling in appropriate cases.

Respectfully submitted,

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