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 A. LAVAR TAYLOR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

Amicus A. Lavar Taylor is a tax controversy practitioner with 40 years of experience in handling judicial and administrative tax controversies. His experience includes working for the Department of Justice as an Assistant United States Attorney in the Tax Division of the United States Attorney's Office for the Central District of California, for the Internal Revenue Service ("IRS") Office of Chief Counsel, and for taxpayers as an attorney in private practice. Mr. Taylor is an Adjunct Professor at the Chapman Fowler School of Law where he teaches Federal Tax Procedure, and is an Adjunct Professor of Law at the University of California, Irvine, School of Law where he runs the Appellate Tax Clinic. Mr. Taylor and his firm have represented taxpayers in hundreds of Collection Due Process appeals at the administrative level and in multiple Collection Due Process cases at the judicial level. Mr. Taylor has been involved as a private practitioner in approximately 275 cases brought in the U.S. Tax Court ("Tax Court"), and has personally been involved in numerous additional tax-related cases in the U.S. District Courts ("District Courts"), U.S. Courts of Appeal, and this Court as a private practitioner.

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[1] No person other than the named *Amicus* or their counsel authored this Brief or provided financial support for this Brief. Counsel for both parties have consented to the filing of this Brief.

Amicus is filing this brief in support of Petitioner, Boechler, P.C.[2] The ability of taxpayers (and of other parties affected by the federal tax system) to gain access to the Tax Court (and to other courts whose function includes the resolution of tax-related disputes) to resolve their disputes with the IRS is important. Taxpayers who have disputes with the IRS want and need the ability to be heard by a neutral court that is independent of the bureaucracy that is the IRS. Construing the 30-day time deadline for filing a petition with the Tax Court in 26 U.S.C. § 6330(d)(1) of the Internal Revenue Code to allow taxpayers to invoke equitable tolling of this 30-day period where appropriate is consistent with the goal of allowing taxpayers to present their cases to a neutral arbiter and is consistent with this Court's jurisprudence outside of the tax arena.

Allowing taxpayers to raise equitable tolling should not be controversial. Allowing equitable tolling in appropriate circumstances does not guarantee that taxpayers will prevail; it merely gives them an opportunity to make their arguments before a neutral arbiter in situations where the facts justify the invocation of equitable tolling.

Because the foundation of our tax system is "voluntary compliance" by taxpayers, any perceived unfairness in the tax system can have an outsized

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[2] *Amicus* regularly represents clients of the type whose interests will be affected by the outcome of this case, but *Amicus* has not been retained by any client (or by any third party) for the purpose of filing this Brief as *Amicus Curiae*.

adverse effect on the willingness of taxpayers to voluntarily comply with the tax laws. Allowing taxpayers to invoke the doctrine of equitable tolling in situations where the facts justify the application of that doctrine demonstrates to the public at large that the system is fair and that litigants in the tax arena are not being treated differently than litigants in other arenas for a reason other than the fact that their case is a "tax case."

Given that the IRS itself has successfully invoked equitable tolling against taxpayers in at least one case before this Court during the past 20 years and has successfully invoked equitable tolling against taxpayers in multiple opinions issued by lower courts, allowing taxpayers to invoke equitable tolling in tax cases such as the present case also sends the message to taxpayers that the tax system is fair and is not biased in favor of the IRS.

SUMMARY OF ARGUMENT

This Court has recently rejected the notion that there should be "tax exceptionalism" in the context of a review by the courts of tax regulations issued by the Treasury Department on behalf of the IRS. *Mayo Found. for Med. Educ. & Res. v. United States,* 562 U.S. 44 (2011). It is appropriate for this Court to similarly hold that there is no "tax exceptionalism" for purposes of determining whether taxpayers who bring suit against the IRS may invoke the doctrine of equitable tolling. To the extent that *United States v. Brockamp*, 519 U.S. 547 (1997) suggests that this Court's jurisprudence regarding

when courts will permit parties to invoke equitable tolling should not be applied to tax cases as a whole should be disavowed by this Court.

The various provisions within the Internal Revenue Code setting deadlines within which to judicially challenge actions of the IRS are not identical. As such, each provision should be evaluated separately, based on its own language, for purposes of determining whether equitable tolling may apply.

This Court has allowed the IRS itself to invoke the doctrine of equitable tolling against taxpayers. *Young v. United States*, 535 U.S. 43 (2002). In the context of the present case, there is no meaningful reason why the Court should not afford the petitioner the similar opportunity afforded the IRS to invoke the doctrine of equitable tolling.

Since this Court's ruling in *Young* permitted the IRS to invoke the doctrine of equitable tolling, the IRS has successfully argued that equitable tolling continues to apply under the statute construed in *Young* before Congress subsequently enacted additional statutory tolling provisions to the statute construed in *Young*. Thus, the fact that the Internal Revenue Code contains statutory provisions which can extend the 30-day time period in 26 U.S.C. § 6330(d)(1) in very limited circumstances does not preclude the application of the doctrine of equitable tolling here.

Many of the statutory time periods for seeking court review of actions taken by the IRS, including the 30-day period at issue here, are amenable to equitable tolling. The statutory schemes associated with many of these time periods should permit equitable tolling based on this Court's case law regarding equitable tolling of statutes outside the Internal Revenue Code.

The 30-day period at issue here is particularly susceptible to equitable tolling. The statutory scheme for filing a petition in Tax Court is not complex, and there is no clear statement from Congress indicating that equitable tolling should not apply to this time period. Furthermore, this time deadline is very short.

If this Court were to hold that equitable tolling does not apply with respect to this 30-day time period, many U.S. taxpayers who reside outside the United States would effectively be deprived of the ability to seek Tax Court review of determinations under section 6330(d)(1). Given the restrictions placed by countries on the delivery of international mail as the result of COVID-19 and the normal delays inherent in the delivery of international mail, 30 days is not sufficient time for a "determination" under section 6330(d)(1) to reach overseas taxpayers, allow them to prepare a Tax Court petition, and then file the petition with the Tax Court. Indeed, today, the 30-day period may not be sufficient time for the "determination" to reach U.S. taxpayers who live overseas. Allowing equitable tolling of this 30-day period is necessary to allow

overseas taxpayers the opportunity to seek Tax Court review of determinations under section 6330(d)(1).

ARGUMENT

A. There Should be No "Tax Exceptionalism" For Purposes of Determining Whether Equitable Tolling Applies to a Statutory Deadline for Filing Suit

In *Mayo Foundation for Medical Education & Research v. United States,* 562 U.S. 44 (2011), this Court addressed the question of whether the validity of tax regulations promulgated by the Treasury Department should be determined using a standard that is different from the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), which is used to determine the validity of government regulations promulgated outside of the tax arena. This Court was required to address this question because the Court in its prior decisions addressing the validity of tax regulations, such as *National Muffler Dealers Assn., Inc. v. United States,* 440 U.S. 472 (1979), had employed a standard somewhat different from the *Chevron* standard to determine the validity of tax regulations.

The Court determined in *Mayo* that it was not appropriate to "carve out an approach to administrative review good for tax law only." 562 U.S. at 55. This Court noted "the importance of

maintaining a uniform approach to judicial review of administrative action," citing *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999), and *Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 222-23 (1989).

This rationale supporting this Court's refusal to permit "tax exceptionalism" in determining the validity of tax regulations applies with equal force in the present context. There are no valid reasons for employing a different analytical framework in tax cases when determining whether equitable tolling applies to a statutory deadline for filing suit against the government. Just as is the case in non-tax cases, the outcome of the analysis will depend on the factors discussed in cases such as *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), *Holland v. Florida*, 560 U.S. 631 (2010), and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

The analysis of these factors in no way depends on whether or not the statutory language appears in the Internal Revenue Code as opposed to appearing elsewhere. To the extent this Court suggested otherwise in *Brockamp*, *see* 519 U.S. at 352, this Court should make clear now that tax exceptionalism is not appropriate in the present context.

The various provisions in the Internal Revenue Code which establish deadlines for filing suit against the government illustrate quite well why a "one analysis fits all" for tax cases is inappropriate. The 30-day statutory deadline at issue here is one of two 30-day statutory deadlines

for filing a Tax Court petition contained in the Internal Revenue Code. The other 30-day statutory deadline is contained in 26 U.S.C. § 7623(b)(4), which establishes the deadline for seeking Tax Court review of the IRS's denial of claims for whistleblower rewards. *See Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019).

Many of these statutory deadlines are set at a straightforward 90 days. *See* 26 U.S.C. § 6234(a) (judicial review of final partnership adjustment); 26 U.S.C. § 7428(b)(3) (declaratory judgment action regarding status of 26 U.S.C. § 501(c)(3) charitable organization); 26 U.S.C. § 7430(f)(2) (judicial review of denial of request for reasonable administrative costs); 26 U.S.C. § 7476(b)(5) (declaratory judgment action regarding qualification of retirement plans); 26 U.S.C. § 7477(b)(3) (declaratory judgment action regarding value of certain gifts); 26 U.S.C. § 7478(b)(3) (declaratory judgment action regarding status of certain governmental obligations); and 26 U.S.C. § 7479(b)(3) (declaratory judgment action regarding eligibility of estates with respect to installment payments under 26 U.S.C. § 6166). None of these statutory provisions contain the word "jurisdiction."

Two additional statutory deadlines, contained in 26 U.S.C. § 6213(a) (actions to challenge asserted deficiencies in income taxes, asserted deficiencies in estate and gift taxes, and asserted deficiencies in certain excise taxes) and 26 U.S.C. § 6901(a) (actions to challenge asserted liabilities as transferees with respect to certain types of taxes and asserted,

fiduciary liability for unpaid taxes under 31 U.S.C. § 3713), are set at a straightforward 90-day period with the exception of establishing a 150-day period where the notice of deficiency or notice of 26 U.S.C. § 6901(a) liability is addressed to a taxpayer outside of the United States. These sections refer to "jurisdiction" only in the context of the ability of the petitioning taxpayer to seek injunctive relief against improper collection action where a timely petition is filed with the Tax Court, similar to the language in 26 U.S.C. § 6330(e).

One statutory deadline, contained in 26 U.S.C. § 7436(b)(2) (proceeding to determine employment status) is set at what appears to be a straightforward 90-day deadline but which the Tax Court has construed as permitting the taxpayer to file a Tax Court petition prior to the IRS's final determination regarding employment status, prior to the running of the statutory 90-day period. *See SECC Corp. v. Commissioner*, 142 T.C. 225 (2014). This section does not contain the word "jurisdiction."

Another statutory deadline, contained in 26 U.S.C. § 6015(e)(1) (proceeding to determine relief from joint and several liability), establishes an outer limit of 90 days but expressly allows the taxpayer to bring an action prior to the IRS's final determination of whether to grant relief. This provision contains the word "jurisdiction" in the same type of parenthetical ["(and the Tax Court shall have jurisdiction)"] which appears in section 6330(d)(1). The language of this section differs from other sections, however. *See* Petr's Opening Br. at p. 22.

Another statutory deadline, contained in 26 U.S.C. § 6110(f)(3) (action to determine whether certain information may be disclosed by the IRS), is a straightforward 60 days. This section does not contain the word "jurisdiction."

Then there are the provisions which set statutory deadlines for bringing suit in courts other than the Tax Court. Many of these statutory deadlines are set at two years from the date on which the cause of action accrues. *See* 26 U.S.C. § 7431(d) (suit for unauthorized disclosure of return information can be brought within 2 years of the discovery of the unauthorized disclosure); 26 U.S.C. § 7432(d)(3) (suit for damages for failure to release tax lien can be brought within 2 years after cause of action accrues); 26 U.S.C. § 7433(d)(3) (suit for damages for unauthorized collection action can be brought within 2 years after the cause of action accrues); and 26 U.S.C. § 7435(d) (cause of action for unauthorized enticement of information disclosure). None of these sections contain the word "jurisdiction." *See also Keohane v. United States*, 669 F.3d 325, 330 (D.C. Cir. 2012) (holding that the 2 year period in § 7433(d)(3) is not jurisdictional).

There are also the limitations periods in 26 U.S.C. § 6532, which include the two-year period of limitations on bringing a refund suit, which can be extended in writing by both parties (section 6532(a)), and the two-year period of limitations on bringing a wrongful levy action (section 6532(c)). The latter period can be extended under certain circumstances, and the Ninth Circuit has held that this period can

be equitably tolled. *See Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015).

Then there are the statutory deadlines discussed by this Court in *Brockamp*. The statutory provisions analyzed in *Brockamp* are materially different from virtually all of the statutory provisions discussed above.

There are other statutory deadlines for bringing suit not discussed above. *See*, *e.g.,* 26 U.S.C. § 1314(b) (one-year statute of limitations on invoking mitigation provisions to seek refund). While the statutory deadlines discussed above are potentially susceptible to being "grouped" for purposes of analyzing whether equitable tolling applies, these provisions have differences that can be meaningful. *See*, *e.g., Brockamp, supra.* This diversity, and the fact that the provisions discussed in *Brockamp* differ materially from virtually all of the other statutory provisions discussed above, supports the conclusion that there should not be any "tax exceptionalism" for purposes of determining whether equitable tolling applies to statutory deadlines for bringing suit.

B. This Court Has Allowed Equitable Tolling at the Request of the IRS; What is Sauce for the Goose is Sauce for the Gander

In the case of *Young v. United States, supra*, this Court, at the urging of the IRS, held that the time deadlines specified in the Bankruptcy Code which govern the priority and dischargeability of

claims for taxes, were effectively statutes of limitation that could be equitably tolled. 535 U.S. at 52. This Court explained that the three-year period at issue in *Young* is "a limitations period subject to traditional principles of equitable tolling," 535 U.S. at 47, and further explained that it is hornbook law that limitations periods are "customarily subject to 'equitable tolling'" unless tolling would be inconsistent with the statutory language, citing *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95 (1990). *Id.* at 49.

The Court reached that conclusion even while acknowledging that the statutory scheme in effect at the time of the Court's decision contained a statutory tolling provision which tolled the 240-day period in a prior version of section 507(a)(8)(A)(ii), tolling this 240-day period while an offer in compromise was pending.

In addition, the Court assumed that there was an additional general tolling provision in section 108(c) of the Bankruptcy Code and concluded that the presence of such a general tolling provision did not bar bankruptcy courts from applying equitable tolling of the relevant statutory periods in individual cases based on the unique circumstances of a particular case. *Young*, 535 U.S. at 53. In essence, the Court held that the presence of a "macro" tolling provision in the statutory scheme did not prevent the courts from engaging in the "micro" tolling of the applicable time limitations based on the facts in each individual case.

After the IRS's victory in *Young*, Congress added additional statutory tolling provisions to some of the time periods addressed by this Court in *Young*. *See* Bankruptcy Abuse Prevention & Consumer Protection Act, Pub. L. No. 109-8, § 705, 119 Stat. 23, 126 (modifying section 507(a)(8)).

Since the additional statutory tolling provisions were added to the Bankruptcy Code, provisions construed by this Court in *Young*, the IRS has continued to argue, with success, that it can invoke the principle of equitable tolling on a case by case basis, notwithstanding the existence of multiple statutory tolling provisions. *See*, *e.g., Putnam v. IRS (In re Putnam)*, 503 B.R. 656 (Bankr. E.D.N.C. 2014).

The possibility that these time periods may be equitably tolled, notwithstanding the presence of statutory tolling provisions, requires practitioners who advise clients on whether they are able to discharge their tax obligations in bankruptcy, such as *Amicus*, to spend a significant amount of time to properly investigate and analyze whether equitable tolling may apply in order to properly advise their clients.

This is not to say that it is objectively unreasonable to allow equitable tolling, which in turn requires that this additional work be done by practitioners who advise taxpayers on whether they can discharge their tax liabilities in bankruptcy. Rather, the point is that the IRS has successfully invoked equitable tolling, which affects tens of

thousands of taxpayers who file bankruptcy owing taxes to the IRS each year and requires a significant amount of work to be done by professional advisors that would not have to be done if equitable tolling was not allowed.

Thus, the IRS is not in a position to complain about the potential effects of permitting equitable tolling in the present case. The number of cases which will be affected by future claims of equitable tolling will be very modest. That is so even if equitable tolling is permitted for limitations periods in the Internal Revenue Code other than the 30-day period at issue here. The number total number of Tax Court cases pending at any given time has historically been less than 30,000. *See infra* at pp. 18 and Pet'r's Opening Br. at pp. 45. The number of Collection Due Process cases pending before the Tax Court at any given time is a small fraction of that number. *See* Pet'r's Opening Br. at pp. 45.

No one who files an action against the IRS does so in joyful anticipation that they will have the pleasure of demonstrating to the Court why equitable tolling should be allowed in their case. Taxpayers who file actions against the IRS endeavor to file them on a timely basis. But a small number of such endeavors are not timely. Allowing judges to adjudicate the question of whether the taxpayer has met the requirements for equitable tolling in a modest number of cases is not going to cause the type of problems that concerned this Court in *Brockamp*.

The presence of limited statutory tolling provisions which can toll the limitations periods on filing a court proceeding against the IRS under section 6330(d)(1) in very limited circumstances does not preclude this Court from concluding that courts should permit equitable tolling of this 30-day period when it is appropriate to do so. This point is amply demonstrated by this Court's opinion in *Young* and by the IRS's successful efforts to invoke equitable tolling following its victory in *Young*.

There are several provisions that can toll this 30-day period at issue here. Some of which are discussed in Petitioner's Opening Brief at pages 31 and 46. Another such provision was just signed into law on November 15, 2021. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80503, H.R. 3684—13 (2021) (tolls all periods of limitation applicable to the filing of Tax Court petitions when the Tax Court's clerk's office is not accessible).

None of these provisions constitute a clear statement by Congress that it intended to preclude taxpayers from invoking equitable tolling in cases where the facts justify allowing it. Based on this Court's holding in *Young*, the presence of these provisions does not bar the application of equitable tolling of the 30-day period under section 6330(d)(1).

The fact that *Young* involved periods of limitation under the Bankruptcy Code as opposed to periods of limitation under the Internal Revenue Code does not matter. Tax exceptionalism has no

place here for the reasons discussed above. What is sauce for the goose is sauce for the gander.

C. Many of the Statutory Deadlines Affecting Court Review of Various IRS Determinations and Decisions Are Amenable to Equitable Tolling

Most of the statutory time limitations on filing suit against the IRS differ significantly from the statutory scheme addressed by this Court in *Brockamp*, but do not differ meaningfully from the 30-day period under section 6330(d)(1). While the only statutory provision at issue in the present case is section 6330(d)(1), this Court's holding and explanation of its holding in the present case will be closely watched by the IRS and by private practitioners such as *Amicus* for purposes of determining whether equitable tolling applies to the other time limitations in the Internal Revenue Code discussed above (other than the provisions address by this Court in *Brockamp*). For this reason, *Amicus* provides a brief explanation of the nature the other time limitations discussed above, with an eye towards the principles discussed by this Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

Most litigation in Tax Court arises under 26 U.S.C. § 6213(a), which is the provision that allows taxpayers to challenge asserted deficiencies in income taxes, estate and gift taxes, and certain excise taxes. The time period set forth in that section is a straight 90-day period. The 90-day period is

extended to 150 days where the notice of deficiency is addressed to a taxpayer outside the U.S. Aside from the difference in the duration of the basic filing deadline and the existence of an extended deadline when the notice of deficiency is addressed to a taxpayer outside the U.S., there are no meaningful differences between the statutory deadlines under section 6330(d)(1) and section 6213(a). Thus, if this Court were to draw a distinction between these two statutory deadlines for purposes of applying equitable tolling, this Court would likely rely on the fact that the period under section 6330(d)(1) is significantly shorter than the period under section 6213(a) and that the period under section 6330(d)(1) is not extended if the determination is mailed to a taxpayer outside the United States.

Sections 6330(d)(1) and 6213(a) have one other commonality that distinguishes them from *Brockamp*, and thus renders them far more susceptible to equitable tolling than the statutory deadline addressed in *Brockamp*. That commonality is that the number of Tax Court cases to which equitable tolling might apply is far, far less than the number of matters to which the IRS asserted in *Brockamp* could be subject to equitable tolling.

Some statistics regarding the number of cases pending in the Tax Court and, more specifically, the number of Collection Due Process cases pending in the Tax Court, are contained in Petitioner's Opening Brief at pp. 45. This Court can, however, get a sense of how many cases have been pending in the Tax Court at any given time over the last 20+ years by

looking at the statistics made available by the IRS Office of Chief Counsel regarding the number of active Tax Court cases and the number of active tax refund cases that were pending in each of the past 23 years. These statistics, available for fiscal years 1998 through 2020, are available at SOI Tax Stats - Chief Counsel Workload: Tax Litigation Cases, by Type of Case - IRS Data Book Table 29, https://www.irs.gov/statistics/soi-tax-stats-chief-counsel-workload-tax-litigation-cases-by-type-of-case-irs-data-book-table-29 (last visited Nov. 17, 2021).

Because the IRS is represented in every Tax Court case by an attorney from the IRS Office of Chief Counsel, the statistics regarding the number Tax Court cases pending in IRS Chief Counsel's Office as of the close of each fiscal year (September 30th of each year) approximate the number of cases pending in the Tax Court as of those dates.[3] Looking at the statistics for September 30, 2020, the total number of Tax Court cases being handled by IRS Chief Counsel's Office as of that date was 23,440.

By way of comparison, the number of Tax Court cases pending in IRS Office of Chief Counsel as of September 30, 1997, before the Collection Due Process procedures were enacted by Congress in 1998, was 29,775. Thus, since the enactment of the

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[3] The only cases excluded from the totals in the IRS Chief Counsel statistics are tax cases pending in the Courts of Appeal and in this Court. The same exclusion applies to the number of tax refund suits, discussed immediately below.

Collection Due Process provisions in 1998, the total number of pending Tax Court cases being handled by the IRS Chief Counsel's Office has decreased by more than 6,000 cases, which is a reduction of roughly 20%.

Only a modest number of the cases filed with the Tax Court will involve petitions filed after the statutory deadlines specified in the Internal Revenue Code. Thus, assuming that this Court were to permit taxpayers to argue for equitable tolling in all types of cases brought before the Tax Court, the number of Tax Court cases in which the issue of equitable tolling would arise is quite small.

The total number of tax refund suits being handled by IRS Chief Counsel's Office at any given time is comparatively miniscule. While the IRS is represented by the Tax Division of the Department of Justice in refund suits brought in District Courts and the U.S. Court of Federal Claims, IRS Chief Counsel attorneys are assigned to virtually every single refund suit brought against the IRS to provide advice and assistance to the Department of Justice Tax Division. Thus, the number of tax refund suits pending in the IRS Office of Chief Counsel at any given time will approximate the number tax refund suits pending nationwide at that time.

As of September 30, 2020, refund suits being handled by the IRS Office of Chief Counsel totaled 759. *See* IRS Data Book Table 29, *supra*. As of October 1, 1998, refund suits being handled by the IRS Office of Chief Counsel totaled 2,095. *Id.*

These numbers indicate that the application of equitable tolling to the various time deadlines discussed above will have a very modest effect on tax-related litigation and will not involve the types of problems that the IRS claimed would occur when the IRS was litigating *Brockamp* before this Court. Thus, the various time periods specified in the Internal Revenue Code for bringing suit against the government are susceptible to equitable tolling, aside from the time periods at issue in *Brockamp*.

D. The Doctrine of Equitable Tolling is Particularly Appropriate For the 30-Day Period for Filing a Petition With the Tax Court Under Section 6330(d)(1)

Petitioner's Opening Brief does an excellent job of explaining why the 30-day period in section 6330(d)(1) is particularly susceptible to equitable tolling. Pet'r's Opening Br. at pp. 35-47. *Amicus* will not repeat here those arguments made by Petitioner. *Amicus* notes, however, that this 30-day period is appreciably shorter than any other time deadline for bringing suit against the IRS contained in the Internal Revenue Code aside from the 30-day deadline specified in 26 U.S.C. § 7623(b)(4). To the extent this Court is inclined to treat the 30-day period in section 6330(d)(1) differently from the other provisions in the Internal Revenue Code which set deadlines of longer than 30 days (a position not advocated by *Amicus*), it is this short 30-day time window within which to file a Tax Court petition which distinguishes section 6330(d)(1) from the other time deadlines for bringing suit specified in the

Internal Revenue Code (aside from the provisions discussed in *Brockamp*).

E. The Failure of This Court to Allow Equitable Tolling of the time period under Section 6330(d)(1) Would Effectively Deprive Many U.S. Taxpayers Living Abroad of the Ability to Challenge Determinations Under Section 6330(d)(1) in the Tax Court

Millions of U.S. taxpayers live outside of the United States. Because U.S. tax laws are based on citizenship and not on the country of the taxpayer's residence or domicile, U.S. citizens living abroad owe taxes to the IRS based on their worldwide income even if they reside and work abroad and earn all of their income abroad.

The Department of State estimates that there are approximately 9 million U.S. citizens living abroad. *See* U.S. Dep't of State, Bureau of Consular Affairs, *Consular Affairs by the Numbers* (2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (last visited Nov. 17, 2021). The actual number of U.S. citizens living abroad is very likely higher because there are persons residing abroad who were born in the United States who are therefore U.S. citizens subject to tax on their worldwide income and who permanently left the United States as an infant or small child. *Amicus* has been personally involved in multiple cases with this fact pattern.

Mail sent to persons living outside the U.S. is now frequently delayed or not delivered at all due to COVID-19. Numerous postal administrations around the world issue updates on delays in delivery of, or the inability to deliver, mail addressed internationally. *See* U.S. Postal Serv., *USPS Serv. Alerts: Int'l Mail Disruptions*, https://about.usps.com/newsroom/service-alerts/international/welcome.htm (last visited Nov. 17, 2021); Japan Post, *Int'l Mail – Serv. Availability by Country*, https://www.post.japanpost.jp/int/information/overview_en.html (last visited Nov. 17, 2021); Royal Mail, *United Kingdom Royal Mail Int'l Incident Bulletin*, https://business.help.royalmail.com/app/answers/detail/a_id/5317/~/international-incidents-update (last visited Nov. 17, 2021). Private services likewise provide updates on problems with the delivery of international mail and international delivery services to their customers. *See, e.g.,* Ray Bissett, *As of 8 October 2021: Quick Links: Mail and Parcel Carrier Serv. Updates from Around the Globe*, Quadient (Oct. 8, 2021) https://www.quadient.com/blog/of-8-october-2021-quick-links-mail-and-parcel-carrier-service-updates-around-globe (last visited Nov. 17, 2021).

The IRS is required to send a "determination" made under section 6330(d)(1) by certified mail or registered mail. 26 C.F.R. § 301.6330-1(a)(1). Certified mail service is not available for mail sent internationally from the U.S. *See* U.S. Postal Serv., *What Else do I Need to Know About Certified Mail Servs.,* https://faq.usps.com/s/article/What-else-do-I-

Need-to-Know-about-the-Certified-Mail-Services (last visited Nov. 17, 2021). Thus, IRS must mail determinations to taxpayers living abroad by registered mail.

The delivery of registered mail is often delayed due to the need for special handling of registered mail within the United States. *See* Office of Inspector General, U.S. Postal Serv., Registered Mail, Audit Report FT-AR-17-008 (July 14, 2017), https://www.uspsoig.gov/sites/default/files/document-library-files/2017/FT-AR-17-008.pdf (last visited Nov. 17, 2021).

Other problems with the delivery of mail occur aside from the problems associated with COVID-19. *See*, *e.g.,* Press Release, U.S. Attorney's Office for the Northern District of New York, *Former Postal Employee Pleads Guilty to Mail Theft in Washington County*, (Nov. 17, 2021), https://www.justice.gov/usao-ndny/pr/former-postal-employee-pleads-guilty-mail-theft-washington-county (last visited Nov. 18, 2021); Rich Schapiro, *Is Mail Theft Surging in the U.S.? Postal Inspectors Don't Know*, NBC News (Sept. 27, 2020) https://www.nbcnews.com/news/us-news/mail-theft-surging-u-s-postal-service-inspectors-don-t-n1241179 (last visited Nov. 17, 2021).

Problems existed with respect to the delivery of international mail prior to COVID-19. Those problems manifested themselves in the case of *Sarrell v. Commissioner*, 117 T.C. 122 (2001). In *Sarrell*, the Tax Court held that a petition mailed to

the Tax Court within 30 days after the issuance of the notice of determination under section 6330(d)(1) from Israel, but which was delivered to the Tax Court outside of the 30 day deadline specified in section 6330(d)(1), was untimely. The Court noted that the delivery of the determination to the taxpayer in Israel had been delayed due to the Jewish Holidays. The Court further noted that the "timely mailed is timely filed" rules set forth in section 7502 and the regulations issued thereunder do not apply to mail sent from a foreign post office. *Sarrell*, 117 T.C. at 126.

This case illustrates all too well the problems that will be (and have been) faced by U.S. taxpayers living abroad if equitable tolling is not permitted under section 6330(d)(1). Had equitable tolling been permitted in *Sarrell*, it is quite likely that the Tax Court would have applied equitable tolling to treat Sarrell's Tax Court petition as timely filed.

Aside from this case, *Amicus* has represented U.S. taxpayers living overseas who did not receive mail which the IRS claimed to have sent to them and who received mail from the IRS more than 60 days after the date on which the IRS sent the mail. Mail delays which result in the need of taxpayers to invoke equitable estoppel are not figments of anyone's imagination. They are quite real, and the only way to ensure that these delays do not deprive taxpayers of their right to seek review of determinations under section 6330(d)(1) is to permit them to invoke the doctrine of equitable tolling.

This Court should interpret section 6330(d)(1) so as to permit taxpayers to invoke equitable tolling of the 30-day period in that section in appropriate circumstances.

CONCLUSION

For the reasons set forth above, *Amicus* urges this Court to reverse the holding of the Eighth Circuit and to remand for a determination of whether equitable tolling applies.

Respectfully submitted,

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