No. 19-402

In the Supreme Court of the United States

HOWARD L. BALDWIN AND KAREN E. BALDWIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 921 F.3d 836. The opinion and order of the district court (Pet. App. 16a-23a) are not published in the Federal Supplement but are available at 2016 WL 11593219. An additional order of the district court (Pet. App. 24a-31a) is not published in the Federal Supplement but is available at 2017 WL 11129004.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2019. A petition for rehearing was denied on June 25, 2019 (Pet. App. 42a). The petition for a writ of certiorari was filed on September 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. A variety of tax consequences may depend on whether a return or other document is timely filed with the Internal Revenue Service (IRS). Until 1954, "the law treated tax documents as timely filed only if they were physically delivered to the IRS by the applicable deadline." Pet. App. 5a; see *United States* v. *Lombardo*, 241 U.S. 73, 76 (1916) (holding that the word "'file'" as used in a federal statute "means to deliver to the office and not send through the United States mails," and that a paper is filed only "when it is delivered to the proper official and by him received"). Under that physical-delivery rule, a document is timely filed only if it is actually delivered to the IRS by the applicable deadline, regardless of when it is mailed. See, *e.g.*, *Stebbins' Estate* v. *Helvering*, 121 F.2d 892, 893-894 (D.C. Cir. 1941); *Poynor* v. *Commissioner*, 81 F.2d 521, 522 (5th Cir. 1936). For obvious reasons, the physical-delivery rule can leave "taxpayers vulnerable to postal service malfunctioning." *Anderson* v. *United States,* 966 F.2d 487, 490 (9th Cir. 1992).

In pre-1954 disputes about whether documents had been physically delivered to the IRS on time, some federal courts permitted taxpayers to invoke an evidentiary presumption that came to be known as the "common-law mailbox rule." Pet. App. 5a. Under that doctrine, if a taxpayer could persuade the fact-finder that a document had been "properly addressed and deposited in the United States mails, with postage thereon duly prepaid," in time for the document to reach the IRS "in the ordinary course of mail," the taxpayer was entitled to a rebuttable evidentiary presumption that the document had been physically delivered to the IRS on time—even if the IRS had no record of receiving it. *Detroit Auto.*

Prods. Corp. v. *Commissioner*, 203 F.2d 785, 785 (6th Cir. 1953) (per curiam); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952).

In 1954, Congress enacted Section 7502 of the Internal Revenue Code. See Internal Revenue Code of 1954, ch. 736, § 7502, 68A Stat. 895-896. Section 7502(a) creates a limited exception to the physical-delivery rule. When a tax document that must be filed by a certain deadline is delivered to the IRS by U.S. mail after that deadline, the date of the postmark on the mailing is "deemed to be the date of delivery," 26 U.S.C. 7502(a)(1), as long as the document was deposited in the mail before the deadline, 26 U.S.C. 7502(a)(2). For tax documents sent by *registered* U.S. mail, Section 7502(c) establishes a similar rule *and* provides taxpayers with a limited evidentiary presumption if a dispute arises about whether a document was actually delivered to the IRS. In that circumstance, the registration is "prima facie evidence that the * * * document was delivered" to the IRS, and "the date of registration shall be deemed the postmark date." 26 U.S.C. 7502(c)(1)(A) and (B).

Section 7502 also authorizes the Secretary of the Treasury to promulgate regulations establishing similar rules for tax documents sent by certified mail, electronic mail, or a private delivery service. 26 U.S.C. 7502(c)(2) and (f)(3). The Secretary has exercised that authority to extend similar treatment to tax documents sent via certified mail or by designated private delivery services. See 26 C.F.R. 301.7502-1(c)(2)-(3) and (e)(2); I.R.S. Notice 2016-30, 2016-18 I.R.B. 676.

b. In the decades since Section 7502 was enacted, the courts of appeals have disagreed about whether that provision forecloses a taxpayer from relying on the evidentiary presumption of physical delivery that some

courts had recognized before 1954. Pet. App. 8a. The Sixth Circuit held that Section 7502's exceptions to the physical-delivery rule were "exclusive and complete," and that a taxpayer therefore could not "invoke the judicially-created presumption that material mailed is material received." *Miller* v. *United States*, 784 F.2d 728, 730-731 (1986) (per curiam). The Second Circuit similarly concluded that Section 7502 reflected "a penchant for an easily applied, objective standard," to the exclusion of judicially crafted presumptions. *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980). By contrast, the Eighth and Ninth Circuits held that Section 7502 did not displace the prior evidentiary presumption—*i.e.*, that a taxpayer who could persuade the fact-finder that a tax document was placed in the U.S. mail in time to reach the IRS by the applicable deadline in the ordinary course was entitled to an evidentiary presumption of timely physical delivery, even if Section 7502(c) was inapplicable because the document was not sent by registered or certified mail. See *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1158-1159 (8th Cir. 1990); *Anderson,* 966 F.2d at 490-491 (9th Cir.). And in *Sorrentino* v. *IRS*, 383 F.3d 1187 (2004), a single panel of the Tenth Circuit issued three conflicting opinions on the question.

In 2011, after utilizing notice-and-comment rulemaking procedures, the Department of the Treasury amended its regulations to provide "certainty" to taxpayers in light of the conflicting judicial decisions described above. 76 Fed. Reg. 52,561, 52,561 (Aug. 23, 2011); cf. Pet. App. 9a (observing that the pre-2011 "circuit split left the law in an undesirable state, as it allowed similarly situated taxpayers to be treated differently depending on where they lived"). The agency explained

that the amended regulations were intended to clarify that Section 7502 sets forth "the only ways to establish prima facie evidence of delivery of documents that have a filing deadline prescribed by the internal revenue laws, absent direct proof of actual delivery." 76 Fed. Reg. at 52,561. In particular, the agency amended its regulations to state:

> Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated [private delivery service] * * * are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

26 C.F.R. 301.7502-1(e)(2)(i). The agency made the amended version of the regulation applicable to "all documents mailed after September 21, 2004," the date when the amendment had been proposed in a notice of proposed rulemaking. 26 C.F.R. 301.7502-1(g)(4); see 76 Fed. Reg. at 52,563; 69 Fed. Reg. 56,377, 56,379 (Sept. 21, 2004).

2. The dispute in this case involves the alleged filing of petitioners' amended 2005 tax return. Pet. App. 4a. In that return, petitioners sought to carry back to 2005 a net operating business loss that they had incurred in 2007, and to claim a resulting tax refund of approximately $167,000. *Ibid.*

In order to be timely under the applicable statutory provisions, the amended 2005 tax return had to be filed by October 15, 2011. Pet. App. 4a. Petitioners asserted that one of their employees had deposited the amended 2005 return in the U.S. mail in June 2011. *Ibid.* The IRS has no record of receiving an amended 2005 return

from petitioners postmarked before the October 2011 deadline. *Id.* at 18a. The IRS eventually received an amended 2005 return from petitioners in July 2013, but that mailing did not effect a timely delivery under Section 7502(a) because it was postmarked after the October 2011 deadline. *Id.* at 4a. Accordingly, the IRS denied petitioners' refund claim as untimely. *Ibid.*[1]

3. Petitioners brought suit against the United States for a tax refund for the 2005 tax year. Pet. App. 4a-5a. The federal government has waived its sovereign immunity from certain claims for tax refunds, but only if the taxpayer "'duly filed'" a request for the refund with the IRS "in accordance with IRS regulations." *Id.* at 5a (quoting 26 U.S.C. 7422(a)); see *United States* v. *Dalm*, 494 U.S. 596, 609-610 (1990) (explaining that the government has not waived its immunity from suits by taxpayers who "fail[] to comply with the statutory requirements for seeking a refund"). The government moved for summary judgment on sovereign-immunity grounds, arguing that petitioners had not filed their amended 2005 return before the October 2011 deadline. Pet. App. 33a.

The district court denied the government's motion for summary judgment. Pet. App. 32a-41a. The court recognized that the Treasury Department's amended regulation, 26 C.F.R. 301.7502-1(e), made "registered or certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received" by the IRS. Pet. App. 37a-38a. But it declined to give effect to the regulation because it found "that § 7502 is not ambiguous" and that the statute does not "foreclose other evidentiary means that

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[1] In the lawsuit that followed, the government also disputed petitioners' entitlement to the net operating loss that was the basis for the 2005 refund claim. That issue is not before the Court.

might assist [taxpayers] in establishing a presumption of delivery." *Id.* at 39a-40a. The court also determined that petitioners had provided sufficient evidence to create a genuine issue of material fact as to the date on which their amended 2005 return was mailed. *Id.* at 40a-41a.

After a bench trial, the district court found that petitioners' assistant had deposited their amended 2005 return in the regular U.S. mail on June 21, 2011. Pet. App. 18a; see *id.* at 16a-23a. On petitioners' own account, that mailing was addressed to the wrong IRS service center. *Id.* at 18a, 21a. The court nonetheless found that petitioners' evidence was sufficient to trigger a presumption that the return was delivered before the October 2011 deadline. *Id.* at 21a-22a. The court also found that the government had failed to rebut that presumption. *Ibid.* The court therefore concluded that petitioners had filed their amended 2005 return in a timely manner and that they were entitled to a refund of $167,663. *Id.* at 22a. It later awarded petitioners $25,515 in attorney's fees and costs. *Id.* at 24a-31a.

4. The court of appeals reversed and remanded. Pet. App. 1a-15a. Applying "the familiar two-step analysis" (*id.* at 10a) of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court upheld 26 C.F.R. 301.7502-1(e)(2) as a reasonable interpretation of 26 U.S.C. 7502.

At the first step, the court of appeals found that Section 7502 "is silent as to whether the statute displaces the common-law mailbox rule." Pet. App. 11a. In the court's view, "the statute does not address whether a taxpayer who sends a document by regular mail can rely on the common-law mailbox rule to establish a presumption of delivery when the IRS claims not to have received the document." *Ibid.* The court observed that

Section 7502(c)(1)(A) does establish a presumption of delivery "when a taxpayer sends a document by *registered* mail," but that the statute is "silent" about any such presumption for documents sent by regular mail. *Ibid.*; see 26 U.S.C. 7502(c)(1)(A) (for a tax document sent by registered mail, "such registration shall be prima facie evidence" of delivery). The court concluded that Congress has not "directly spoken to the precise question at issue." Pet. App. 11a (quoting *Chevron*, 467 U.S. at 842).

At the second step, the court of appeals held that 26 C.F.R. 301.7502-1(e)(2) is "based on a permissible construction of the statute." Pet. App. 11a. The court stated that, as "reflected by the circuit split that developed on this issue," Section 7502 could "reasonably be construed in one of two ways: as intended merely to supplement the common-law mailbox rule, or to supplant it altogether." *Id.* at 11a-12a. In the court's view, the Treasury Department reasonably "chose the latter construction." *Id.* at 12a.

The court of appeals noted that the agency's construction of the statute is supported by "the principle that 'where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" Pet. App. 12a (quoting *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013)). The court further explained that, "[g]iven that the purpose of enacting * * * § 7502 was to provide exceptions to the physical-delivery rule, it is reasonable to conclude that 'Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.'" *Ibid.* (quoting *United States* v. *Johnson*, 529 U.S. 53, 58 (2000)). The court rejected petitioners' contention that the canon

of construction disfavoring departures from the common law compelled a different interpretation. See *ibid.*

The court of appeals also held that the agency's reasonable interpretation of the statute was entitled to deference notwithstanding the contrary circuit precedent established by *Anderson*. Pet. App. 13a. In that case, which was decided two decades before the agency's 2011 rulemaking, the Ninth Circuit had "declined to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule." *Ibid.* (quoting *Anderson*, 966 F.2d at 491) (brackets omitted). Here, invoking this Court's decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), the court of appeals explained that a "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Pet. App. 13a (quoting *Brand X*, 545 U.S. at 982). The court found that *Anderson* did not meet that criterion because the *Anderson* court had not stated that its interpretation "was the *only* reasonable interpretation." *Ibid.*

Petitioners argued in the alternative that 26 C.F.R. 301.7502-1(e)(2) was inapplicable to this case because the alleged mailing of petitioners' amended 2005 return had occurred before the amended regulation was published. Pet. App. 13a-15a. The court of appeals rejected that argument, explaining that the agency had validly made the amended regulation applicable to tax documents mailed after September 21, 2004. *Id.* at 14a; see 26 U.S.C. 7805(b)(1)(B); see also p. 5, *supra*. The court

also reversed the award of attorney's fees and costs. Pet. App. 15a.

ARGUMENT

By enacting 26 U.S.C. 7502 in 1954, Congress eliminated the judge-made evidentiary presumption that petitioners seek to invoke. Section 7502 sets forth the exclusive means, other than direct proof of physical delivery, by which a taxpayer can establish prima facie evidence that tax documents were actually delivered to the IRS. Petitioners do not dispute that they lack such direct proof and that, absent the judge-made evidentiary presumption on which they rely, their suit for a tax refund must be dismissed on sovereign-immunity grounds because they did not file a timely amended return for the 2005 tax year.

The Ninth Circuit reached the correct result in this case by deferring, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Department of the Treasury's interpretation of Section 7502 as reflected in 26 C.F.R. 301.7502-1(e)(2). That regulation was intended to clarify the law in the wake of conflicting circuit-court decisions, and it confirms that Section 7502 supersedes any judge-made evidentiary presumptions. The court in this case correctly held that, under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), the agency's regulation should be given effect notwithstanding a pre-regulation Ninth Circuit panel decision that had adopted a different understanding of Section 7502.

Petitioners do not contend that the decision below conflicts with any decision of this Court. Petitioners also do not contend that any other court of appeals has

interpreted Section 7502 differently since the IRS issued its 2011 regulation. Instead, they ask (Pet. 13-25) the Court to grant review in order to overrule *Brand X*.

The Court should decline that request. As long as *Chevron* remains the law, there is no sound reason to reconsider *Brand X*, and petitioners do not ask the Court to revisit *Chevron*. Pet. 13. This case would also be an unsuitable vehicle for addressing issues of administrative deference because Section 7502 itself forecloses petitioners' reliance on a judge-made evidentiary presumption of physical delivery. Petitioners' challenge (Pet. 26-33) to the manner in which the court below applied *Brand X* to the specific facts of this case also does not warrant further review. The petition for a writ of certiorari should be denied.

1. The text, structure, purpose, and history of Section 7502 demonstrate that the provision sets forth the exclusive means for a taxpayer to establish prima facie evidence of physical delivery of tax documents to the IRS in circumstances where the IRS has no record of receiving the documents. Petitioners' contrary argument (Pet. 26-30) rests on the interpretive canon that departures from the common law are disfavored. That canon does not support petitioners, however, because the relevant legal backdrop for Section 7502 was the physical-delivery rule, not the common-law mailbox rule. In Section 7502, Congress has created carefully delineated exceptions to the physical-delivery rule; identified narrow circumstances in which a taxpayer can establish a physical delivery of documents that the IRS has no record of receiving; and authorized the Treasury Department to promulgate additional exceptions in spe-

cific circumstances that are not present here. That reticulated scheme leaves no room for the application of additional judicially created exceptions.

a. Before Section 7502 was enacted in 1954, the established rule in federal tax law was that a tax document was filed with the IRS only when it was physically delivered to the agency. See pp. 2-3, *supra*. To avoid the seemingly harsh results that this physical-delivery rule could produce, some lower courts recognized an evidentiary presumption under which "proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive," even if the IRS had no record of receiving the document. Pet. App. 5a; see, *e.g.*, *Detroit Auto. Prods. Corp.* v. *Commissioner*, 203 F.2d 785, 785 (6th Cir. 1953) (per curiam).

In Section 7502, as amended, Congress addressed these timeliness issues in several interrelated ways. First, the statute contains a limited exception to the physical-delivery rule, under which the date of the postmark of a tax document mailed to the IRS is "deemed to be the date of delivery" if the document arrives after the applicable deadline. 26 U.S.C. 7502(a)(1). That exception applies only if specific conditions are met. Among other things, the document must be "delivered * * * to the agency," *ibid.*; the document must be postmarked and deposited in the mail before the applicable deadline, 26 U.S.C. 7502(a)(2)(A) and (B); and the document must be "properly addressed," 26 U.S.C. 7502(a)(2)(B). Congress also authorized the Secretary of the Treasury to specify the applicability of Section 7502(a) to certain other

mailings, such as those not postmarked by the U.S. Postal Service. See 26 U.S.C. 7502(b) and (f).

Second, Section 7502 provides a way for taxpayers to establish prima facie evidence of the physical delivery of tax documents that the IRS has no record of receiving. If a tax document "is sent by United States registered mail," the registration "shall be prima facie evidence that the * * * document was delivered to the agency, officer, or office to which addressed." 26 U.S.C. 7502(c)(1)(A); cf. *Black's Law Dictionary* 701 (11th ed. 2019) (defining "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced") (emphasis omitted). In addition, the "date of registration shall be deemed the postmark date," 26 U.S.C. 7502(c)(1)(B), for purposes of applying Section 7502(a)'s exception to the physical-delivery rule. Congress also authorized the Secretary to specify the applicability of Section 7502(c) to certain forms of mailing other than registered mail, including certified mail. See 26 U.S.C. 7502(c)(2) and (f)(3); see also 26 C.F.R. 301.7502-1(e)(2)(i) and (ii).

As a result of these provisions and the implementing regulations, a taxpayer may ensure that a document will be deemed timely filed by mailing it to the correct address by registered or certified mail before the applicable deadline. The current cost of certified mail services is $3.50, plus postage. U.S. Postal Serv., *Price List* (June 23, 2019), https://go.usa.gov/xpn6U.

b. Section 7502(c) sets forth the exclusive means for taxpayers to establish prima facie evidence of physical delivery for documents the IRS has no record of receiving. Taxpayers cannot circumvent the limitations of that provision by relying instead on (for example) testi-

mony concerning the date on which a document was deposited in the regular mail. Nor may taxpayers invoke any pre-1954 evidentiary presumption of delivery based on such circumstantial evidence.

That reading of Section 7502 follows from the established principle of statutory construction that, "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Pet. App. 12a (quoting *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013)). In Section 7502(a), Congress created an exception to the traditional physical-delivery rule for documents that are postmarked before a filing deadline but delivered to the IRS after the deadline. Section 7502(a) helps to identify the applicable filing date once actual delivery has been established, but it does not speak to the means by which the fact of delivery can be proved.

In Section 7502(c), Congress enacted a complementary rule for establishing prima facie evidence of delivery, affording taxpayers an opportunity to take advantage of Section 7502(a)'s exception to the physical-delivery rule even when the IRS has no record of receiving a document. Section 7502(c), however, is limited by its terms to *registered* mail, and to certified mail and private delivery services to the extent the Treasury Department so provides. 26 U.S.C. 7502(c)(1), (2), and (f)(3). Taxpayers may not circumvent those statutory limitations by invoking an alternative and inconsistent judge-made evidentiary presumption of timely physical delivery. Thus, the best interpretation of Section 7502 "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000).

The statutory structure and purpose reinforce the conclusion that Section 7502 forecloses resort to the pre-1954 evidentiary presumption that petitioners invoke. The statute "demonstrate[s] a penchant for an easily applied, objective standard" for establishing the timeliness of tax documents filed by mail. *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). The date of delivery for a document subject to the rule in Section 7502(a) is the date of the postmark "stamped on the cover" of the mailing. 26 U.S.C. 7502(a)(1). Likewise, if the document is sent by registered mail, the registration date is deemed to be the postmark date. 26 U.S.C. 7502(c)(1)(B).

No testimony from the taxpayer or other circumstantial evidence of the date of a mailing is necessary to apply those rules. The presumption of delivery available under Section 7502(c) likewise turns on an objective criterion—whether the document was "sent by United States registered mail," 26 U.S.C. 7502(c)(1)—that can readily be established through documentary proof. An additional, non-statutory presumption of timely physical delivery, based on whatever evidence the taxpayer can locate or produce, cannot be squared with the statute's manifest preference for clear and easily administered rules.

Millions of documents are mailed to the IRS each year, and the determination of whether the documents were filed on time may have significant practical consequences. Section 7502 establishes easily administered rules about timely filing, which can be applied without discovery or judicial fact-finding, and which produce uniform results for similarly situated taxpayers. Petitioners' reading of the statute would undercut those purposes.

Finally, the history of the statute confirms that Section 7502(c) sets forth the exclusive evidentiary presumption available in this context. When Congress first enacted Section 7502 in 1954, the filings to which the provision applied did not include tax returns or tax payments. See Internal Revenue Code of 1954, § 7502(a), 68A Stat. 895; 26 U.S.C. 7502 (1958). The IRS had expressed concerns about "unforeseen problems" that might arise if the new statutory exceptions to the physical-delivery rule were applied more broadly. S. Rep. No. 1625, 89th Cong., 2d Sess. 8 (1966) (Senate Report) (summarizing IRS's 1954 views).

In 1966, after additional experience with the statute, Congress amended Section 7502 to include both returns and payments. See Act of Nov. 2, 1966, Pub. L. No. 89-713, § 5(a), 80 Stat. 1110-1111. But in doing so, Congress chose to treat tax payments differently than tax returns and other tax documents. As amended, Section 7502(a)(1) provides that the timely-mailing-is-timely-filing rule applies to both tax returns and tax payments. 26 U.S.C. 7502(a)(1). Yet Section 7502(c)(1) extends the registered-mail-presumptive-delivery rule to tax returns but *not* to tax payments. 26 U.S.C. 7502(c)(1)(A); see Senate Report 8-9, 15-16. And to underscore that tax payments are to be treated differently, Congress provided that no part of Section 7502 shall apply to "currency or other medium of payment unless actually received *and accounted for.*" 26 U.S.C. 7502(d)(2) (emphasis added).

This history forecloses any inference that Section 7502 merely "supplement[s]" the pre-1954 evidentiary presumption recognized by some courts. Pet. App. 11a. From 1954 to 1966, Congress declined to establish for tax payments any exception to the physical-delivery

rule. When Congress ultimately established such an exception in 1966, it still declined to permit the registration of mailed tax payments to serve as prima facie evidence of delivery. Those legislative choices would make little sense if Congress had contemplated that taxpayers could invoke a non-statutory evidentiary presumption of timely physical delivery, even for tax payments.

c. The "common-law presumption canon" (Pet. 27) does not support petitioners' reading of Section 7502. Under that canon, "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (ellipsis omitted; brackets in original) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). The relevant legal backdrop for the enactment of Section 7502, however, was the strict physical-delivery rule. See pp. 12-13, *supra*.

To be sure, some federal courts before 1954 had attempted to soften the effect of the physical-delivery rule by recognizing a presumption of timely delivery based on evidence of timely mailing—the so-called "common-law mailbox rule." Pet. App. 5a (citing *Detroit Auto. Prods. Corp.*, 203 F.2d at 785-786, and *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952)). But the predominant background rule against which Congress legislated in 1954 was the physical-delivery rule. The best inference to be drawn from Congress's adoption of limited exceptions to that rule is that Congress intended to foreclose any non-statutory presumption of timely delivery. At a minimum, the statute is sufficiently clear to overcome the canon petitioners invoke.

d. The Treasury Department eliminated any doubt about the exclusive nature of Section 7502 by amending its implementing regulations in 2011. The applicable regulation now provides that, "[o]ther than direct proof of actual delivery," proof that a document was sent by registered or certified U.S. mail or by a designated private-delivery service is "the exclusive means to establish prima facie evidence of delivery of a document" to the IRS. 26 C.F.R. 301.7502-1(e)(2)(i). The regulation further specifies that "[n]o other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered." *Ibid.*

The implementing regulation thus makes clear that taxpayers cannot rely on any non-statutory presumption of timely delivery premised on a taxpayer's testimony that a particular document was placed in the mail on a specified date. Petitioners do not suggest that the regulation itself is ambiguous, and they have abandoned their argument (Pet. 11 n.5) that the regulation is inapplicable to the facts of this case. And while petitioners suggest (Pet. 27-28) that the amended regulation is contrary to Section 7502, they identify nothing in the statutory text to support that suggestion, and they do not seek the Court's review on that basis.

2. Petitioners contend (Pet. 13-25) that this Court should grant review to overrule *Brand X*. No sound reason exists to revisit *Brand X* in this case. As this Court recognized in *Brand X* itself, the rule the Court adopted there "follows from *Chevron*." 545 U.S. at 982. Petitioners have not asked this Court to overrule *Chevron*, and this case is not a suitable vehicle for considering that step. As long as *Chevron* remains the law, it would make little sense for a court of appeals to decline

to give effect to an agency regulation that is otherwise entitled to deference, simply because a prior panel of the same court had interpreted an ambiguous statute differently before the regulation was promulgated.

a. In *Brand X*, this Court addressed whether a court of appeals should afford *Chevron* deference to an agency's interpretation of an ambiguous statute if that interpretation conflicts with a decision previously issued by the same circuit. See 545 U.S. at 982. The Ninth Circuit had found *Chevron* to be inapplicable in those circumstances unless the prior decision had itself been based on deference to the agency. See *Brand X Internet Servs.* v. *FCC*, 345 F.3d 1120, 1131 (2003) (per curiam). This Court reversed, explaining that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982.

The Court in *Brand X* explained that "[t]his principle follows from *Chevron* itself," which had "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Brand X*, 545 U.S. at 982 (quoting *Smiley* v. *Citibank (S.D.), N. A.*, 517 U.S. 735, 740-741 (1996)). The Court further observed that allowing a prior panel opinion resolving a statutory ambiguity to foreclose an agency from resolving the same ambiguity differently in the future would contravene "*Chevron*'s premise * * * that it is for agencies, not courts, to

fill statutory gaps." *Ibid.* Instead, the Court held, the "better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-983.

b. Petitioners argue (Pet. 13-16) that *Brand X* is inconsistent with the principle of *stare decisis*, but the Court rejected that same argument in *Brand X* itself. 545 U.S. at 983; see *id.* at 985 (explaining that the Court granted review in *Brand X* in part to resolve "confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles"). The Court explained that, "[s]ince *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe the statute differently from a court does not say that the court's holding was legally wrong." *Id.* at 983. If the agency later exercises its authority to "choose a different construction" than the one the court selected, the agency has not "'reversed'" the court, "any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law." *Id.* at 983-984. Instead, the agency is merely exercising the same gap-filling authority that it possessed before the court announced its interpretation.

Petitioners also argue (Pet. 16-19) that *Brand X* is "unworkable" because, "[b]efore *Brand X*, courts seldom explicitly stated whether a statute is silent, truly

ambiguous, or unambiguous." That contention lacks merit. *Brand X* provides a clear default rule in those circumstances: "Before a judicial construction of a statute * * * may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." 545 U.S. at 985. To be sure, cases will occasionally arise in which the proper application of that rule is fairly debatable. Compare *United States* v. *Home Concrete & Supply, LLC*, 566 U.S. 478, 488-489 (2012) (plurality opinion), with *id.* at 493-494 (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with the plurality's application of *Brand X*). But the existence of occasional close cases does not suggest that the rule is unworkable or otherwise unsound.[2]

Petitioners also fail to address the *Brand X* Court's discussion of the practical problems that their own rule would produce. See 545 U.S. at 983. Under petitioners' approach, whether an "agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference." *Ibid.* That rule would contradict *Chevron*'s premise and would produce "anomalous" and "haphazard" results. *Ibid.* Here, for example, taxpayers in the Ninth Circuit would be entitled to rely on an evidentiary presumption that would be not be available to taxpayers in other circuits in which the agency's regulation is

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[2] In any event, the circuit precedent that petitioners believe (Pet. 17-18) should have been treated as binding here, *Anderson* v. *United States*, 966 F.2d 487 (9th Cir. 1992), was decided well after *Chevron*. Petitioners' concern for the workability of applying *Brand X* to older decisions is therefore inapposite here.

given controlling effect under *Chevron*. That would ill-serve one of the purposes of delegating authority to an agency: promoting national uniformity in the administration of federal law. Cf. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2413-2414 (2019) (plurality opinion).

Finally, petitioners argue (Pet. 19-25) that *Brand X* violates due process, Article III, and the constitutional separation of powers "by commanding judges to exhibit bias toward government litigants." Deferring to an agency's reasonable interpretation of an ambiguous statute is not a form of "bias" or "favoritism" (Pet. 21) as those terms are ordinarily understood. Petitioners' bias arguments would apply equally to *Chevron*, and perhaps to all administrative deference doctrines—as reflected in petitioners' reliance (Pet. 20-21, 23) on decisions that discuss those other doctrines. See *Michigan* v. *EPA*, 135 S. Ct. 2699, 2712-2714 (2015) (Thomas, J., concurring) (questioning *Chevron*, not *Brand X*); *Valent* v. *Commissioner of Soc. Sec.*, 918 F.3d 516, 524-525 (6th Cir. 2019) (Kethledge, J., dissenting) (similar); *Egan* v. *Delaware River Port Auth.*, 851 F.3d 263, 278-280 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (similar); cf. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1151-1152 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Brand X* but stating that it "does seem to follow pretty naturally" from *Chevron*). Petitioners provide no sound basis for their request to overrule *Brand X* alone.

c. The effect of applying *Brand X* in this case was simply to allow the panel below to treat the intervening Treasury regulation as a ground for departing from the Ninth Circuit's prior decision in *Anderson* without convening an en banc court. See Fed. R. App. P. 35. Even without *Brand X*, the court of appeals sitting en banc would not have been bound by the prior panel decision

in *Anderson* as a matter of *stare decisis*, and it would have been required to defer to the agency's regulation under *Chevron*. Petitioners' contention that the panel should not have been allowed to perform the same function provides no sound reason for this Court to reconsider its holding in *Brand X*. And it would be an atypical use of this Court's resources to grant review to police the boundary between the issues that a court of appeals panel may decide and those that are reserved for an en banc court.

3. Petitioners alternatively request (Pet. 26-33) that this Court grant review to "clarify" *Brand X* and, in particular, the role of "traditional tools of statutory construction" (Pet. 30) when applying that decision. That request should be rejected. The *Brand X* rule comes into play only when an agency interpretation is "otherwise entitled to *Chevron* deference." *Brand X*, 545 U.S. at 982. To determine whether the agency's interpretation warrants *Chevron* deference, a court must rigorously apply all the "traditional tools of statutory construction" before finding the statute ambiguous. *Chevron*, 467 U.S. at 843 n.9. Petitioners identify (Pet. 30) no reason to engraft an additional "traditional-tool analysis" onto the operation of *Brand X*.

Contrary to petitioners' suggestion, the court of appeals did not treat the common-law presumption canon as something "on par with IRS's 'equally permissible construction of the statute.'" Pet. 29 (citation omitted). Rather, the court considered the common-law presumption canon together with other relevant guides to the statute's meaning, including other canons of construction. See Pet. App. 12a. Petitioners are also wrong in asserting (Pet. 30) that the court of appeals based its decision to apply *Brand* X on "a cursory magic-words

review." The court instead explained that "[w]e did not hold in *Anderson* that our interpretation of the statute was the *only* reasonable interpretation. In fact, our analysis made clear that our decision filled a statutory gap." Pet. App. 13a. In any event, petitioners' disagreement with the application of *Chevron* and *Brand X* to this particular dispute does not warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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