No. 23-1037

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ISOBEL BERRY CULP AND DAVID R. CULP,
Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 6213(a) of the Internal Revenue Code provides that "[w]ithin 90 days" after the Internal Revenue Service (IRS) mails a taxpayer a notice of deficiency, "the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." 26 U.S.C. § 6213(a). The questions presented are:

1. Whether the 90-day time limit in § 6213(a) is a jurisdictional requirement.

2. Whether the Tax Court lacks jurisdiction if the IRS assesses the previously determined deficiency after a notice of deficiency is mailed but before a petition is filed in Tax Court.

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INTRODUCTION

This Court has spent more than a decade trying to bring some discipline to what legal rules are properly characterized as "jurisdictional." The Court has repeatedly held—and reaffirmed just four days ago—that "most time bars are nonjurisdictional." *Harrow v. Department of Def.*, No. 23-21, 2024 WL 2193874, at *3 (U.S. May 16, 2024) (citation omitted). To identify the rare circumstances when a time limit will be treated as jurisdictional, the Court has articulated a "readily administrable bright line" rule: Congress must "clearly state[]" that it is. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). And the Court has granted certiorari nearly every Term to reaffirm those principles when lower courts have gone astray.

The Third Circuit did not go astray here. In a unanimous decision, the court of appeals held that the 90-day deadline in 26 U.S.C. § 6213(a), to file a petition for redetermination of a deficiency in Tax Court, is *not* jurisdictional. That decision followed from—and was all but dictated by—this Court's recent decision in *Boechler, P.C. v. Commissioner*, 596 U.S. 199 (2022). No other court of appeals has considered the jurisdictional status of the 90-day deadline in a published decision after *Boechler*. And very few circuits have considered the question under this Court's modern jurisprudence. The Court need not intervene just to say the Third Circuit got it right.

Even if the Court were to grant on the first question presented, it should deny the second. The question whether an assessment deprives the Tax Court of jurisdiction was neither pressed nor passed upon below, has not been decided by any court, and has an easy answer. This Court should deny review.

STATUTORY PROVISIONS INVOLVED

Section 6213(a) of the Internal Revenue Code provides:

> Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any

> refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

26 U.S.C. § 6213(a).

Additional pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT

1. The tax system in the United States relies "primarily on self-reporting." *United States v. Rodgers*, 461 U.S. 677, 683 (1983). Each year, a taxpayer files a return reporting her tax liability. *See* 26 U.S.C. § 6012(a). The IRS "shall assess" the liability shown on the return. *Id.* § 6201(a)(1). "The 'assessment' is 'essentially a bookkeeping notation'"; it is a "'recording' of the amount the taxpayer owes." *Hibbs v. Winn*, 542 U.S. 88, 100 (2004) (citations omitted); *see* 26 U.S.C. § 6203.

The IRS can, of course, disagree with a taxpayer's self-reported tax liability. It has ample authority to audit compliance with the tax laws. *See, e.g.*, 26 U.S.C. § 6201(a). And if, at the end of an audit, the IRS thinks a taxpayer owes more tax, it can determine a deficiency—the difference between the tax reported by the taxpayer and the tax the IRS claims is due. *See id.* § 6211(a). If there is a deficiency, the IRS mails the taxpayer a notice of that deficiency. *See id.* § 6212(a).

That is when the 90-day time limit to file a petition in the Tax Court comes into play. "Within 90 days . . .

after the notice of deficiency . . . is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." *Id.* § 6213(a). The Tax Court is the exclusive forum for a taxpayer to challenge a disputed tax before it is assessed and paid. *See, e.g.*, *Flora v. United States*, 362 U.S. 145, 148, 175 (1960). The IRS generally may not assess or collect the disputed tax if the taxpayer still has time to file a petition or, "if a petition has been filed," until the Tax Court's decision becomes final. 26 U.S.C. § 6213(a). And the "proper court, including the Tax Court," may enjoin violations of that prohibition—except the Tax Court lacks "jurisdiction" to enjoin certain collection activity "unless a timely petition for redetermination of the deficiency has been filed." *Id.*

Once a petition for redetermination is filed, the Tax Court has plenary jurisdiction to decide the correct tax liability. It has "jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency" in the notice. *Id.* § 6214(a). It also has "jurisdiction" to determine that the taxpayer's self-reported tax liability was too high. *Id.* § 6512(b)(1)-(2). After a Tax Court decision becomes final, only the deficiency determined by the court "shall be assessed." *Id.* § 6215(a).

2. In 2015, respondents David R. and Isobel Berry Culp each received $8,826 to settle an employment-related dispute. Pet. App. 3a. Although the Culps reported these payments on their joint 2015 tax return, the IRS erroneously believed they did not. *Id.* According to the IRS, a notice of deficiency asserting a tax underpayment of $3,363 and penalties of $1,324 was mailed to the Culps in February 2018. *Id.* at 3a, 21a. The Culps did not receive that notice. *Id.* at 5a.

By May 2018, the IRS realized it had made a mistake. *Id.* at 3a. It determined that the Culps had in fact reported the settlement payments on their tax return and paid regular income tax on them—but asserted they owed self-employment tax as well. *Id.*; Pet. 5-6. The IRS reduced the balance allegedly due to $2,087, including taxes, penalties, and interest. Pet. App. 3a. The IRS assessed that amount and, over the next 18 months, seized funds from the Culps' social security payments and tax refund to satisfy that assessment. *Id.*; Pet. 6.

In April 2021, the Culps filed a petition with the Tax Court to redetermine the 2015 deficiency asserted by the IRS. Pet. App. 17a.

3. On February 15, 2022, the Tax Court dismissed the Culps' petition for lack of jurisdiction. *Id.* at 16a-17a. Citing its own precedent from 1989, the court held that its "jurisdiction depends upon the issuance of a valid notice of deficiency and the timely filing of a petition." *Id.* at 19a (citing *Monge v. Commissioner*, 93 T.C. 22, 27 (1989)). The court found that the IRS had mailed the Culps a valid notice of deficiency in February 2018, and that the Culps had filed their petition more than 90 days later. *Id.* at 22a. Because the petition was filed after the 90-day deadline, the court held it "lack[ed] jurisdiction over any challenge to the Notice of Deficiency." *Id.*

4. Two months later, this Court decided *Boechler*.

The question in *Boechler* was whether the 30-day deadline to file a collection due process petition in Tax Court is jurisdictional. 596 U.S. at 203-04. This Court unanimously held that it is not. *Id.* at 211. The Court reiterated that, under modern jurisprudence, "a procedural requirement [i]s jurisdictional only if

Congress 'clearly states' that it is." *Id.* at 203 (citation omitted). And in the context of that clear statement rule, the Court explained, a jurisdictional reading that may be "better is not enough." *Id.* at 206.

The statutory provision at issue said: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d)(1). The Court acknowledged that the parenthetical "can be plausibly construed to condition the Tax Court's jurisdiction on a timely filing." *Boechler*, 596 U.S. at 205-06. But the Court held the parenthetical's grant of jurisdiction over "such matter" does not clearly "sweep[] in the [30-day] deadline and grant[] jurisdiction only over petitions filed within that time." *Id.* at 204. And the Court found no other "clear tie between the deadline and the jurisdictional grant." *Id.* at 207.

Neither context nor history provided the clear statement the text lacked. The Commissioner had relied heavily on a nearby provision—which denies the Tax Court "'jurisdiction'" to grant certain injunctive relief absent a "'timely appeal'"—but that only "highlight[ed] the lack" of a clear statement "in § 6330(d)(1)." *Id.* at 208 (quoting 26 U.S.C. § 6330(e)(1)). The Commissioner also pointed to the 90-day deadline in § 6213(a), which "lower courts had held . . . is jurisdictional," and claimed that Congress "expected § 6330(d)(1)'s time limit to have the same effect." *Id.* The Court was unpersuaded: "[W]hile this Court has been willing to treat '"a long line of [Supreme] Cour[t] decisions left undisturbed by Congress"' as a clear indication that a requirement is jurisdictional, no such 'long line' of authority exists

here." *Id.* (second and third alterations in original) (citation omitted).

5. With the benefit of the Court's intervening decision in *Boechler*, the Third Circuit reversed. Pet. App. 1a-15a.

In the Third Circuit's words: "If the § 6330(d)(1) deadline in *Boechler* fell short of being jurisdictional, § 6213(a)'s limit must as well." *Id.* at 8a. Beginning with the first sentence of § 6213(a), the court found "[n]othing in that language" that "links the deadline to the [Tax] Court's jurisdiction." *Id.* The court also contrasted that language with the fourth sentence of § 6213(a), which deprives the Tax Court of "jurisdiction" to enjoin certain collection activity "unless a timely petition for a redetermination of the deficiency has been filed." *Id.* (quoting 26 U.S.C. § 6213(a)). That contrast, the court concluded, showed "Congress knew how to limit the scope of the Tax Court's jurisdiction"—but chose not to "limit the Tax Court's power to review untimely redetermination petitions." *Id.*

The court of appeals then looked to "[c]ontext" and concluded it "does little to bolster the IRS's case for the deadline being jurisdictional." *Id.* at 9a. The court seemingly accepted the Commissioner's assertion that "the assessed amount would have preclusive effect in a refund suit" if the "redetermination petition" were "dismissed for untimeliness." *Id.* But it found that this "theoretical possibility" would "seldom, if ever, . . . occur" and, so, "could not move the needle." *Id.* Nor was the court of appeals "persuaded by the Commissioner's argument that relevant historical treatment"—specifically, the court's prior precedent—"compels [it] to treat § 6213(a)'s deadline as jurisdictional." *Id.*

After holding that the 90-day deadline is subject to equitable tolling, the court of appeals "remand[ed] this case to the Tax Court to decide whether the Culps are entitled to that relief." *Id.* at 10a-14a.

6. The Commissioner sought rehearing. In the petition, the Commissioner added a new argument: Even if § 6213(a)'s 90-day deadline is not jurisdictional, the Commissioner argued, "the IRS's intervening assessment" (made because the Culps did not file a petition for redetermination by the 90th day) deprived the Tax Court of jurisdiction. C.A. Doc. 73, at 8. The court of appeals denied rehearing and rehearing en banc. Pet. App. 25a-26a.

REASONS FOR DENYING THE WRIT

The Commissioner presents two questions for this Court's review. Neither warrants certiorari.

I. The Commissioner first asks the Court to consider whether § 6213(a)'s 90-day deadline to file a petition for redetermination is jurisdictional. There is no cognizable circuit split on that question. The decision below was the first post-*Boechler* published decision to consider the 90-day time limit in § 6213(a). And its textbook application of the clear statement rule does not require the Court's intervention. The other courts of appeals should be given the same opportunity to reconsider any "drive-by" jurisdictional rulings or other contrary precedent. The Court's review is not warranted at this time.

II. The Commissioner also asks the Court to decide whether the IRS's intervening assessment of the deficiency deprived the Tax Court of jurisdiction. That question was not pressed or passed on below. No court has considered it. And the Commissioner's

argument lacks merit. The Court need not and should not grant review to be the first to say so.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW

The Commissioner asks this Court to grant review to decide whether § 6213(a)'s 90-day deadline is jurisdictional. That question is not yet ripe for review because there is no cognizable circuit split. The Third Circuit is the only court of appeals to consider the impact of *Boechler* in a published decision. And its analysis was correct. The Court should deny review.

A. There Is No Cognizable Circuit Split

The Commissioner asserts a "clear circuit conflict." Pet. 27-28. That is true in one respect: The Third Circuit is the first court of appeals to hold the § 6213(a) time limit nonjurisdictional. But it is also the first court of appeals to meaningfully consider the jurisdictional status of § 6213(a) after this Court's intervening decision in *Boechler*. And it is the only post-*Boechler* published decision on the question. That is where the asserted split breaks down.

Although the Commissioner alludes to a "uniform[]" body of court of appeals precedent adopting a "jurisdictional reading of § 6213(a) or its predecessor," he seems to recognize that the asserted conflict is far less deep and entrenched. *Id.* at 27 (citation omitted). That is because the "uniform" precedent largely pre-dates this Court's recent jurisprudence "bring[ing] some discipline to the use of" "the jurisdictional label." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). All of the court of appeals decisions cited elsewhere in the petition fall into that category. *See* Pet. 20-21 (citing decisions between

1928-1952 involving predecessor provisions); *id.* at 22 (citing decisions between 1954-1995 involving § 6213(a)). They rely on now-discredited reasoning or a prior decision relying on such reasoning—and are more properly characterized as the sort of "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted).

The Commissioner instead erects a more shallow conflict based on two published and two unpublished decisions from three circuits. Pet. 28. But the only two precedential decisions—out of the Seventh and Ninth Circuits—pre-date *Boechler*. *See Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092-95 (9th Cir. 2020); *Tilden v. Commissioner*, 846 F.3d 882, 886 (7th Cir. 2017). And *Boechler* casts doubt on their reasoning.

Most notably, both courts found the 90-day deadline to be jurisdictional primarily because another part of § 6213(a)—which addresses the Tax Court's power to grant certain relief, not its power to consider late-filed petitions—uses "the magic word 'jurisdiction.'" *Organic Cannabis*, 962 F.3d at 1093-94; *accord Tilden*, 846 F.3d at 886. In *Boechler*, the Court was "unmoved" by essentially the same argument. 596 U.S. at 207; *see infra* at 17-18. The Ninth Circuit also relied on the fact that circuit courts had "uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since at least 1928." *Organic Cannabis*, 962 F.3d at 1095. But as *Boechler* reaffirmed in addressing that same case law, the only "long line" of precedent that counts is that of this Court. 596 U.S. at 208 (citation omitted). With the

benefit of *Boechler*, both circuits may (and should) reconsider.[1]

The two post-*Boechler* unpublished orders the Commissioner cites are nonprecedential and unreasoned. Pet. 28. The first was issued without full adversarial briefing, applied drive-by jurisdictional rulings from cases decided decades prior, and did not even acknowledge *Boechler*'s existence. *See Atighi v. Commissioner*, No. 21-71417, 2022 WL 17223046, at *1 (9th Cir. Nov. 25, 2022) (per curiam). The second was a summary affirmance that also applied obsolete case law; it mentioned *Boechler* only to note that *Boechler* "did not overrule" an earlier circuit precedent. *Allen v. Commissioner*, No. 22-12537, 2022 WL 17825934, at *2 (11th Cir. Dec. 21, 2022) (per curiam).

Further percolation is warranted. This Court has labored mightily to bring discipline to the jurisdictional label. Nearly every Term, the Court's docket includes at least one certiorari grant needed to correct lower court decisions that have failed to heed that directive. The presumable hope is that the courts of appeals will eventually course-correct on their own. That is precisely what the Third Circuit did here. The other courts of appeals should be given an opportunity to do the same before this Court intervenes.

B. The Court Of Appeals Correctly Held That The 90-Day Deadline Is Not Jurisdictional

The court of appeals correctly held that the 90-day deadline in § 6213(a) is not jurisdictional. The Commissioner's arguments to the contrary disregard

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[1] The jurisdictional label also was not dispositive in the Seventh Circuit; the taxpayer won. *Tilden*, 846 F.3d at 887-88.

the clear statement rule and this Court's decision in *Boechler*. As the Third Circuit concluded, there is nothing "special" in the statutory text, context, history, or purpose of § 6213(a)'s 90-day deadline that "tag[s]" it as jurisdictional. *United States v. Wong*, 575 U.S. 402, 410 (2015); *see* Pet. App. 8a-9a.

1. Jurisdictional requirements are "unique in our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Courts "cannot grant equitable exceptions"; objections to jurisdiction "can be raised at any time"; and "courts must enforce jurisdictional rules *sua sponte*." *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). Given these "untoward consequences," this Court has "adopted a 'readily administrable bright line'": A procedural rule is jurisdictional only if "Congress has 'clearly state[d]'" as much. *Auburn Reg'l*, 568 U.S. at 153 (alteration in original) (citation omitted).

"Where multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Boechler*, 596 U.S. at 205. And "the statement must indeed be clear; it is insufficient that a jurisdictional reading is 'plausible,' or even 'better,' than nonjurisdictional alternatives." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (citation omitted). "[U]nder that approach, 'most time bars are nonjurisdictional.'" *Harrow v. Department of Def.*, No. 23-21, 2024 WL 2193874, at *3 (U.S. May 16, 2024) (citation omitted).

The Commissioner largely disregards the clear statement rule. The phrase "clear statement" or its variants is nowhere to be found. The only nod is a brief quote from *Boechler* saying traditional statutory interpretation tools must "'plainly show'" Congress

intended jurisdictional consequences, and reference to a "heightened standard." Pet. 10-11 (citation omitted). But the Commissioner never explains why the nonjurisdictional reading is somehow implausible. Nor does he demonstrate why this 90-day deadline is the exceedingly rare jurisdictional time limit. Applying the clear statement rule (though, frankly, even without it), it clearly is not.

2. Starting with the text, nothing in § 6213(a)'s 90-day deadline limits the Tax Court's jurisdiction.

a. The first sentence of § 6213(a) provides: "Within 90 days . . . after the notice of deficiency . . . is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." 26 U.S.C. § 6213(a). "The deadline . . . explains what the taxpayer may do," *Boechler*, 596 U.S. at 205, and "speaks only to a [petition]'s timeliness," *Wong*, 575 U.S. at 410. But "[t]here is no mention of the [Tax Court's] jurisdiction, whether generally or over untimely [petitions]." *Harrow*, 2024 WL 2193874, at *4. Nor does the text suggest that "Congress imbued [the deadline] with jurisdictional consequences." *Wong*, 575 U.S. at 410. The deadline reads like an ordinary claim-processing rule.

Boechler places that conclusion beyond doubt. *Boechler* concerned a statute with a single sentence that both permits a taxpayer to petition the Tax Court within 30 days and grants the court jurisdiction over "such matter." 26 U.S.C. § 6330(d)(1). The Commissioner argued that the word "jurisdiction" was in the same sentence as the statutory deadline, and that "such matter" cross-referenced that time limit. *Boechler*, 596 U.S. at 204. And this Court acknowledged that § 6330(d)(1) "can be plausibly construed to condition the Tax Court's jurisdiction on

a timely filing." *Id.* at 205-06. The Court nonetheless found the link between the deadline and the grant of jurisdiction not clear enough to deem the deadline jurisdictional. *Id.* at 204-06.

The first sentence of § 6213(a) not only lacks a clear link between the deadline and the Tax Court's jurisdiction, *it does not mention jurisdiction at all*. So as the court of appeals observed, "[i]f the § 6330(d)(1) deadline in *Boechler* fell short of being jurisdictional, § 6213(a)'s limit must as well." Pet. App. 8a.

b. To find the necessary textual link, the Commissioner asks the Court to read "jurisdiction" into § 6213(a) and then apply it to the time limit. Specifically, he starts from the premise that the first sentence "implicitly" grants the Tax Court jurisdiction to redetermine a deficiency. Pet. 12. From that premise, he concludes the court lacks jurisdiction "to consider petitions for redetermination that do not comply with the statutory standard," including the time limit. *Id.* (emphasis omitted). That argument fails for two reasons.

First, the Commissioner's argument rests on a false premise. The first sentence of § 6213(a) does *not* implicitly grant the Tax Court jurisdiction to redetermine a deficiency. It does not need to because other statutory provisions do that *explicitly*. Section 7442 grants the court "such jurisdiction as is conferred on [it] by this title." 26 U.S.C. § 7442. Section 6214(a) grants the court "jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than" the amount in the notice of deficiency. *Id.* § 6214(a). And § 6512(b) grants the court "jurisdiction to determine the amount of [an] overpayment." *Id.* § 6512(b)(1). Together, these statutes show that § 6213(a)'s first

sentence is not the "sole basis for the Tax Court's jurisdiction to review a taxpayer's claim that the deficiency determined by the Commissioner is too high." Pet. 11-12.

That conclusion aligns with the history of these provisions. The Revenue Act of 1924 contained a form of § 6213(a)'s first sentence. *See* ch. 234, § 274(a), 43 Stat. 253, 297 ("Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals . . . ."). But a different statutory provision granted the Board of Tax Appeals (Board) jurisdiction, as the Commissioner concedes. *See id.*, § 900(e), 43 Stat. at 337 ("The Board . . . shall hear and determine appeals filed under [certain statutes]."); Pet. 12 n.2 (calling this statute an "express grant of jurisdiction"). The Revenue Act of 1926 replaced that statute with the predecessor of § 7442, which addressed the Board's "jurisdiction" generally, and added the predecessors of §§ 6214(a) and 6512(b), which addressed the Board's "jurisdiction" to redetermine deficiencies specifically. Ch. 27, §§ 274(e), 284(e), 1000, 44 Stat. 9, 56, 67, 106. The logical conclusion is that these provisions took over as the basis for the Board's jurisdiction—and that §§ 7442, 6214(a), and 6512(b) serve the same function for the Tax Court today.

There is comparably little logic behind the Commissioner's position. The Commissioner leans on the "even if" clause in § 6214(a) to claim the statute merely "clarifies" that the Tax Court can "'*increase*'" a deficiency. Pet. 11-12 n.2 (citation omitted). But he misreads the text. As the Commissioner's own use of the phrase "even if" illustrates, § 6214(a) grants the Tax Court "jurisdiction to redetermine the correct amount of the deficiency" *whether or not* the correct

deficiency is higher than the amount in the notice of deficiency. *See id.* at 11, 16, 25-26; *see also, e.g.*, *The New Oxford American Dictionary* 599 (3d ed. 2010) (defining "even if" as "despite the possibility that; no matter whether"). And when it comes to history, the Commissioner offers no evidence that Congress did—or explanation as to why Congress would—replace explicit jurisdictional provisions with an *implicit* grant of jurisdiction in the 1926 Act.

Second, even if the first sentence of § 6213(a) implicitly granted the Tax Court jurisdiction, the outcome would be the same. The 90-day deadline would then at least be in "proximity" to the jurisdictional grant, but "the important feature"—"a clear tie between the deadline and the jurisdictional grant"—would still be missing, just as it was in *Boechler*. 596 U.S. at 207; *see supra* at 13-14. And as the Court reaffirmed just last week, the tie must indeed be clear: An indirect cross-reference to a provision including the time limit is not enough. *See Harrow*, 2024 WL 2193874, at *4.

The Commissioner did not have the benefit of *Harrow*, but he tellingly does not engage with this part of *Boechler* either. The Commissioner relies instead on *Fort Bend County v. Davis*, where the Court described "the amount-in-controversy requirement for federal-court diversity jurisdiction" as "jurisdictional." 139 S. Ct. 1843, 1849 (2019); *see* Pet. 11-13. The problem is that diversity jurisdiction is expressly conditioned on the amount-in-controversy. *See* 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions *where* the matter in controversy exceeds the sum or value of $75,000 . . . ." (emphasis added)); *Arbaugh*, 546 U.S. at 514-15 (calling "the amount-in-

controversy threshold an ingredient of subject-matter jurisdiction"). The first sentence of § 6213(a) has no comparable condition.

3. Statutory context does not help the Commissioner. In arguing otherwise, the Commissioner relies on (a) the fourth sentence of § 6213(a); (b) a purported conflict between § 6213(a) and § 6213(c); (c) the history of what is now the second sentence of § 7459(d); and (d) a purported anomalous result that flows from a nonjurisdictional reading, also arising from § 7459(d). None supports a jurisdictional reading—let alone with the clarity required by the clear statement rule.

a. The fourth sentence of § 6213(a) takes away the Tax Court's "jurisdiction" to enjoin certain collection activity "unless a timely petition for a redetermination of the deficiency has been filed." 26 U.S.C. § 6213(a). The Commissioner asserts that this sentence supports his reading. Pet. 13. The Commissioner made the same argument in *Boechler*, and this Court rejected it. It fares no better this time.

In *Boechler*, a near-identical provision in § 6330(e)(1) provided that "[t]he Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1)." 26 U.S.C. § 6330(e)(1). The Commissioner argued that this "neighboring provision clarifies the jurisdictional effect of the filing deadline." *Boechler*, 596 U.S. at 207. "It would be strange," the Commissioner argued, "to make the deadline a jurisdictional requirement for a particular remedy (an injunction), but not for the underlying merits proceeding itself." *Id.* The Court was "unmoved." *Id.* "If anything," the Court explained, the "clear statement" that "[t]he Tax Court shall have

no jurisdiction" in § 6330(e)(1) "highlights the lack of such clarity in § 6330(d)(1)." *Id.* at 208 (alteration in original) (citation omitted).

So too here. As the Third Circuit held, the contrast between the first and fourth sentences in § 6213(a) shows "Congress knew how to limit the scope of the Tax Court's jurisdiction," "expressly constrained" the court's jurisdiction to grant certain injunctive relief, but "did not similarly limit the Tax Court's power to review untimely redetermination petitions." Pet. App. 8a; *see also Santos-Zacaria*, 598 U.S. at 419 ("The contrast between the text of § 1252(d)(1) and the 'unambiguous jurisdictional terms' in related provisions 'show[s] that Congress would have spoken in clearer terms if it intended' for § 1252(d)(1) 'to have similar jurisdictional force.'" (alteration in original) (citation omitted)).

b. The Commissioner next argues that treating the 90-day deadline as nonjurisdictional places § 6213(a) and (c) "in conflict." Pet. 14. Not so.

Section 6213(a) and (c), along with § 6215(a), prescribe the normal course of assessing a deficiency. The IRS ordinarily cannot assess a deficiency "until the expiration of the 90-day" petition deadline. 26 U.S.C. § 6213(a). If that deadline passes and no petition has been filed, then the deficiency "shall be assessed." *Id.* § 6213(c). But "if a petition has been filed with the Tax Court," the IRS cannot assess the deficiency until the court's decision becomes final, *id.* § 6213(a), at which point the deficiency determined by the court "shall be assessed," *id.* § 6215(a).

The Commissioner's claimed conflict suffers from several flaws. For one thing, and contrary to what the Commissioner suggests, the IRS does not assess

immediately after the 90th day. It typically waits at least another 30 days. *See* IRM 8.20.7.55.2(1)-(2) (Sept. 28, 2018). For another, assessments are not written in stone. An "'assessment' is 'essentially a bookkeeping notation.'" *Hibbs v. Winn*, 542 U.S. 88, 100 (2004) (citation omitted); *see* 26 U.S.C. § 6203. It can be undone. And the IRS has procedures for "abat[ing]" "[a]n assessment made . . . when the taxpayer has timely filed a petition." IRM 8.20.7.24.2 (Sept. 28, 2018) (emphasis omitted).

But perhaps most fundamentally, the identified conflict would not be resolved by treating the 90-day deadline as jurisdictional. The Commissioner can hardly dispute that many "timely" petitions can be (and are) filed after the 90th day. The most common reason is that a petition postmarked by the 90th day is timely even if it is not delivered until later. 26 U.S.C. § 7502(a). A taxpayer also gets extra time to file if, for example, a notice of deficiency states that a petition for redetermination is due after the 90-day deadline, *id.* § 6213(a) (fifth sentence); the taxpayer files for bankruptcy, *id.* § 6213(f)(1); or the Tax Court is "inaccessible" on the due date, *id.* § 7451(b)(1).

There are other exceptions too that are both longer and harder to track. The deadline is suspended while taxpayers are deployed in a combat zone. *Id.* § 7508(a)(1)(C). The Department of Defense gives the IRS information so that it does not take "enforcement actions against military personnel while serving in a combat zone." IRM 11.4.2.7.13(4) (Dec. 3, 2020); *see Boechler* Oral Argument Tr. 37:20-39:21. But that information is not perfect, and the IRS may "assess[]" a deficiency if it is unaware "that the person concerned is entitled to th[at] benefit[]." 26 U.S.C. § 7508(e)(2). The deadline is also suspended if the

taxpayer is affected by a disaster. *Id.* § 7508A(a), (d). Although the IRS purports to track this too, *see Boechler* Oral Argument Tr. 38:3-8, it regularly moves for dismissal of Tax Court petitions even when taxpayers are entitled to extra time because they were affected by a disaster. *See, e.g.*, *Abdo v. Commissioner*, 162 T.C. No. 7, 2024 WL 1406440, at *1-2, *12 (2024); *Mariscal v. Commissioner*, No. 18767-23 (T.C. Jan. 26, 2024) (order).

So the right way to think about the interplay of § 6213(a) and (c) is this: If the 90-day deadline passes and no Tax Court petition has been filed, the IRS is free to assess the deficiency. 26 U.S.C. § 6213(c). If the court receives a petition later, the question becomes whether there is a statutory or equitable basis for treating the petition as timely. *Cf. Artis v. District of Columbia*, 583 U.S. 71, 81 (2018) (equitable tolling stops the clock). If there is, and the IRS has already assessed, the IRS should abate the assessment. IRM 8.20.7.24.2 (Sept. 28, 2018). And if the IRS does not do so voluntarily, the court may order it to take that action. *See* 26 U.S.C. § 6213(a). This relationship between § 6213(a) and (c) is the only one that fits with the statutory scheme.

c. The Commissioner next turns to the history of what is now the second sentence of § 7459(d), and argues it demonstrates that Congress (in 1928) understood the 90-day time limit to be jurisdictional. But § 7459(d) says nothing about the jurisdictional status of the 90-day deadline. Nor could it possibly provide the needed clear statement.

Section 7459 is entitled "Reports and decisions" and is in a Part of the Internal Revenue Code about Tax Court "Procedure." 26 U.S.C. § 7459. Not surprisingly, then, § 7459(d) is a procedural provision

about the Tax Court's reports and decisions. It works with other parts of § 7459 to address reports and decisions when the court dismisses a case.

The first sentence of § 7459(d) works alongside § 7459(b). These provisions originated in the Revenue Acts of 1924 and 1926. The 1924 Act imposed a duty on the Board to "make a report in writing of its findings of fact and decision in each case." Ch. 234, § 900(h), 43 Stat. at 337. The 1926 Act "relieve[d] the board of this duty in instances in which a case before the board [wa]s not decided upon the merits but [wa]s dismissed." S. Rep. No. 69-52, at 35 (1926). The Board could do away with a formal report and enter a summary decision dismissing the case, which was "considered as its decision that the deficiency is the amount determined by the Commissioner"—the result that would have obtained had the taxpayer not sought Board review in the first place. Ch. 27, § 1000, 44 Stat. at 107. This framework applies to the Tax Court today through substantially similar language in § 7459(b) and the first sentence of § 7459(d).

The second sentence of § 7459(d) works hand-in-hand with § 7459(c). Both provisions came about in the 1926 Act. That Act permitted direct appeal of Board decisions for the first time, *see United States v. Dalm*, 494 U.S. 596, 603 n.4 (1990), requiring rules for when Board decisions were appealable and when they became final after appeal, *see* S. Rep. No. 69-52, at 38 ("[I]t is of utmost importance that this time be specified as accurately as possible."). In merits cases, the Board typically entered an opinion resolving the issues raised by the parties and later entered a final order determining the deficiency based on the parties' computations. *See, e.g.*, Rule 50, 1 B.T.A. 1283, 1295 (1925); *Appeal of Glady Mfg. Co.*, 1 B.T.A. 337, 338

(1924). The 1926 Act made clear that the Board's "decision"—the document that triggered the right to appeal—was rendered when "an order specifying the amount of the deficiency [wa]s entered," not when the Board issued an interim opinion. Ch. 27, §§ 1000, 1001(a), 44 Stat. at 107, 109.

If the Board dismissed a case, it did not determine the deficiency itself. Instead, it had to enter "[a]n order specifying" the "amount determined by the Commissioner" as the deficiency, which served as the appealable decision. *Id.*, § 1000, 44 Stat. at 107. But there was an exception if the "Board dismisse[d] a proceeding and [wa]s unable . . . to determine the amount of the deficiency determined by the Commissioner." *Id.* In that situation, the Board entered "an order to that effect," "and the decision of the Board" was deemed rendered for appeal purposes "upon the date of such entry." *Id.*

As the Commissioner points out, the Revenue Act of 1928 added a second exception. Pet. 4, 19. By 1926, the Board had an established practice of "not provid[ing]" in an order dismissing a case for lack of jurisdiction "that the deficiency [was] the amount determined by the Commissioner." *Appeal of United Paper Co.*, 4 B.T.A. 257, 258 (1926). The exception added by the 1928 Act expressly permitted that practice and ensured that such an order would be appealable even though it did not specify the amount of the deficiency. *See* ch. 852, § 601, 45 Stat. 791, 872. As the statutory history confirms, Congress was primarily concerned about the appealability of an order dismissing a case for lack of jurisdiction that did

not specify the amount of the deficiency.[2] This framework still exists, in essentially the same form, in § 7459(c) and the second sentence of § 7459(d).

This history shows that § 7459(d) serves two modest functions. It lets the Tax Court issue a summary dismissal order that is considered to be a decision that the deficiency is the deficiency determined by the IRS. *See* 26 U.S.C. § 7459(b); *id.* § 7459(d) (first sentence). And it tells the court whether it needs to enter an order specifying the amount of the deficiency determined by the IRS in order to finalize a dismissed case for appeal purposes. *See id.* § 7459(c); *id.* § 7459(d) (second sentence).

The Commissioner's suggestion that the second sentence of § 7459(d) is, instead, indicative of Congress's intent to treat the 90-day deadline as jurisdictional rests in large part on an overreading of *United Paper* and is otherwise lacking in historical support. All the Board did in *United Paper* was make clear it would not issue an "order that the deficiency is the amount determined by the Commissioner" when it dismissed a case for lack of jurisdiction. 4 B.T.A. at 258. That practice extended to dismissals for a variety of reasons other than timeliness. *See* Appeals Dismissed or Otherwise Disposed of From April 21, 1926, to and Including September 30, 1926, 4 B.T.A. 1303, 1303-07 (1926). The 1928 Act may

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[2] An early committee print of the 1928 Act treated an order dismissing a case for lack of jurisdiction as an appealable decision even if it did not specify the amount of the deficiency determined by the Commissioner; language expressly allowing the Board to enter such an order was not added until later. *See* H.R. Comm. Print No. 5, § 601, at 204 (1927), *reprinted in* 71 Internal Revenue Acts of the United States 1909-1950 (Bernard D. Reams, Jr., ed. 1979).

have recognized that practice and ensured that these dismissal orders would be appealable, but it did nothing to clearly codify the petition deadline as a jurisdictional rule.

d. Relying again on § 7459(d), the Commissioner argues that a nonjurisdictional reading would have "anomalous" results. Pet. 14. Specifically, he claims that § 7459(d) gives dismissal orders "preclusive effect," subject only to the "except[ions]" in the second sentence. *Id.* at 4. Since one of those exceptions is for lack of jurisdiction, he argues that nonjurisdictional dismissals are preclusive, whereas jurisdictional dismissals are not. *Id.* at 15. In his view, the 90-day deadline in § 6213(a) should be jurisdictional because otherwise a taxpayer whose petition is dismissed as untimely would be precluded from seeking a refund administratively with the IRS and judicially through a refund suit. *Id.* at 14-17. That argument fails, for many reasons.

First, § 7459(d) is about procedure, not preclusion. Under § 7459(d)'s first sentence, a Tax Court decision dismissing a case is "considered as its decision that the deficiency is the amount determined by the [IRS]" whether that dismissal is jurisdictional or not. The second sentence is not an exception from that rule. It addresses the separate issue of whether the court must enter an order specifying the amount of the deficiency determined by the IRS as a corollary to the appealability rules in § 7459(c). *See supra* at 20-23. Nothing in § 7459(d)'s text or history describes the preclusive effect of a decision dismissing a case.

Second, the Commissioner ignores the statute that *does* address preclusion. As part of its move to allow direct appellate review of Board decisions, the 1926 Act added what is now § 6512(a). *See* ch. 27, § 284(d),

44 Stat. at 67; *Dalm*, 494 U.S. at 603 n.4. Section 6512(a) generally precludes taxpayers from obtaining a refund if they petition the Tax Court for the same tax period. *See* 26 U.S.C. § 6512(a). But that preclusion principle has an important caveat: A petition precludes a refund claim or suit only "if the taxpayer files a petition with the Tax Court *within the time prescribed in section 6213(a)*." *Id.* (emphasis added). There is no preclusion if a petition is filed outside of that time. A taxpayer is therefore *not* precluded from obtaining a refund if her Tax Court case is dismissed because her petition was untimely—regardless whether that deadline is jurisdictional.

Third, even if § 7459(d) made nonjurisdictional dismissals preclusive and jurisdictional dismissals nonpreclusive, that still would not mean the 90-day deadline is jurisdictional. If the predicate is a view that Congress wanted to help taxpayers, more taxpayers would be helped by allowing equitable tolling than would be hurt by giving preclusive effect to dismissals for untimeliness. *See* Pet. App. 9a; C.A. Doc. 14, at 10-19 (Amicus Br. of Ctr. for Taxpayer Rights). And preclusion is not automatic; the Commissioner could always waive the defense to avoid "anomalous" results. But perhaps most importantly, any perceived anomaly is simply "not the stuff of which clear statements are made." *MOAC Mall Holdings*, 598 U.S. at 299.

4. The Commissioner also argues that Congress ratified lower court decisions declaring the deadline jurisdictional decades before this Court's recent jurisprudence Pet. 17-24. Variations of this argument routinely have been made—and just as routinely have been rejected by this Court. The Commissioner's iteration is no more compelling.

The Court has been "willing to treat" a deadline as jurisdictional, despite the lack of a clear statement in the statutory text or context, only when "'a long line of [Supreme] Cour[t] decisions'" has treated it that way. *Boechler*, 596 U.S. at 208 (alterations in original) (quoting *Fort Bend County*, 139 S. Ct. at 1849). And this Court has consistently held that lower court decisions—especially decisions that pre-date this Court's modern jurisprudence—do not qualify. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 167 (2010) (rejecting argument that "it would be improper to characterize the statutory condition as nonjurisdictional because doing so would override '"a century's worth of precedent"' treating [it] as jurisdictional" (citation omitted)); *see also Santos-Zacaria*, 598 U.S. at 422 ("[P]re-*Arbaugh* lower court cases interpreting a related provision are not enough to make clear that a rule is jurisdictional."); *MOAC Mall Holdings*, 598 U.S. at 304 ("pre-1976 lower court jurisdictional consensus" on predecessor provision not enough); *Wilkins v. United States*, 598 U.S. 152, 165 (2023) ("handful of lower court opinions" cannot "stand in for a ruling of this Court, especially where some of these decisions contain only fleeting references to jurisdiction").

The Court held exactly that in *Boechler*, with respect to the 90-day deadline in § 6213(a) at issue here. 596 U.S. at 208. And framing the argument as one of congressional ratification is neither a distinction nor a difference. *Cf. Wong*, 575 U.S. at 416 ("What is special about the Tucker Act's deadline . . . comes merely from this Court's prior rulings . . . ."). No amount of lower court precedent can make up for the fact that this Court has never treated § 6213(a)'s 90-day deadline or its predecessors as jurisdictional.

5. Treating § 6213(a)'s 90-day deadline as nonjurisdictional is also consonant with the purposes of the statutory scheme. In creating the Board (and, later, the Tax Court), Congress sought to alleviate the "great financial hardship" of having to pay the tax and then seek a refund—the only remedy previously available. H.R. Rep. No. 68-179, at 7 (1924); *see Flora v. United States*, 362 U.S. 145, 169 n.36 (1960). And Tax Court proceedings are supposed to be accessible. Upwards of 90% of petitioners proceed *pro se*, the court travels around the country so that taxpayers can appear "with as little inconvenience and expense . . . as is practicable," and streamlined proceedings are available for many small-dollar cases. 26 U.S.C. § 7446; *see id.* § 7463; Pet. 30. The statutory scheme is built around special solicitude to taxpayers. It is precisely the sort of scheme in which Congress would *not* be expected to make the filing deadline jurisdictional. *Cf. Henderson*, 562 U.S. at 440.

Treating the 90-day deadline as jurisdictional has also produced bizarre results. To name but a few: The Tax Court dismissed an incarcerated taxpayer's case when he delivered his petition to the prison mail room 12 days before the 90-day deadline because the prison did not mail it until after the deadline. *See Rich v. Commissioner*, 250 F.2d 170, 172-73 (5th Cir. 1957). The court dismissed a case when it was electronically filed on the 90th day in the taxpayer's time zone but on the 91st day in the eastern time zone. *See Nutt v. Commissioner*, 160 T.C. No. 10, 2023 WL 3194502, at *3 (2023). And the court dismissed a case when the taxpayer reportedly mailed the petition on the 90th day and the post office admitted it may have postmarked it with the wrong date. *See Braun v. Commissioner*, 28 T.C.M. (CCH)

1175, 1175-77 (1969). There is no reason to think Congress intended to withhold pre-assessment (and pre-payment) judicial review in these circumstances.

II. THE SECOND QUESTION PRESENTED IS NOT PRESERVED OR CERTWORTHY

The Commissioner's second question presented asks "whether [the Tax Court's] jurisdiction extends to a petition filed after the Internal Revenue Service has already assessed the previously determined deficiency." Pet. i. That question was not pressed or passed upon below, has not been addressed by any court, and has a clear answer. Even if the Court grants on the first question, it should deny the second.

A. The Second Question Is Not Preserved

This Court ordinarily does not decide questions "neither pressed nor passed upon below." *Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022); *see Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). That aptly describes the second question.

The Commissioner asks the Court to consider whether the assessment itself deprived the Tax Court of jurisdiction. He never made that argument to the Tax Court. *See* C.A. Doc. 7-2, at 30-31 (Mot. to Dismiss). Nor did he press that argument in the court of appeals merits brief or at oral argument. *See* C.A. Doc. 32, at 17-42 (Comm'r Br.); C.A. Doc. 58, at 15:16-36:2 (Tr.). The Commissioner instead briefed the issue for the first time in his rehearing petition. C.A. Doc. 73, at 5-10. That was too late. *See Stotter & Co.*

v. Amstar Corp. (In re Sugar Indus. Antitrust Litig.), 579 F.2d 13, 20 (3d Cir. 1978).[3]

The court of appeals did not pass on the question either. The Commissioner points to a one-sentence footnote in the court's opinion stating that "the Tax Court retained jurisdiction here 'even though the IRS had already collected a portion of the deficiency via levy.'" Pet. 26 (quoting Pet. App. 4a n.2). But that footnote responded to the (unfounded) concern—raised by the court at oral argument—that the IRS's *collection* of the tax might have made the case "moot." C.A. Doc. 58, at 4:24-25.[4] It did not address, let alone answer, the question on which the Commissioner now seeks review: Whether "assess[ing]" the tax deprives the Tax Court of jurisdiction—whether or not the tax is collected. Pet. i; *see id.* at 25-27.

B. The Second Question Is Not Certworthy

Review of the Commissioner's second question presented is not warranted regardless.

1. The Commissioner acknowledges "no circuit conflict exists" on this question. *Id.* at 28 n.3. And he does not argue the issue is independently certworthy.

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[3] In a post-argument Rule 28(j) letter, the Commissioner identified a 15-year-old case as "supplemental" authority and argued that the Culps' case was "bar[red]" because "the tax had been assessed and collected" "[b]y the time the Culps filed their Tax Court petition." C.A. Doc. 65, at 2. That argument does not appear to be the same one the Commissioner presses here: It was not framed in jurisdictional terms and did not rely on the same authorities. *See id.*

[4] The court of appeals' question presumed that the Tax Court could not order a refund after the tax was collected, *see* C.A. Doc. 58, at 4:23-5:2, but it can, *see* 26 U.S.C. § 6512(a)-(b).

The Commissioner's pitch instead rests on the notion that the two questions are "closely related" and "should be considered" together. *Id.* But the Commissioner does not suggest the Court would be unable to resolve the first question without addressing the second. Nor does he argue that resolution of the second question would resolve the first. (And if it would, query whether this case would be a good vehicle to resolve the asserted circuit split on the first question.) If the Third Circuit decision stands, the Tax Court could presumably consider any jurisdictional challenge in the first instance.

It would be extraordinarily premature for the Court to take up the second question now. Not only is there "no circuit conflict," *id.*, *no court* has decided the question. The Commissioner says the issue "could not arise in circuits that treat the 90-day deadline as jurisdictional." *Id.* That is incorrect and immaterial. It is incorrect because courts "can address jurisdictional issues in any order [they] choose." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023). It is immaterial because there is still no reason for this Court to be the first to opine on the question. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view . . . .").

2. The Commissioner is also wrong on the merits. An assessment made after the IRS mails a notice of deficiency and before a petition is filed does not affect the Tax Court's jurisdiction.

When the IRS determines a deficiency, it "send[s] notice of such deficiency to the taxpayer." 26 U.S.C. § 6212(a). "[S]uch deficiency," *id.*, is based on the tax the IRS claims is owed at the time of the determination, taking into account the tax shown on the return and "amounts *previously* assessed (or

collected without assessment) as a deficiency," *id.* § 6211(a)(1)(B) (emphasis added). It is that notice—*i.e.*, notice of a deficiency claimed to exist *at the time of the notice*—that serves as the taxpayer's "ticket to the tax court." *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976); *see* 26 U.S.C. § 6213(a).

What happens *before* the IRS sends a notice of deficiency may affect the taxpayer's ability to petition the Tax Court. For example, the IRS may propose an adjustment in the course of an audit. *See, e.g.*, C.A. Doc. 7-2, at 64. If the taxpayer pays the proposed adjustment before a notice of deficiency is sent, any potential deficiency is "wiped out," the IRS does not send a notice, and the taxpayer cannot go to Tax Court. *Baral v. United States*, 528 U.S. 431, 439 n.2 (2000); *see* 26 U.S.C. §§ 6211(a), 6213(b)(4); *Bendheim v. Commissioner*, 214 F.2d 26, 28 (2d Cir. 1954).

But what happens *after* the IRS sends a notice of deficiency has no comparable impact.[5] Under § 6213(b)(4), "[a]ny amount paid as a tax" "after the mailing of a notice of deficiency" "may be assessed" but "shall not deprive the Tax Court of jurisdiction over such deficiency." 26 U.S.C. § 6213(b)(4). The post-notice assessment might eliminate the deficiency, but it does not deprive the Tax Court of jurisdiction to redetermine the deficiency.

The Commissioner contends the outcome is different when the IRS assesses a deficiency under § 6213(c) before the petition is filed in Tax Court.

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[5] The IRS agrees that certain post-notice activity is irrelevant. For example, the IRS takes the position that if it reduces or eliminates the deficiency in a notice of deficiency, that does not nullify the notice or alter the deadline to petition the Tax Court. *See, e.g.*, IRM 4.8.9.25.2.3, 4.8.9.25.2.5 (July 9, 2013).

Pet. 25-27. But he cites nothing to support that contention. Section 6213(c) is purely procedural, *see supra* at 18-19, and does not speak to the Tax Court's jurisdiction. Nor is there anything inherent in a § 6213(c) assessment that would impact the court's jurisdiction. If a taxpayer petitions the court based on a valid notice of deficiency, the court has plenary "jurisdiction to redetermine the correct amount of the deficiency." 26 U.S.C. § 6214(a). That includes "jurisdiction" to determine that taxes previously assessed, such as those shown on a taxpayer's return and those assessed after the notice was sent, were excessive. *Id.* § 6512(b)(1); *see id.* §§ 6201(a)(1), 6213(b)(4); *supra* at 14-15. Indeed, this Court has recognized that jeopardy assessments—which the IRS "shall" make when it "believes that the assessment or collection of a deficiency . . . will be jeopardized by delay," 26 U.S.C. § 6861(a)—do not forestall Tax Court review. *See Laing v. United States*, 423 U.S. 161, 170-71 (1976).

The Commissioner's position is also incompatible with the statutory scheme. As discussed above, the IRS might assess a deficiency after the usual 90-day period expires under § 6213(c) even if the taxpayer has extra time to petition the Tax Court—such as when the taxpayer is deployed in a combat zone. *See* 26 U.S.C. § 7508(a)(1)(C), (e)(2); *supra* at 19-20. If the Commissioner were right, that assessment would deprive the court of jurisdiction even though a later petition would be *timely*. But he is not right. An assessment must give way to the Tax Court's power to redetermine a deficiency, not the other way around. *See, e.g.*, 26 U.S.C. §§ 6213(a), 6215(a), 6861(c)-(e); *supra* at 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

ADDENDUM TABLE OF CONTENTS*

* This addendum contains the current versions of the statutes listed. To the extent any statutes were modified after the tax year at issue, those modifications are not material to the resolution of this case.

26 U.S.C. § 6201

§ 6201. Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) Taxes shown on return

The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists (or payments under section 6225(c)(2)(B)(i)) are made under this title.

* * *

26 U.S.C. § 6203

§ 6203. Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 U.S.C. § 6211

§ 6211. Definition of a deficiency

(a) In general

For the purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * *

26 U.S.C. § 6212

§ 6212. Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

* * *

26 U.S.C. § 6213

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has

been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(b) Exceptions to restrictions on assessment

* * *

(4) Assessment of amount paid

Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

* * *

(c) Failure to file petition

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

* * *

(f) Coordination with title 11

(1) Suspension of running of period for filing petition in title 11 cases

In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is

prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.

* * *

26 U.S.C. § 6214

§ 6214. Determinations by Tax Court

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax

Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

* * *

26 U.S.C. § 6215

§ 6215. Assessment of deficiency found by Tax Court

(a) General rule

If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary. No part of the amount determined as a deficiency by the Secretary but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.

* * *

26 U.S.C. § 6512

§ 6512. Limitations in case of petition to Tax Court

(a) Effect of petition to Tax Court

If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final, and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final, and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has

expired before the notice of deficiency was mailed, shall be conclusive, and

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63, and

(5) As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court under the provisions of section 6213(a), and

(6) As to overpayments the Secretary is authorized to refund or credit pending appeal as provided in subsection (b).

(b) Overpayment determined by Tax Court

(1) Jurisdiction to determine

Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is

authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction to enforce

If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

* * *

26 U.S.C. § 7442

§ 7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

26 U.S.C. § 7451

§ 7451. Petitions

* * *

(b) Tolling of time in certain cases

(1) In general

Notwithstanding any other provision of this title, in any case (including by reason of a lapse in appropriations) in which a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, the relevant time period for filing such petition shall be tolled for the number of days within the period of inaccessibility plus an additional 14 days.

(2) Filing location

For purposes of this subsection, the term "filing location" means—

(A) the office of the clerk of the Tax Court, or

(B) any on-line portal made available by the Tax Court for electronic filing of petitions.

26 U.S.C. § 7459

§ 7459. Reports and decisions

(a) Requirement

A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) Inclusion of findings of fact or opinions in report

It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions. Subject to such conditions as the Tax Court may by rule provide, the requirements of this subsection and of section 7460 are met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings.

(c) Date of decision

A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court or, in the case of a declaratory judgment proceeding under part IV of this subchapter or under section 7428 or in the case of an action brought under section 6234, the date of the court's order entering the decision. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to

determine the amount of the deficiency determined by the Secretary, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

(d) Effect of decision dismissing petition

If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

* * *

26 U.S.C. § 7502

§ 7502. Timely mailing treated as timely filing and paying

(a) General rule

(1) Date of delivery

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

* * *

26 U.S.C. § 7508

§ 7508. Time for performing certain acts postponed by reason of service in combat zone or contingency operation

(a) Time to be disregarded

In the case of an individual serving in the Armed Forces of the United States, or serving in support of such Armed Forces, in an area designated by the President of the United States by Executive order as a "combat zone" for purposes of section 112, or when deployed outside the United States away from the individual's permanent duty station while participating in an operation designated by the Secretary of Defense as a contingency operation (as defined in section 101(a)(13) of title 10, United States Code) or which became such a contingency operation by operation of law at any time during the period designated by the President by Executive order as the period of combatant activities in such zone for purposes of such section or at any time during the period of such contingency operation, or hospitalized as a result of injury received while serving in such an area or operation during such time, the period of service in such area or operation, plus the period of continuous qualified hospitalization attributable to such injury, and the next 180 days thereafter, shall be disregarded in determining, under the internal revenue laws, in respect of any tax liability (including any interest, penalty, additional amount, or addition to the tax) of such individual—

(1) Whether any of the following acts was performed within the time prescribed therefor:

* * *

(C) Filing a petition with the Tax Court, or filing a notice of appeal from a decision of the Tax Court;

* * *

(e) Exceptions

* * *

(2) Action taken before ascertainment of right to benefits

The assessment or collection of any internal revenue tax or of any liability to the United States in respect of any internal revenue tax, or any action or proceeding by or on behalf of the United States in connection therewith, may be made, taken, begun, or prosecuted in accordance with law, without regard to the provisions of subsection (a), unless prior to such assessment, collection, action, or proceeding it is ascertained that the person concerned is entitled to the benefits of subsection (a).

* * *

26 U.S.C. § 7508A

§ 7508A. Authority to postpone certain deadlines by reason of Federally declared disaster, significant fire, or terroristic or military actions

(a) In general

In the case of a taxpayer determined by the Secretary to be affected by a federally declared disaster (as defined by section 165(i)(5)(A)), a significant fire, or a terroristic or military action (as defined in section 692(c)(2)), the Secretary may specify a period of up to 1 year that may be disregarded in determining, under the internal revenue laws, in respect of any tax liability of such taxpayer—

(1) whether any of the acts described in paragraph (1) of section 7508(a) were performed within the time prescribed therefor (determined without regard to extension under any other provision of this subtitle for periods after the date (determined by the Secretary) of such disaster, fire, or action),

* * *

(d) Mandatory 60-day extension

(1) In general

In the case of any qualified taxpayer, the period—

(A) beginning on the earliest incident date specified in the declaration to which the disaster area referred to in paragraph (2) relates, and

(B) ending on the date which is 60 days after the later of such earliest incident date described

in subparagraph (A) or the date such declaration was issued,

shall be disregarded in determining, under the internal revenue laws, in respect of any tax liability of such qualified taxpayer, whether any of the acts described in subparagraphs (A) through (F) of section 7508(a)(1) were performed within the time prescribed therefor (determined without regard to extension under any other provision of this subtitle for periods after the date determined under subparagraph (B)).

(2) Qualified taxpayer

For purposes of this subsection, the term "qualified taxpayer" means—

(A) any individual whose principal residence (for purposes of section 1033(h)(4)) is located in a disaster area,

(B) any taxpayer if the taxpayer's principal place of business (other than the business of performing services as an employee) is located in a disaster area,

(C) any individual who is a relief worker affiliated with a recognized government or philanthropic organization and who is assisting in a disaster area,

(D) any taxpayer whose records necessary to meet a deadline for an act described in section 7508(a)(1) are maintained in a disaster area,

(E) any individual visiting a disaster area who was killed or injured as a result of the disaster, and

(F) solely with respect to a joint return, any spouse of an individual described in any preceding subparagraph of this paragraph.

(3) Disaster area

For purposes of this subsection, the term "disaster area" means an area in which a major disaster for which the President provides financial assistance under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174) occurs.

* * *