No. 20-1472

IN THE

Supreme Court of the United States

BOECHLER, P.C.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

BRIEF OF THE FEDERAL TAX CLINIC AT CHARLES WIDGER SCHOOL OF LAW AND THE SETON HALL CENTER FOR SOCIAL JUSTICE IMPACT LITIGATION CLINIC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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

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INTEREST OF AMICI CURIAE[1]

The Federal Tax Clinic at Villanova University's Charles Widger School of Law represents low-income taxpayers in controversies before the Internal Revenue Service ("IRS"), the United States Tax Court, and the federal courts of appeal, with the goal of maximizing financial well-being and protecting the rights of low-income taxpayers. To that end, the Villanova clinic frequently files petitions in the Tax Court on behalf of low-income taxpayers seeking to obtain review of notices of determination. The Villanova clinic also frequently consults with low-income taxpayers who have attempted to navigate the process on their own. As a participant in the Tax Court's Clinical Program, the Villanova clinic assists individuals who appear at Tax Court trial sessions without representation, and the clinic's contact information is provided by the Court to self-represented litigants, who often contact the Villanova clinic for advice or representation.

The Seton Hall Center for Social Justice Impact Litigation Clinic represents indigent individuals in federal appellate litigation and other important cases affecting legal reform. It regularly provides assistance to low-income taxpayers through the Volunteer Income Tax Assistance program. The Seton Hall clinic also files amicus briefs in cases that impact issues of concern to indigent clients.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days in advance of the intent to file this brief and have consented to its filing.

Amici have a substantial interest in the resolution of the Question Presented because low-income taxpayers are disproportionately burdened when courts treat 26 U.S.C. § 6330(d)(1)'s 30-day deadline for filing a petition as jurisdictional. Low-income taxpayers typically are more likely to be audited and more likely to petition the United States Tax Court than other taxpayers. They also face challenges navigating the tax code and IRS procedures without the aid of counsel, and their petitions are not infrequently dismissed for lack of jurisdiction. Treating § 6330(d) as jurisdictional often deprives these taxpayers of their only opportunity for judicial review before the IRS seizes their property—sometimes for taxes they do not even owe.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant review to resolve uncertainty about an important and recurring question that affects taxpayers nationwide. As the Petition explains, the circuits are split 2-1 about whether 26 U.S.C. § 6330(d)(1)'s 30-day filing deadline is a jurisdictional requirement or a claim-processing rule. In the decision below, the Eighth Circuit joined the wrong side of the split. The Petition thoroughly explains that the Eighth and Ninth Circuits' holdings depart from the text of § 6330(d)(1) and this Court's precedents. Amici write separately to emphasize that those decisions also thwart Congress's intent in enacting § 6330(d)(1).

In overhauling the tax code in 1998, Congress provided the Tax Court with jurisdiction under § 6330 to review IRS Notices of Determination. That critical reform enables taxpayers to exercise

adversarial rights *before* the IRS seizes their property. Congress determined that such review was necessary because the IRS often seized property for taxes that were not in fact owed, and taxpayers had no prepayment recourse.

Treating § 6330(d)(1) as jurisdictional will, in many cases, eliminate this important check on the IRS's authority, frequently to the disproportionate detriment of low-income taxpayers. Low-income taxpayers often must navigate complex IRS rules alone and may not know when or where to file their petition. Interpreting § 6330(d)(1) as a jurisdictional requirement will deprive these taxpayers of their only chance to have the Tax Court review the IRS's determination before seizing their property. It is unfair—and contrary to Congress's intent—to allow the IRS to use § 6330(d)(1) to shield erroneous tax assessments from review by the Tax Court.

ARGUMENT

I. The Decision Below Undermines Congressional Intent By Treating § 6330(d)(1) As A Jurisdictional Requirement

A. When Congress overhauled the tax code in 1998 and adopted § 6330(d)(1), it created a more adversarial system to protect taxpayer rights before the IRS seized their property. Before that time, a "taxpayer could not enjoin the government or prevent collection—he or she had to pay the tax and pursue a claim for a refund." Pippa Browde, *A Reflection on Tax Collecting: Opening a Can of Worms to Clean Up a Collection Due Process Jurisdictional Mess*, 65 Drake L. Rev. 51, 56–57 (2017). Under that system, business owners and their employees could report to

work in the morning only to find that the IRS had padlocked the doors, and families could come home in the evening only to find they were suddenly homeless because the IRS had seized their property. *See Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong., S. Hrg. 105-190, at 1–4 (1997) (statement of Sen. William V. Roth, Jr., Chairman, S. Comm. on Finance).

In a series of high-profile hearings in 1997, witnesses told Congress that their lives were upended by their inability to contest the IRS's assessments, often for taxes they did not owe, before the IRS summarily seized their property. *See id.* at 75–120. For instance, one witness explained that she was forced to move her family into a rented room and use her elderly parents' retirement savings to satisfy an IRS tax assessment that she did not owe because the tax code did not permit her to seek prepayment review from the Tax Court. *See id.* at 75–82.

In response to this testimony, Congress decided "that the problem is [the IRS] has too much unchecked power": it had the "ability to investigate, evaluate, and basically prosecute, all wrapped up into one." *IRS Restructuring: Hearings Before the S. Comm. on Finance*, 105th Cong., S. Hrg. 105-529, at 210–11 (1998). Members of Congress therefore declared that "reform must go beyond a few minor improvements of strengthening taxpayer protections to literally addressing the balance of power between the taxpayer and the agency." *Id.* at 4 (statement of Sen. William V. Roth, Jr., Chairman, S. Comm. on Finance).

The 1998 IRS Restructuring and Reform Act tried to achieve that balance by implementing "adversarial check[s]" that were "needed to cure these abuses." Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 87 (2004). Congress accordingly granted citizens the right to pre-payment collection due process ("CDP") hearings before the IRS seizes the taxpayer's property. *See Giamelli v. Commissioner*, 129 T.C. 107, 118 (2007) (Wherry, J., concurring) ("Congress enacted section 6330 as a part of remedial legislation . . . to ensure taxpayer rights against alleged Internal Revenue Service mistreatment by affording taxpayers formal procedures designed to ensure due process where the IRS seeks to collect taxes by levy (including by seizure)." (citation omitted)). CDP hearings are conducted before the IRS Office of Appeals, *see* §§ 6320(b), 6330(b), which Congress made independent by insulating it from other functions of the IRS, *see Browde*, *supra*, at 54. Congress reemphasized its intent in 2019 by renaming the office the "Independent Office of Appeals." *See* Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019).

Further cementing "the kryptonite of adversarial process," Congress allowed taxpayers to petition the Tax Court for review of the IRS's CDP determinations before the IRS seizes their property by adopting 26 U.S.C. § 6330(d)(1). Camp, *supra*, at 121. Section 6330(d)(1) is "one of the most significant modern developments in the operation of the Tax Court." Harold Dubroff & Brant J. Hellwig, *The United States Tax Court: An Historical Analysis* 481

(2d ed. 2014). Congress intended that the combination of CDP hearings and petitions for review would "afford taxpayers due process in collections" and thereby "increase fairness to taxpayers." *Lunsford v. Commissioner*, 117 T.C. 183, 194 (2001) (Laro, J., dissenting) (citations omitted).

B. Since 2016, the Tax Court has incorrectly held that it lacks jurisdiction over petitions filed after § 6330(d)(1)'s 30-day filing requirement. *See Guralnik v. Commissioner*, 146 T.C. 230 (2016). Two circuits, including the Eighth Circuit in the decision below, have agreed. Treating § 6330(d)(1)'s 30-day filing requirement as jurisdictional thwarts Congress's intent because it threatens to eliminate a critical adversarial check on the IRS's authority.

As this Court has recognized, "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Under the usual adversarial system, courts address only the "claims and arguments advanced by the parties"; but because courts have an obligation to ensure that they do not exceed the scope of their jurisdiction, they must raise and decide jurisdictional questions themselves, even if a party has declined to press the issue. *Id.* at 434–35. Indeed, treating rules as jurisdictional often introduces elements of an inquisitorial system where the Tax Court develops the facts and legal arguments rather than permitting that work to be done by the parties through the adversarial system. *See McNeil v. Wisconsin*, 501 U.S. 171, 181, n.2 (1991); *cf. Camp*, *supra*, at 86–89 (explaining how Congress's 1998

reforms to the tax code intended to transform it from an inquisitorial system to an adversarial system).

Experience shows that the consequences of this shift are significant. Since its 2016 decision in *Guralnik*, the Tax Court has diluted the adversarial process Congress constructed by expending its limited resources to determine whether a taxpayer filed his petition within 30 days of receiving the IRS's determination—even when the IRS declined to raise the argument, and regardless of whether the IRS contributed to the taxpayer missing the deadline. For instance, in a two-month period during 2019, the Tax Court issued *sua sponte* orders in 12 different cases directing the parties to explain why the court had jurisdiction.[2] The Tax Court extinguished each of those taxpayers' adversarial rights when it dismissed their petitions as untimely. *See, e.g.*, *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017).

Because the Tax Court does not police its jurisdiction only at the beginning of a case, the adversarial process Congress intended often is

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[2] *See Beaupre v. Commissioner*, Docket No. 23536-18S (Nov. 8, 2019); *Edmonson v. Commissioner*, Docket No. 1239-19SL (Nov. 12, 2019); *Croker v. Commissioner*, Docket No. 9070-18S (Nov. 14, 2019); *Gonzalez v. Commissioner*, Docket No. 2256-19S (Nov. 14, 2019); *Garland v. Commissioner*, Docket No. 17921-19L (Nov. 25, 2019); *Chappell v. Commissioner*, Docket No. 20711-19 (Nov. 26, 2019); *Harris v. Commissioner*, Docket No. 15979-19S (Dec. 16, 2019); *Castaldo v. Commissioner*, Docket No. 19264-19 (Dec. 19, 2019); *Treas v. Commissioner*, Docket No. 12225-19S (Dec. 19, 2019); *Davila-Cabrera v. Commissioner*, Docket No. 19192-19 (Dec. 20, 2019); *Mansfield v. Commissioner*, Docket No. 19342-19S (Dec. 23, 2019); *Rosenthal v. Commissioner*, Docket No. 18392-19S (Dec. 26, 2019); *Stephens v. Commissioner*, Docket No. 20418-19 (Dec. 30, 2019); *Slavo v. Commissioner*, Docket No. 19732-19 (Dec. 30, 2019).

disrupted later on. Even when the IRS does not contest jurisdiction and the parties ultimately resolve their differences through settlement, the Tax Court will not endorse the settlement if it discovers that the taxpayer failed to timely file his petition. *See, e.g.*, *Williams v. Commissioner*, Docket No. 24954-17 (Jan. 26, 2018). Treating filing deadlines as jurisdictional can be especially disruptive to the adversarial process and "unfairly prejudice litigants" when they are scrutinized at the conclusion of a case, wasting "months of work on the part of the attorneys and the court." *Henderson*, 562 U.S. at 434–35.

II. Treating § 6330(d)(1) As Jurisdictional Disproportionately Harms Low-Income Taxpayers

As Judge Kelly explained in her concurrence in the decision below, construing § 6330(d)(1) as jurisdictional has "drastic consequences" that are shouldered disproportionately by "low-income taxpayers." *Boechler, P.C. v. Commissioner*, 967 F.3d 760, 767 (8th Cir. 2020).

Low-income taxpayers are more likely to find themselves subject to an IRS audit. *See* Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 Hous. L. Rev. 1145, 1148 n.7 (2004) (explaining that in a typical tax year, "one in 47 of the working poor had their returns audited, compared to one in 145 of the affluent" (citation omitted)); *see also Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong., S. Hrg. 105-190, at 324 (1997) (prepared statement of Sen. William V. Roth, Jr., Chairman, S. Comm. on Finance) ("One of the most distressing things you will learn from this

hearing is the preference to audit middle- and lower-income taxpayers, as well as mom and pop small businesses. So why are these Americans audited? Because it's easy. Most often, these are the taxpayers who can't afford to fight back."). Low-income taxpayers accordingly are also more likely to seek CDP hearings, and they typically bring between 60% and 70% of CDP challenges per year. *See* National Taxpayer Advocate, *Annual Report to Congress 2020*, at 188 (Dec. 31, 2020); National Taxpayer Advocate, *FY 2002 Annual Report to Congress* 276 (Dec. 31, 2002). Correspondingly, nearly half of CDP petitions in Tax Court are filed pro se. *See* Carlton M. Smith & T. Keith Fogg, *Tax Court Collection Due Process Cases Take Too Long*, 130 Tax Notes (TA) 403 (Jan. 24, 2011).

Construing § 6330(d)(1) as jurisdictional renders the Tax Court an illusory adversarial check for these low-income taxpayers in many cases. *First*, "[u]nrepresented taxpayers may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late." National Taxpayer Advocate, *2021 Purple Book* 101 (Dec. 31, 2020). Those who do file late lose their opportunity for the Tax Court's review without even getting to the merits. *See* National Taxpayer Advocate, *Annual Report to Congress 2020*, at 168. Indeed, taxpayers with counsel win their challenges to CDP determinations at twice the rate of pro se challengers. *See id.*

Second, the complexities of the tax code and inaccessibility of the IRS often prevents low-income taxpayers from knowing when and where to challenge the IRS's assessments. The National Taxpayer Advocate has determined that several

structural problems pose a serious access challenge for taxpayers unable to seek assistance from counsel. To begin, the IRS often sends taxpayers "on a voyage that requires them to interpret obscure IRS acronyms and function names, navigate a complex and multifaceted phone tree, and identify unnamed and often-changing responsible IRS officials." National Taxpayer Advocate, *Annual Report to Congress 2018*, at 53 (Feb. 12, 2019). When taxpayers actually complete this voyage, it can be for naught because they "often receive incorrect information about tax law or their own IRS accounts from IRS customer service representatives, and taxpayers usually have no way of contacting that representative or the representative's supervisor again." Villanova Federal Tax Clinic, Comment Letter on Proposed Rule on Procedures for Asylum Withholding of Removal; Credible Fear and Reasonable Fear Review (EOIR Docket No. 18-0002), at 5 (July 15, 2020), https://ssrn.com/abstract=3834701. Given low-income taxpayers' difficulties navigating the IRS's structure, many challenges in Tax Court are forfeited by failing to meet § 6330(d)(1)'s 30-day requirement.

These practical challenges arise frequently. Take, for example, the Ninth Circuit's decision in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018). The IRS mailed Duggan two Notices of Determination informing him that it intended to collect several years of back taxes. *Id.* at 1031. The notices told Duggan that he could contest the IRS's determinations by "fil[ing] a petition with the United States Tax Court within a 30-day period beginning the day after the date of this letter." *Id.* (alteration in original) (citation omitted). Unaided by counsel, Duggan concluded that his 30-day clock began

ticking the day after he received the letter and thus filed his challenge in Tax Court within 31 days. *Id.* Despite Duggan's reliance on the IRS's ambiguous letter, the Ninth Circuit held that filing one day late cost him his prepayment chance of litigating the IRS's notice of determination in Tax Court. *See id.*

Duggan's experience is not uncommon: many other pro se taxpayers misunderstand the IRS's notices to require them to file their petitions 31 days after receiving their letter. *See, e.g.*, *Cunningham v. Commissioner*, 716 F. App'x 182, 184 (4th Cir. 2018) ("Cunningham claims she understood the language in the IRS letter to essentially count May 17 as 'day zero,' and onward from there, resulting in a cutoff date one day later than the true deadline.").

The consequences of depriving taxpayers of equitable tolling are often severe. In *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017), a taxpayer sought to utilize the innocent spouse exception to avoid tax liabilities created by false returns filed by her husband. The IRS moved the Tax Court to dismiss for lack of jurisdiction because the petition had been filed on January 6 instead of January 5, as required by the applicable statute. *Id.* at 195. The taxpayer responded that her petition was timely because "two IRS agents informed her she had until 'the end of business on January 7' to petition the Tax Court for review." *Id.* She also argued that it would be unfair for the IRS to deprive an unrepresented taxpayer of her prepayment petition rights by giving her incorrect information, especially since one of the IRS employees who gave her that information was an attorney. *See id.* Acknowledging the "drastic consequences" for the taxpayer, the

Second Circuit nevertheless concluded that Tax Court lacked jurisdiction. *Id.* at 195–97; *see also Rubel v. Commissioner*, 856 F.3d 301, 304 (3d Cir. 2017) (pro se taxpayer forfeited prepayment appeal to Tax Court by relying on erroneous filing date provided by the IRS in writing).

The draconian ramifications of viewing § 6330(d)(1) as a jurisdictional requirement are particularly troubling when the initial assessment is wrong. In an appeal pending before the Second Circuit, the IRS sent Josefa Castillo—a low-income taxpayer—an assessment claiming that she owes over $80,000 for failing to pay taxes in 2014 on income earned and reported by a restaurant Ms. Castillo had sold five years earlier. *See* Brief of Petitioner-Appellant at 5–7, *Castillo v. Commissioner*, No. 20-1635 (2d Cir. Oct. 22, 2020). Ms. Castillo, through counsel, filed a timely request for a CDP hearing in March 2018, explaining that she sold the restaurant in 2009 and has had no affiliation with it since. *See id.* at 5–6. While her CDP hearing request was pending, Ms. Castillo notified the IRS that she had replaced her counsel and was now being represented by the Fordham University Federal Tax Clinic. *See id.* at 6–7. In September and October 2018, Ms. Castillo's new counsel reiterated to the IRS through phone calls and letters that Ms. Castillo was not liable for the back taxes. *See id.* at 7–8. Despite further follow-up attempts, Ms. Castillo received no information from the IRS for most of 2019. *See id.* When she finally obtained her file from the IRS in late 2019, Ms. Castillo was surprised to learn that the IRS had rejected her challenge on December 11, 2018, and now claimed that she had waived judicial review under § 6330(d)(1). *See id.* at 8.

Within 30 days of receiving her case file—the first actual notice from the IRS regarding its determination—Ms. Castillo petitioned the Tax Court for review. *See id.* at 8–9. Although the IRS acknowledged that Ms. Castillo had never received its determination (which apparently got lost in the mail), the IRS nevertheless moved to dismiss the petition for lack of jurisdiction because Ms. Castillo failed to file it within 30 days of the determination. *See id.* at 9–11. Ignoring Ms. Castillo's arguments that equitable tolling was warranted given that she did not owe back taxes and had never received the IRS's determination, the Tax Court dismissed her petition for lack of jurisdiction. *See id.*

This unfair result resurrects the very problems that Congress sought to eliminate when it overhauled the tax code in 1998. Particularly when the IRS makes an erroneous assessment and then fails to properly inform the taxpayer of its CDP determination, it should not be able to use § 6330(d)(1)'s 30-day deadline as a shield to insulate its errors from the Tax Court's review.

*   *   *

Congress enacted § 6330(d)(1) to ensure that taxpayers have the right to a full adversarial hearing before the IRS seizes their property. Treating the 30-day deadline as a jurisdictional requirement as opposed to a claim-processing rule undermines congressional intent, to the particular detriment of low-income taxpayers. Uncertainty on this important issue is unacceptable but will persist until this Court intervenes.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

May 21, 2021

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