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IN THE SUPREME COURT OF THE UNITED STATES

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BOECHLER, P.C., )

Petitioner, )

v. ) No. 20-1472

COMMISSIONER OF INTERNAL REVENUE, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, January 12, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

MELISSA ARBUS SHERRY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

JONATHAN C. BOND, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely.

We'll hear argument this morning in Case 20-1472, Boechler versus the Commissioner of Internal Revenue.

Ms. Sherry.

ORAL ARGUMENT OF MELISSA ARBUS SHERRY

ON BEHALF OF THE PETITIONER

MS. SHERRY: Mr. Chief Justice, and may it please the Court:

This Court has repeatedly held that time limits are rarely jurisdictional and that if Congress wants to make them jurisdictional, it has to speak clearly. Section 6330(d)(1) does not have the needed clarity.

The first clause reads like an ordinary statute of limitations. It says what the taxpayer may do, and it says nothing about the Tax Court's jurisdiction. The second clause does speak to jurisdiction, but the only reference back to the first is through the two words "such matter."

Now we think "such matter" refers to a

1 petition to the Tax Court for review of a CDP  
2 determination. The Commissioner agrees, but he  
3 says it also refers to the 30-day deadline to  
4 file that petition.

5 Our reading is more natural. It stops  
6 at the closest reasonable antecedent, and it  
7 uses the word "matter" as it's ordinarily  
8 understood. The Commissioner's reading  
9 requires more work, and it requires this Court  
10 to treat the time limit the same as subject  
11 matter in the context of subject matter  
12 jurisdiction. If nothing else, it is far from  
13 clear.

14 The statutory history resolves any  
15 doubt. As originally enacted, the same time  
16 limit governed the Tax Court and the district  
17 courts and it was not jurisdictional. The  
18 relevant language has not changed. It has to  
19 mean the same thing today as it did in 1998.

20 Congress enacted this collection due  
21 process regime in order to protect taxpayers  
22 from IRS abuses. It would not have included a  
23 rare and harsh jurisdictional deadline to close  
24 those courthouse doors, let alone through a  
25 vague parenthetical reference to "such matter."

1           An equitable tolling easily follows  
2     from that. That is the presumption, and it is  
3     not overcome here. The limitations period  
4     looks just like the one in Irwin, and it looks  
5     nothing like the deadlines in Brockamp. The  
6     CDP regime is remedial, and it is a place where  
7     equity finds a comfortable home.

8           I welcome the Court's questions.

9           JUSTICE THOMAS: Ms. Sherry, why would  
10    Congress permit the Tax Court to take into --  
11    to consider an untimely action but then not  
12    allow it to enjoin a levy action?

13          MS. SHERRY: So I think that goes to  
14    that final sentence in (e)(1). And our view is  
15    that the word "timely" in that final sentence  
16    is not self-defining. When you -- (e)(1) does  
17    not decide what is timely. If you want to  
18    decide what is timely, you have to look at the  
19    statute of limitations itself in (d)(1) and the  
20    rules that govern that statute of limitations.  
21    That includes things like the mailbox rule. It  
22    includes statutory tolling. And so -- and it  
23    includes equitable tolling.

24          And so our view is whether or not  
25    equitable tolling is available is a separate

1 question, but (e)(1) doesn't answer that. And  
2 so just to directly answer Your Honor's  
3 question, our reading of the final sentence in  
4 (e)(1) is that it gives the Tax Court authority  
5 to enjoin as long it has authority to actually  
6 decide the merits of the case. And if  
7 equitable tolling is available and warranted,  
8 then those petitions are deemed timely under  
9 that final sentence.

10 And so the incongruity that the  
11 Commissioner points to we just don't think  
12 exists. We think -- looking at the language of  
13 the statute of limitations itself in (d)(1), we  
14 think we have the better reading of that  
15 language, but we think at the very least the  
16 Commissioner's reading is very far from clear.

17 The statutory history, we think, is  
18 really compelling here. It's on page 14a of  
19 the blue brief. And if you look at that  
20 language at the time, it's the very same 30-day  
21 time limit. It just applied to two different  
22 courts.

23 CHIEF JUSTICE ROBERTS: Before you get  
24 too far along on the legislative history, I  
25 want to focus a little more on the actual

1 language.

2 As it reads, it's not just a filing  
3 rule. It refers to the jurisdiction of the  
4 court and how that jurisdiction is confirmed.  
5 It's by the filing within 30 days.

6 I mean, I understand if it were a  
7 provision that said, you know, the petition for  
8 review shall be filed within 30 days and -- and  
9 this -- you know, take it from there. That's  
10 one that I think we would clearly apply  
11 equitable estoppel to.

12 But it triggers the jurisdiction of  
13 the court, and there we usually have a stricter  
14 rule. You don't want jurisdiction, the power  
15 of the court, to be, oh, okay, it's 30 days;  
16 well, maybe it's 60 days, maybe it's 90 days,  
17 depending upon the facts, and you're going  
18 through a factual inquiry of some length about  
19 whether or not you should accept it.

20 We're talking about the power of the  
21 court, and, here, that is directly connected to  
22 the filing.

23 MS. SHERRY: So -- so we don't think  
24 it's directly connected. You're absolutely  
25 right the word "jurisdiction" appears in this



1 provision, and this is a  
2 jurisdiction-conferring provision. It does  
3 give jurisdiction to the Tax Court to hear  
4 these sorts of petitions.

5           The question is whether the  
6 jurisdiction is actually linked to the time  
7 limit. And we don't think it is. If you look  
8 at the language of (d)(1), the only link that  
9 they point to is in this parenthetical phrase,  
10 and it's the words "such matter."

11           The ordinary meaning of "matter" is  
12 subject matter, case, controversy. And it's  
13 perfectly natural to say that a court or a  
14 tribunal has jurisdiction over a notice of  
15 appeal or a petition for review. It's also  
16 perfectly natural to say they have jurisdiction  
17 with respect to a particular kind of petition  
18 for review, here, a CDP determination.

19           It is a stretch to say that "matter"  
20 refers back to time limit. That's just not how  
21 the term is ordinarily used. And I think that  
22 is emphasized further by this Court's --

23           CHIEF JUSTICE ROBERTS: Well, but, I  
24 mean, I guess -- we can diagram the sentence,  
25 and it's been a while since I've done that, but

1 it refers back to "such matter," the matter is  
2 a determination, and it's a -- it's a  
3 determination of something, filed within 30  
4 days.

5 MS. SHERRY: Yeah. And -- and so I  
6 don't think that's the clear antecedent here.  
7 I mean, let me start with the fact that we're  
8 talking about "such matter," and -- and the  
9 initial difficulty is the word "matter" doesn't  
10 appear anywhere else in the sentence. So,  
11 under, you know, Garner's usage guide, there --  
12 there's an automatic sort of vague question  
13 there of what we're referring to.

14 The other problem is, when you try to  
15 go back and find a reference point, you know,  
16 we both agree that it has to refer to the  
17 petition, but the petition here is a verb. We  
18 have to convert it to a noun, so we're already  
19 both doing some work to try to make this  
20 sentence make some grammatical sense.

21 But I think the other thing I would  
22 point Your Honor to is this Court's decision in  
23 Weinberger v. Salfi and as -- and also Auburn  
24 Regional. I mean, in Weinberger, the provision  
25 that had the time limit was the jurisdictional

1 conferring provision. It was 50 -- 405(g). It  
2 was the only reason that the court had  
3 jurisdiction because the court had said that  
4 1331 didn't apply. And 405(g) had both, you  
5 know, the conferral of jurisdiction and also  
6 the time limit, and yet that time limit was  
7 deemed to be non-jurisdictional.

8 I'd also point to Auburn Regional. I  
9 mean, there, there was a provision -- it was  
10 the same conditional clause. It said a  
11 provider can get a hearing if three things  
12 happen. Number one, there's a final  
13 determination. Number two, there's a certain  
14 amount in controversy. And, number three,  
15 there's a particular time limit.

16 And the court-appointed amicus there  
17 argued, well, 1 and 2 are jurisdictional, and  
18 so 3 should be as well, the time limit. And  
19 this Court unanimously rejected that reading.

20 And so I -- I think, you know, we can  
21 certainly start by looking at the fact that  
22 this is a jurisdiction-conferring provision,  
23 but it doesn't really answer the question  
24 because there has to be a more direct link  
25 between the time limit and the phrase "such

1 matter."

2 JUSTICE SOTOMAYOR: Counsel --

3 JUSTICE BARRETT: Ms. Sherry --

4 JUSTICE SOTOMAYOR: -- the Chief just  
5 said that "matter" referred to determination in  
6 his question, because that's logical, isn't it?  
7 "Matter" suggests a noun, and the closest  
8 antecedent noun is "determination."

9 Yet -- and, in fact, if you read  
10 Section 6330(d)(3), it provides that the IRS  
11 Appeals Office "shall retain jurisdiction with  
12 respect to any determination made under this  
13 section."

14 So the statute by its own terms in  
15 another provision is making clear that  
16 jurisdiction is tied to determination, not  
17 petition.

18 The 30-day period, the 30-day  
19 limitation, is tied to the petition, not to the  
20 determination, correct?

21 MS. SHERRY: It -- it is. And -- and  
22 -- and let me be clear. I mean, we -- we think  
23 that it --

24 JUSTICE SOTOMAYOR: Counsel, I'm not  
25 trying to hurt you. I'm actually trying to

1 help you.

2 MS. SHERRY: And -- and I -- I agree  
3 with you.

4 CHIEF JUSTICE ROBERTS: I'm the one  
5 she's trying to hurt.

6 (Laughter.)

7 MS. SHERRY: No, no, no, and -- and --  
8 and I -- you know, I agree with you. We have  
9 this on page 30 of our blue brief. We offer  
10 such determination up as an alternative way of  
11 reading this.

12 Frankly, the -- the reason we didn't  
13 put it as our primary is we understand that  
14 normally Congress uses the same words to mean  
15 the same things, but we also recognize that  
16 this Court's cases say that's not always the  
17 case. And so --

18 JUSTICE SOTOMAYOR: It's not always  
19 the case, but it's the logical grammatical  
20 rule, which is the last antecedent is to the  
21 last thing spoken of. And the last thing  
22 spoken of in this provision is determination.

23 MS. SHERRY: That's absolutely right.  
24 And I'm certainly not going to fight that  
25 because I think it's really easy to see that if

1 the reference point is determination, then the  
2 time limit is not jurisdictional because  
3 there's no link at all in those -- in those  
4 circumstances. And --

5 JUSTICE ALITO: What do you make of  
6 the -- I'm sorry.

7 MS. SHERRY: No, go ahead.

8 JUSTICE ALITO: Were you finished?  
9 No? What do you make of the fact that this  
10 reference to jurisdiction is in a  
11 parenthetical?

12 MS. SHERRY: I think it helps us. You  
13 know, usually jurisdiction is something that is  
14 very important, particularly with respect to  
15 time limits. And so normally something in a  
16 parenthetical is a bit of an aside. And so it  
17 seems strange to have this harsh and rare  
18 jurisdictional rule when it comes up only in --  
19 in a parenthetical.

20 I think, if you go to the original  
21 enactment, it's maybe easier to understand why  
22 Congress put this in and why Congress put it in  
23 a parenthetical. At that time, both the  
24 district court and the Tax Court had  
25 jurisdiction, but Congress didn't have to

1 confer jurisdiction on the district court to  
2 hear these cases because it already had  
3 jurisdiction under 1331, under 1340.

4 The Tax Court didn't. The Tax Court's  
5 jurisdictional authority comes from 7442, and  
6 that provision essentially just says the Tax  
7 Court shall have jurisdiction as conferred  
8 elsewhere in this title.

9 And so Congress had to give the Tax  
10 Court jurisdiction over this new CDP petition.  
11 And so that's why it's in the Tax Court  
12 subparagraph and it's not in the district court  
13 subparagraph.

14 But that just, you know, emphasizes  
15 the fact that normally, when you're talking  
16 about subject matter jurisdiction, you're  
17 talking about a class of cases. And so it's  
18 perfectly natural for it to refer to what the  
19 determination is or what the petition is.

20 It is a -- a big stretch to say that  
21 it links back to the time limit.

22 And the reason why is the reason why  
23 we have a clear statement rule in the first  
24 place, because there are really harsh  
25 consequences for calling a time limit

1 jurisdictional.

2 I mean, we're here today talking about  
3 equitable tolling, but it's not just --

4 JUSTICE KAVANAUGH: Well -- well, can  
5 I interrupt right there?

6 MS. SHERRY: Yes.

7 JUSTICE KAVANAUGH: Because I think  
8 this is somewhat different contextually than  
9 some of the other provisions we've had over the  
10 years because, here, if you miss the time  
11 limit, you're not boxed out entirely, as the  
12 government points out.

13 You could pay and -- and sue for a  
14 refund. So there is that avenue for  
15 proceeding. And there's also -- maybe not  
16 applicable to this case, but in many of the  
17 cases covered by this -- also the opportunity  
18 for the -- the pre-assessment determination as  
19 well.

20 So it seems to me contextually  
21 Congress has a scheme here where there are  
22 other paths for someone to proceed even if you  
23 miss the deadline.

24 What's your response to that?

25 MS. SHERRY: Yeah. So I -- I think



1 two responses. One is, you know, those two  
2 alternatives existed at the time in 1998, and  
3 Congress obviously didn't think they were  
4 sufficient to protect the taxpayer. And the  
5 reason Congress thought that is neither of  
6 those provided protection to prevent a levy  
7 before it actually happens.

8           And what Congress was trying to do  
9 here is to have the IRS be treated more like a  
10 private creditor where there actually was an  
11 external judicial check before the IRS is able  
12 to levy on a taxpayer's property.

13           The -- the second answer I have -- and  
14 I think you alluded to this -- is those options  
15 are not available to everyone. Deficiency  
16 proceedings are only available if it's a type  
17 of tax or penalty for which you can get a  
18 notice of deficiency. You know, my client's an  
19 example of where that's not the case.

20           But there's also a number of cases in  
21 which someone just doesn't get the notice of  
22 deficiency and so misses the opportunity to  
23 bring an action through the deficiency  
24 proceedings, which is why Congress provided in  
25 this particular provision that if you don't get

1 a notice of deficiency, you can challenge the  
2 underlying tax through --

3 JUSTICE KAVANAUGH: What about paying  
4 and -- and suing for a refund? Is that always  
5 available?

6 MS. SHERRY: Yeah, and so -- so yes  
7 and no. I mean, it -- it -- it's available to  
8 the extent you have the ability to pay in full  
9 and seek a refund, but it doesn't really  
10 redress the harm that Congress was getting at  
11 here because it's not -- you know, some people  
12 challenge the underlying tax, but the majority  
13 of people are really asking for collection  
14 alternatives. They're saying there's a  
15 hardship. There -- there's a reason why you  
16 shouldn't levy on this particular piece of  
17 property.

18 And a refund action after the fact  
19 once a levy's already occurred is not going to  
20 solve for any of those harms, which is what  
21 Congress was really trying to get at here.

22 And so, you know, I think, if you're  
23 looking at -- at what Congress was intending to  
24 do, it's just implausible to think that the  
25 same Congress that put this into a Taxpayer

1 Bill of Rights to protect taxpayers was sort of  
2 simultaneously deciding that this is the case  
3 where we should have a harsh, you know, 30-day  
4 time limit with -- no matter what the excuse  
5 is, no matter what the reason.

6 JUSTICE KAVANAUGH: Well, Congress did  
7 put an exception in for bankruptcy, right --

8 MS. SHERRY: It -- it -- it -- it did,  
9 and --

10 JUSTICE KAVANAUGH: -- late -- later  
11 on.

12 MS. SHERRY: Yeah. So it put it in in  
13 2015. But, you know, the -- the same was true  
14 in Holland. In Holland, in the habeas case,  
15 there was an argument made that there was  
16 statutory tolling for when a state  
17 post-conviction review proceeding was pending.

18 And the Court said, well, that's  
19 easily explained. You can't be in state court  
20 and federal court at the same time, and a year  
21 can come and go before you have an opportunity  
22 to get into federal court.

23 I think it's the exact same rationale  
24 when it comes to the bankruptcy exception. You  
25 can't file a petition while you are in

1 bankruptcy. And the 30 days is going to very  
2 quickly come and go before you have an  
3 opportunity to get into federal court.

4 I mean, I think, as far as exceptions  
5 more general, again, we pointed this out in the  
6 reply brief, you know, it -- it feels like the  
7 Commissioner is maybe trying to have the best  
8 of both worlds.

9 You argue if there's no exceptions at  
10 all, then Congress really meant it. It's meant  
11 to be this harsh jurisdictional deadline. But,  
12 if you have exceptions, it means that maybe  
13 Congress already spoke to it and the Court  
14 shouldn't add additional exceptions in equity.

15 And I think the difficult part of  
16 that --

17 JUSTICE GORSUCH: Ms. -- Ms. Sherry --

18 MS. SHERRY: Sorry.

19 JUSTICE GORSUCH: -- if I -- if I  
20 might, speaking of equity, you -- you -- you  
21 argue in the second part of your argument about  
22 -- about the necessity for equitable tolling  
23 here, how it's appropriate.

24 And I understand your -- your -- your  
25 points about the -- the -- the statutory

1 language. But we normally think of equitable  
2 tolling, I -- I thought, as a traditional  
3 common law rule that we don't assume Congress  
4 displaces lightly. It legislates against the  
5 backdrop of the common law.

6 But, here, we don't have a court of  
7 law. The Tax Court, you can call it an Article  
8 I court, one might call it an Article II  
9 agency, but, whatever it is, it's not an  
10 Article III court.

11 So to what extent does that  
12 presumption about the common law and rules  
13 applicable to courts transfer over, or do we  
14 even need to decide that question?

15 MS. SHERRY: I -- I mean, I -- I think  
16 it does transfer over, and let me try to answer  
17 it in a couple of different ways.

18 The veterans court is also an Article  
19 I court. And this Court in Henderson didn't  
20 reach the equitable --

21 JUSTICE GORSUCH: I mean --

22 MS. SHERRY: -- tolling question.

23 JUSTICE GORSUCH: -- the whole Article  
24 I court thing is kind of funny, isn't it,  
25 right? I mean, in Congress --

1 MS. SHERRY: I -- and -- and -- and I  
2 -- you know, I don't think I need to -- to --

3 JUSTICE GORSUCH: Yeah.

4 MS. SHERRY: -- you know, to go down  
5 that road too far here.

6 JUSTICE GORSUCH: Yeah, fair enough.

7 MS. SHERRY: But -- but, you know, it  
8 -- it is an Article I court. And the Court in  
9 Henderson --

10 JUSTICE GORSUCH: I'll spot you that,  
11 okay?

12 MS. SHERRY: The Court in Henderson,  
13 you know, didn't decide it, but the veterans  
14 court has been applying equitable tolling both  
15 before the Federal Circuit's decision in  
16 Henderson and -- and after that.

17 But the -- this Court's also applied  
18 the presumption outside of the sort of strict  
19 Article III context, and let me just point to  
20 two examples. I mean, one is Young involving  
21 the bankruptcy court. But the other is -- is  
22 June. So June was the companion case to Wong,  
23 and it involved the administrative deadline for  
24 an FTCA claim. Wong involved the judicial one,  
25 and --

1 JUSTICE GORSUCH: But the bankruptcy  
2 one, I mean, they're adjuncts, right, to  
3 Article III, and, you know, at least they're  
4 somewhere knocking around, you know, one -- one  
5 could say.

6 Here, there's no -- there's a lot less  
7 relationship to -- to -- to -- to Article III.

8 But -- but -- but fine. To ask -- I  
9 guess -- can you just address -- I -- I get  
10 your point. It's a good one. The -- the  
11 second part of that question is, do we need to  
12 address whether equitable tolling exists, or do  
13 we need to merely allow for that possibility  
14 for the Tax Court to resolve that question?

15 MS. SHERRY: Yeah. And so, you know,  
16 certainly, the -- the Court can decide it's not  
17 jurisdictional and -- and send it back. We  
18 think it does make sense for the Court to  
19 decide both questions. I think there's a lot  
20 of uncertainty on this front, and other  
21 taxpayers -- Ms. Castillo has a case in -- in  
22 the Second Circuit raising this question, and  
23 so I think it would be helpful to resolve it  
24 since it's been fully briefed here.

25 And just one more point, you know, to

1 go --

2 JUSTICE GORSUCH: Sure.

3 MS. SHERRY: -- to go -- add to --

4 JUSTICE GORSUCH: Please.

5 MS. SHERRY: -- the distinction  
6 between the two. I mean, in -- in the -- this  
7 Court's decision in Freytag, it said that the  
8 Tax Court is just like a district court in  
9 terms of judicial power. And if you look, you  
10 know, at things like the standard of review  
11 that's provided by statute, it says treat it  
12 just like a district court.

13 And so the Tax Court has exercised  
14 equitable powers in other areas, whether it's  
15 waiver or estoppel or reformation, and that's  
16 the Pollock decision we cite.

17 JUSTICE GORSUCH: So let me see if  
18 I've got the argument. I'm sorry to interrupt.  
19 But that Congress has decided that we should  
20 treat it like a court even if it isn't a court  
21 and therefore should -- we should continue to  
22 do so here?

23 MS. SHERRY: I mean, I -- I -- I think  
24 -- I think that is true. I mean, again,  
25 whether that stretches the bounds of -- of



1 Article I and how you define that, I don't  
2 think it's something the Court has to address  
3 here, but I think, for purposes of equitable  
4 tolling, there's no basis to distinguish the  
5 two. And, again, just to go back to the  
6 original enactment when it was both the  
7 district court --

8 JUSTICE GORSUCH: Yeah.

9 MS. SHERRY: -- and the Tax Court, it  
10 would be a little strange to say that the  
11 district court can equitably toll, but the Tax  
12 Court --

13 JUSTICE GORSUCH: Right.

14 MS. SHERRY: -- can't. They basically  
15 had concurrent jurisdiction. The only  
16 difference was the underlying type of tax --

17 JUSTICE GORSUCH: Very helpful.

18 MS. SHERRY: -- at issue.

19 JUSTICE GORSUCH: Thank you.

20 JUSTICE KAGAN: Can I take you back to  
21 the jurisdictional question and just ask what  
22 would it take to convert this into a  
23 jurisdictional provision?

24 MS. SHERRY: So the short answer is,  
25 if you look at 6015, which is the innocent

1 spouse provision, it was enacted the very same  
2 legislation as this provision, and it has  
3 conditional language. And so it's on page 1a  
4 of our blue brief. And it essentially says --  
5 you know, has a similar parenthetical, but it  
6 says "if" it was filed within 90 days.

7 And so I think the easiest way to do  
8 it -- I'm not saying it's the only way -- but I  
9 think the easiest way to do it is to actually  
10 include conditional language.

11 JUSTICE KAGAN: Right. I guess -- I  
12 guess what I was sort of driving at is, you  
13 know, we've always said that there are no magic  
14 words. So how do we draw that line? Like, how  
15 -- how can we insist that there are no magic  
16 words and yet insist that there be conditional  
17 language of some kind?

18 MS. SHERRY: So I -- I don't think it  
19 has to be conditional. I think that's the  
20 easiest way. I could -- I could give you a  
21 couple other ways I think Congress could do it.

22 Usually, when the court -- Congress is  
23 talking about jurisdiction, it starts by  
24 talking about the court. And so, if you look  
25 at jurisdictional provisions, they tend to

1 start with the court, you know, shall have  
2 jurisdiction of or over, and then fill in the  
3 blank.

4 And so, here, if it started by saying  
5 the Tax Court shall have jurisdiction over  
6 petitions for review filed within 30 days, I  
7 think it would be -- you know, we would have a  
8 much harder argument to make.

9 I think there are other circumstances  
10 too -- you know, I don't think a  
11 cross-reference is the best way to go about it,  
12 certainly not a parenthetical one. But, if  
13 Congress wanted to do that, use a different  
14 phrase besides "such matter." Say "such  
15 period." Include, you know, the time limit  
16 within that.

17 So I -- I think there are a variety of  
18 different ways that Congress could have spoken  
19 more clearly. I think the reason Congress  
20 didn't do so here is because it's not at all  
21 what Congress in -- intended in this particular  
22 review scheme, to have it be that rare -- rare  
23 deadline.

24 CHIEF JUSTICE ROBERTS: But you're --  
25 you're -- you're asking an awful lot of

1 Congress when you say that, basically, the Tax  
2 Court shall have jurisdiction if it's at the  
3 first part of the sentence rather than in a  
4 parenthetical, it makes -- makes all the  
5 difference.

6 And, you know, "such matter," yes, it  
7 is not the clearest thing. Maybe it refers to  
8 such determination. Maybe it refers to the  
9 whole thing, the petition. To file a petition  
10 in 30 days. That's the matter.

11 And if that's the matter, then you  
12 lose, right? Because it's the petition that's  
13 filed within 30 days that it has jurisdiction  
14 over.

15 MS. SHERRY: So I -- I -- I don't  
16 think we lose on that, but -- but you started  
17 by saying it's a lot to ask of Congress. I  
18 think that is the point of the clear statement  
19 rule. It does ask a lot of Congress but on  
20 purpose because it's something you want  
21 Congress to focus on and affirmatively decide.  
22 And so, you know, in other contexts, when  
23 you're dealing with --

24 CHIEF JUSTICE ROBERTS: In other  
25 contexts, I think we've had an unfortunately

1 large number of cases where we do this type of  
2 parsing, but usually "courts shall have  
3 jurisdiction" seems to me to be a pretty  
4 significant piece of evidence on the question  
5 of whether or not this is jurisdictional.

6 And a -- a -- a lot of your argument  
7 is sort of, you know, well, but that's in a  
8 parenthetical; well, but it comes in the middle  
9 of the sentence. And I don't know that that's  
10 enough to say that you haven't made a clear  
11 statement when the statement is the Tax Court  
12 shall have jurisdiction.

13 MS. SHERRY: And so let -- let me, you  
14 know, respond in two ways. One is I think, you  
15 know, when -- when the Court applies a clear  
16 statement rule -- and I'm now going outside of  
17 the context of the long line of jurisdictional  
18 and equitable tolling cases -- but, if you  
19 look, for example, at the decision in FAA  
20 versus Cooper, it's in the context of waiving a  
21 state's sovereign immunity, the Court has said,  
22 you know, if there's multiple plausible  
23 interpretations, we're going to go with the one  
24 there that didn't waive the state's sovereign  
25 immunity. And the majority there said, you

1 know, the dissent has an interpretation that  
2 seems plausible. It's just not required.

3 And I think the same is -- is the case  
4 here. Now we -- to be clear, we think we have  
5 the better reading of -- of the -- of the  
6 provision, and I think that's in part because  
7 of this Court's case law where there is a  
8 difference between a time limit and subject  
9 matter.

10 And if you look back, again, at the  
11 original enactment, I think it's really clear  
12 why it's talking about jurisdiction. It's not  
13 to say that the time limit is jurisdictional.  
14 It's to say that the subject matter, this new  
15 CDP petition that did not exist before, that  
16 the Tax Court has jurisdiction to adjudicate  
17 that particular kind of petition.

18 And that is normally how  
19 jurisdictional statutes are written. And so,  
20 you know, there's no question Congress can make  
21 a time limit jurisdictional, but, if it wants  
22 to do so, it has to speak clearly.

23 JUSTICE KAVANAUGH: That's six --  
24 6015(e)(1)(A) on --

25 MS. SHERRY: It is.

1 JUSTICE KAVANAUGH: -- on page 1a of  
2 the blue brief you cited?

3 I mean, that's not crystal-clear  
4 either.

5 MS. SHERRY: I mean, I don't -- I  
6 don't dispute that, but at least it has  
7 conditional language, which -- which gets a lot  
8 closer to saying that the time limit is  
9 conditional. I mean, it still has the -- the  
10 difficulty of having it in a parenthetical, and  
11 --

12 JUSTICE KAVANAUGH: It's just the --

13 MS. SHERRY: -- it's a long-winding,  
14 you know, sentence, but it -- it -- it is  
15 conditional.

16 And there -- there's another  
17 provision. It's the interest abatement  
18 provision. It's 6404. It's one that this  
19 Court talked about in the Hincks decision.  
20 That one has similar conditional language in  
21 that it says, you know, if it's filed -- I  
22 think there it's within 180 days.

23 And so, you know, that is a much  
24 closer case, where it's conditional. Here, it  
25 doesn't have conditional language. It still

1 has it in a parenthetical. The phrase is "such  
2 matter." It's not normally what you think  
3 "matter" means.

4 And we know the same language was in  
5 the original enactment, and it didn't mean it  
6 was jurisdictional there. And nothing, you  
7 know, relevant with respect to that language  
8 has changed in the ensuing years.

9 JUSTICE KAVANAUGH: On equitable --

10 JUSTICE ALITO: It's -- no, go ahead.

11 JUSTICE KAVANAUGH: Go ahead. Go  
12 ahead.

13 JUSTICE ALITO: It's pretty artificial  
14 to think that Congress actually intended  
15 anything on these issues, assuming that it can  
16 intend anything. So what we're left with is  
17 the language and maybe what we can infer from  
18 the nature of these proceedings that may or may  
19 not be subject to, on the one hand, a clear but  
20 harsh rule and, on the other hand, a more  
21 flexible rule that may lead to a lot of  
22 proceedings as to whether there was an  
23 equitable ground for tolling the statute of  
24 limitations.

25 So what can you tell us about the



1 nature of the proceeding and what might be  
2 inferred from it with respect to that issue?

3 MS. SHERRY: Absolutely.

4 And may -- may I answer?

5 CHIEF JUSTICE ROBERTS: Certainly.

6 MS. SHERRY: So the nature of the  
7 proceeding, I think, helps us a lot. I mean,  
8 in Henderson, the Court said that that was a  
9 very telling indication there. We think it's  
10 similarly telling here.

11 The CDP proceeding is infused with  
12 equity at every turn. Number one, the reason  
13 it exists is because Congress wanted to put a  
14 court between the IRS and levy and give  
15 taxpayer protections.

16 But, number two, the substance of the  
17 proceeding is about collection alternatives,  
18 whether an offer-in-compromise should be  
19 accepted. And one of the reasons you would  
20 accept an offer-in-compromise is if public  
21 policy and equity suggests that that is the  
22 best option.

23 Congress imposed a balancing test to  
24 balance the interests in tax collection on the  
25 one hand with the interests of the individual

1 taxpayer on the other and having that  
2 collection occur in a -- as least intrusive a  
3 forum as possible.

4 The innocent spouse defense is one of  
5 the things that can be raised in the context of  
6 a collection due process proceeding. That's  
7 equitable in nature too.

8 And so, if we're looking at the nature  
9 of the CDP regime, it's equitable at every turn  
10 and it's an additional reason why, you know, to  
11 the extent the Court thinks that Congress  
12 didn't think about it, it -- it -- it is,  
13 again, I think, pretty implausible to think  
14 that this Congress who enacted this regime  
15 would have wanted it to be the harsh deadline.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Thomas, anything further?

18 JUSTICE THOMAS: Nothing for me,  
19 Chief.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 Justice Sotomayor, anything further?

23 JUSTICE SOTOMAYOR: No. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 Justice Gorsuch?

1 JUSTICE KAVANAUGH: I have --

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Yeah, I have one  
5 additional question. The government makes the  
6 argument that if equitable tolling is  
7 available, it should only be in extraordinary  
8 circumstances and wants to make sure that it's  
9 pretty tightly cabined.

10 I just wanted to get your response of  
11 how you would say equitable -- equitable  
12 tolling should apply, when it should be  
13 available, anything you want to say on that.

14 MS. SHERRY: Yeah. I mean, we -- we  
15 don't dispute that we think the standard for  
16 equitable tolling has been well established for  
17 some time. The Court has cases, you know,  
18 fairly recent cases saying what that two-part  
19 standard is.

20 And we think the standard should be  
21 exactly the same here as it is in other cases.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett? No?

25 Thank you, counsel.

1 Mr. Bond.

2 ORAL ARGUMENT OF JONATHAN C. BOND

3 ON BEHALF OF THE RESPONDENT

4 MR. BOND: Mr. Chief Justice, and may  
5 it please the Court:

6 Section 6330(d)(1) contains what most  
7 statutory deadlines lack: text that expressly  
8 addresses the Court's jurisdiction and ties it  
9 to the time limit for seeking review.

10 The second clause states the -- the  
11 Tax Court shall have jurisdiction with respect  
12 to such matter. Petitioner agrees that "such  
13 matter" refers to the petition described in the  
14 first clause, which permits a person within 30  
15 days to petition for review of a collection due  
16 process determination.

17 And it is common ground that the Tax  
18 Court's jurisdiction is contingent on the  
19 filing of a petition described in the first  
20 clause. The narrow dispute is whether "such  
21 matter" refers to a petition that meets both of  
22 the first clause's requirements or selectively  
23 incorporates just one.

24 The clear meaning of the text in  
25 context is that "such matter" refers to a

1 petition that satisfies both. The first clause  
2 describes a single act, filing a petition that  
3 meets two criteria. And the time limit is  
4 embedded in the verb phrase.

5 That is confirmed by paragraph (e)(1)  
6 at page 14a of our appendix, which undisputedly  
7 makes the Tax Court's jurisdiction to grant an  
8 injunction contingent on a timely petition.  
9 Petitioner cannot explain why Congress would  
10 make a timely petition a jurisdictional  
11 prerequisite to that remedy but not to the  
12 Court's authority to decide the case.

13 The interlocking statutory structure  
14 and nearly a century of decisions addressing  
15 analogous Tax Court provisions reinforce that  
16 understanding.

17 Petitioner's argument at bottom is  
18 that various non-jurisdictional readings can be  
19 posited. But none of them clouds the clear  
20 statement that Congress provided because none  
21 is ultimately tenable after all the  
22 interpretive tools are applied.

23 But, at a minimum, the deadline is  
24 mandatory, not subject to ad hoc exceptions.  
25 If there are to be exceptions, they must come

1 from Congress, which not only can strike a  
2 context-specific balance, as it has in other  
3 areas of the code, but also can address  
4 unintended spillover effects in a way that  
5 courts cannot.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Bond, under  
8 current practices, are -- is this -- are these  
9 time limits ever tolled for any reason?

10 MR. BOND: Yes, there are statutory  
11 grounds for tolling that apply that are  
12 different fundamentally from equitable tolling,  
13 and if I could address those specifically.

14 There's one in this provision itself,  
15 630 -- 6330(d)(2) for cases of bankruptcy.

16 There are also general statutory  
17 tolling provisions that apply to this and many  
18 other provisions in the code for cases where a  
19 person is in a combat zone or a disaster area.

20 What's fundamentally different about  
21 those -- about each of those areas is that the  
22 information the IRS needs to know in to --  
23 order to determine whether it can proceed with  
24 collection is in its possession and is  
25 automatically processed by its system.

1           The IRS gets monthly data from the  
2 Department of Defense on whether someone is in  
3 a combat zone. It has -- its systems  
4 automatically query whether someone's ZIP code  
5 is affected by a disaster declaration. And the  
6 IRS is served with a bankruptcy petition and  
7 knows whether to put a freeze code on that  
8 person's account.

9           Equitable tolling is fundamentally  
10 different. And the open-ended exception that I  
11 think Petitioner is proposing would not be  
12 workable for the IRS because, when the IRS  
13 issues these 26,000-plus collection due process  
14 determinations, it would have no way of knowing  
15 whether a particular taxpayer who doesn't pay  
16 or doesn't file their petition on time is  
17 subject to an equitable circumstance or an  
18 extraordinary circumstance that stands in their  
19 way.

20           CHIEF JUSTICE ROBERTS: Do they get  
21 monthly reports from the Department of Defense  
22 over who's in a combat zone?

23           MR. BOND: They receive monthly data  
24 from the Department of Defense that is -- that  
25 flows into the IRS's data system, that's

1 correct.

2 CHIEF JUSTICE ROBERTS: Well -- well  
3 -- like, how do they even know that -- I mean,  
4 when do they find out? I mean, nobody knows if  
5 they're going to make -- file a claim for  
6 something until they file a claim.

7 I mean, I -- I'm just -- there are a  
8 lot of people, and the Department of Defense --  
9 I -- I -- I just am struck by the difficulty  
10 that that presents and want to make sure I  
11 understand what's involved.

12 MR. BOND: Sure. As -- as -- as we  
13 understand it, the Department of Defense  
14 provides this data that goes into the IRS's  
15 system addressing taxpayers generally, not just  
16 those --

17 CHIEF JUSTICE ROBERTS: Taxpayers  
18 generally? Like every taxpayer in the country?

19 MR. BOND: Those -- those who are in  
20 combat zones, that data is provided by the  
21 Department of Defense.

22 CHIEF JUSTICE ROBERTS: So there is  
23 somewhere in there something said, you know,  
24 Fred Smith not in combat zone. And we don't  
25 even know if Fred Smith's going to file



1 something in the Tax Court or not.

2 JUSTICE BARRETT: And do you  
3 cross-reference it when the list comes in and  
4 -- and -- and --

5 MR. BOND: Yes, this is processed by  
6 the IRS's computers. And that -- that's  
7 because this doesn't just affect collection due  
8 process but a number of other deadlines and  
9 provisions in --

10 CHIEF JUSTICE ROBERTS: Yeah, I know.  
11 But my point is that your name is there even  
12 though you've got nothing to do with -- there's  
13 no reason the IRS should worry about you, or --

14 MR. BOND: Well, it -- it -- if you're  
15 a taxpayer. It's not all persons generally but  
16 all taxpayers. Right?

17 CHIEF JUSTICE ROBERTS: Wow. Okay.

18 MR. BOND: And so too with disaster  
19 relief. That's not by name but by ZIP code.  
20 And for bankruptcy, you receive the petition.  
21 So these exceptions that Congress have created  
22 fit with the system that Congress --

23 JUSTICE BARRETT: Mr. Bond, can I ask  
24 you what your response would be to Ms. Sherry's  
25 point that this process is equitable at every

1 turn?

2 I mean, you make some strong  
3 arguments, but, you know, Ms. Sherry points out  
4 that the nature of these CDP proceedings might  
5 reflect, as Justice Alito said, what is  
6 Congress's intent or might -- might be more  
7 consistent with a plan to permit equity.

8 MR. BOND: So CDP proceedings are not  
9 equitable in the sense of trying to achieve  
10 global fairness in the face of the code's  
11 requirements. They are instead an  
12 accommodation of specific interests, including  
13 intrusion into the -- the taxpayer's affairs  
14 and their ability to pay that Congress provided  
15 on top of all of the other mechanisms of  
16 review.

17 It's important to understand this  
18 additional layer against that backdrop. The  
19 default mechanism for seeking review is a  
20 refund suit. And this Court has held for a  
21 century that that satisfies due process.

22 On top of that, for many taxes, not  
23 this particular one, but income, estate, and  
24 gift taxes, there is deficiency review before  
25 assessment occurs. Congress added this

1 procedure as an additional last clear chance at  
2 -- when the IRS is on the brink of collection  
3 to address the collection steps themselves.

4 And it's only in cases where there  
5 wasn't a prior deficiency opportunity to  
6 challenge the underlying liability that the  
7 merits even come into the picture.

8 JUSTICE KAVANAUGH: On the stat --

9 MR. BOND: So --

10 JUSTICE KAVANAUGH: Keep going.

11 Sorry.

12 MR. BOND: So it -- it is an  
13 accommodation of those additional interests,  
14 but it's a measured and balanced one that's  
15 designed to be a brief pause, not to upend the  
16 collect first and litigate later approach of  
17 the tax code.

18 JUSTICE KAVANAUGH: On the statutory  
19 language, the fact that, as you say, there's a  
20 narrow dispute and there's reasonable arguments  
21 both ways about how to read the parenthetical,  
22 doesn't that, under our precedents going back  
23 20 years or so now, kind of end the case?

24 Because there has to be a clear  
25 statement, we have said, and we've been

1 increasingly strict about that, and the fact  
2 that there's a reasonable debate about how to  
3 read the parenthetical, you can read it one  
4 way, you can read it the other, doesn't that  
5 just end it?

6 MR. BOND: No, Your Honor, because,  
7 here, Congress has provided the kind of clear  
8 statement that this Court has said is most  
9 important. The provision speaks to the Court's  
10 power. The jurisdictional limitation is linked  
11 back to that first clause.

12 I don't think the clear statement rule  
13 requires the clearest possible statement that  
14 each criterion is independently tied to  
15 jurisdiction.

16 JUSTICE KAVANAUGH: But it's in the  
17 same sentence, and that helps you no doubt, but  
18 it's still, I think, debatable which part of  
19 the sentence preceding the parenthetical it  
20 applies to, right?

21 MR. BOND: I don't think it is for two  
22 reasons. First, just --

23 JUSTICE KAVANAUGH: You don't think  
24 it's debatable?

25 MR. BOND: First, just focusing on

1 that clause, I don't think the last antecedent  
2 rule or -- or principles like that help  
3 Petitioner because the first clause describes  
4 one thing, one act, filing a petition that  
5 meets two requirements.

6 You can't use the last antecedent  
7 rule, as Petitioner does, to pick up just the  
8 last half of the first clause because that last  
9 half describes a condition on a petition.

10 You can't grant jurisdiction over a  
11 condition. You grant jurisdiction over the  
12 matter. And, as Petitioner acknowledges,  
13 that's best read to mean the petition.

14 But even if you look beyond (d)(1), I  
15 think paragraph (e)(1) is dispositive because  
16 Congress there --

17 JUSTICE ALITO: Well, before you --  
18 before you get --

19 MR. BOND: -- as it has --

20 JUSTICE ALITO: I'm sorry. No. Go  
21 ahead, please.

22 MR. BOND: There, as it has done in  
23 other provisions, has made clear that the Tax  
24 Court's jurisdiction to grant an injunction is  
25 dependent on a timely petition.

1           And on the point of timely, it's not  
2 correct that in the context of equitable  
3 tolling a -- a -- a -- an action that is done  
4 untimely but is tolled is therefore deemed to  
5 be timely. There are two reasons for that I  
6 would give.

7           First, look at the Court's decision in  
8 Irwin, Petitioner's leading tolling case. At  
9 page 92, the Court holds that the complaint is  
10 untimely. And then it goes on at page 93 to  
11 address the argument that, even if it was not  
12 timely, it should be excused on equitable  
13 tolling grounds.

14           And the second reason is that (e)(1),  
15 as everyone acknowledges, is jurisdictional,  
16 makes a timely petition a jurisdictional  
17 prerequisite. That's the last place you would  
18 expect to see Congress using the word "timely"  
19 as imprecise --

20           JUSTICE BREYER: So does that mean  
21 it's well established -- look, the obvious  
22 thing, just, in English -- I don't know about  
23 the last antecedent rule or so forth, but --  
24 but just in ordinary English, it says here  
25 "such matter." Okay?

1           Now that could refer to the appeal of  
2 such determination, or it could refer to the  
3 appeal of such determination filed within 30  
4 days. Okay?

5           Now I think that was Justice  
6 Kavanaugh's point. And it got me why it  
7 couldn't refer to either. And -- and then, if  
8 you go back to (e), it does say timely, but, I  
9 mean, you go back to laws -- Black's Law  
10 Dictionary, I don't know, maybe you go back to  
11 Justinian, and it says what tolling does is it  
12 stops the clock. Okay? It stops the clock.

13           So, if you do have tolling and you  
14 stop the clock for three days because the  
15 person involved was very ill or his family was  
16 or something, and the best reason in the world  
17 he couldn't get to the post office, there was  
18 black ice everywhere, I don't know, but then it  
19 stopped three days later. Okay? Then it was  
20 timely when he got around to filing it, and  
21 they excused it.

22           I mean, can't it be read that way?  
23 The -- I mean, I guess everybody's asking the  
24 same question, just emphasizing "can't."

25           MR. BOND: So I don't think "timely"

1 in (e)(1) can mean that --

2 JUSTICE BREYER: Why?

3 MR. BOND: -- again because -- because  
4 -- again, for -- for two reasons. First,  
5 that's not how this -- that's the opposite of  
6 how this Court has described the effect of  
7 tolling in the equitable tolling context on  
8 which Petitioner relies. And in this  
9 particular provision, where Congress is saying  
10 a timely petition is a jurisdictional  
11 prerequisite, it's passing strange for Congress  
12 to say timely when they -- if what they meant  
13 was timely only by operation of equitable  
14 doctrines that do not apply to jurisdictional  
15 prerequisites.

16 So I think that argument just doesn't  
17 hold.

18 JUSTICE BREYER: The law dictionary  
19 says equitable tolling is a court's  
20 discretionary extension of a legal deadline.

21 MR. BOND: The practical --

22 JUSTICE BREYER: So they extended the  
23 legal deadline, and, therefore, it is timely.

24 MR. BOND: The practical effect of  
25 equitable --



1 JUSTICE BREYER: Right.

2 MR. BOND: -- tolling is to give  
3 someone the benefit of that. But I think the  
4 Court has distinguished equitable tolling from  
5 statutory case -- tolling in cases like CalPERS  
6 versus ANZ, where it says equitable tolling  
7 isn't interpreting the statute to say it is  
8 extended for this period.

9 JUSTICE BREYER: Okay. My only other  
10 question is, what terrible thing will happen  
11 if, in fact, we say, okay, yeah, you can have  
12 equitable tolling? I mean, there are other  
13 provisions that say you can't file a petition  
14 that's going to interfere with the levying.  
15 There's another provision that says it can't be  
16 frivolous. So we have those two in operation.

17 So what awful thing will happen?

18 MR. BOND: So I would point you to two  
19 things, one specific to this context and more a  
20 -- a broader concern of spillover effects in  
21 the code.

22 The specific consequence here is that  
23 if tolling is available, then when the 30-day  
24 deadline to petition runs, in the 26,000 cases  
25 where the IRS issues these determinations, it

1 then will be in a state of uncertainty about  
2 what, if anything, it can do to collect because  
3 it will know that a taxpayer may file a late  
4 petition, assert tolling, and months or years  
5 later a court will conclude that tolling was,  
6 in fact, available. And I think that puts the  
7 IRS in an impossible position.

8 More broadly, I would -- I would point  
9 the Court to spillover effects of interlocking  
10 relationships in the code. The Ninth Circuit,  
11 in the Organic Cannabis case, pointed to an  
12 illustration of this if you apply Petitioner's  
13 approach to Section 6213(a) governing  
14 deficiency. And that's 95 percent of the  
15 court's docket. And they explained that if you  
16 apply equitable tolling there, because of the  
17 interrelationships of the code, you'll end up  
18 harming taxpayers by precluding them from  
19 seeking -- or from bringing refund suits.

20 The Taxpayer Advocate has acknowledged  
21 that and has explained --

22 JUSTICE BREYER: So don't do it there.

23 MR. BOND: So I think the difficulty

24 --

25 JUSTICE BREYER: "Equitable" means

1 equitable. So, if it's going to hurt  
2 everybody, don't do it.

3 MR. BOND: And I don't think  
4 Petitioner has offered a theory that wouldn't,  
5 on their view, extend to that other  
6 circumstance. But the point where I'm -- I'm  
7 trying to make is that adjusting one provision  
8 in the code has spillover effects in others.

9 JUSTICE BREYER: Right.

10 MR. BOND: And it's the kind of thing  
11 that Congress can address by looking at, in  
12 this context, what would happen to (e)(1) and  
13 the suspension periods if the deadline is not  
14 -- not jurisdictional and subject to tolling.

15 Congress could decide what  
16 circumstances warrant tolling. Maybe there  
17 should be an outer limit on how much tolling is  
18 available or what notice must be provided to  
19 the IRS that a person is under such a  
20 circumstance and needs additional time.

21 Congress can make all of those kinds  
22 of judgments, but this Court, in deciding the  
23 binary question whether it is jurisdictional  
24 and, if not jurisdictional, whether traditional  
25 tolling applies, can't make those kinds of

1 comprehensive judgments across the statute.

2           The other thing I would point you to,  
3 Justice Breyer, is in terms of what Congress  
4 actually understood at the time it enacted  
5 this. 6213, the model for all of these  
6 provisions, had been held at that point by  
7 every circuit in a wall of precedent to be  
8 jurisdictional for 70 years. Congress in this  
9 provision added even more emphatic language,  
10 this jurisdictional parenthetical.

11           So, in terms of expectations of  
12 Congress or how Congress anticipated this and  
13 other provisions would operate, I think  
14 Congress sensibly understood that it would  
15 operate in the same way. And it would upset  
16 those expectations to say, well, no, we need  
17 conditional language, or we need the word  
18 "jurisdiction" to appear earlier in the  
19 sentence.

20           That is a magic words requirement.  
21 That is a clearest possible statement standard,  
22 which is not what this Court's cases require.

23           JUSTICE ALITO: Suppose that (d) --

24           JUSTICE GORSUCH: Is it, though --

25           JUSTICE SOTOMAYOR: Mister --

1 JUSTICE GORSUCH: No, please.

2 JUSTICE ALITO: Suppose that (d)(1)  
3 were worded just slightly differently, and this  
4 is not the kind of language you usually see in  
5 a statute, but indulge the hypothetical.

6 So suppose it said the person may  
7 within 30 days of a determination under this  
8 section petition the Tax Court for review of  
9 such determination and, by the way, the Tax  
10 Court shall have jurisdiction with respect to  
11 such matter. What would you say then?

12 MR. BOND: I think the outcome would  
13 be the same in that circumstance, both under  
14 the language of this provision and especially  
15 with (e)(1) in the backdrop.

16 JUSTICE ALITO: Really? Because, when  
17 -- when you say "and, by the way," that signals  
18 you're switching to a different subject.

19 MR. BOND: I don't think --

20 JUSTICE ALITO: You're -- you're  
21 breaking the link between the 30-day filing  
22 requirement and what you're going to say later  
23 about jurisdiction, aren't you?

24 MR. BOND: I think it's a closer case,  
25 but I think you would still need to figure out

1 what the -- what the antecedent is. And "such  
2 matter" refers to the product of the process  
3 described in that first clause. And even in  
4 that variation, I still think it refers to a  
5 process of filing a petition, the product of  
6 which is a petition that satisfies those  
7 criteria. And --

8 JUSTICE ALITO: All right. Well,  
9 maybe that's -- maybe that's the case. The  
10 reason I asked the question is I think that's  
11 what you normally take -- make out of a  
12 parenthetical. You're switching to something  
13 else. It's an aside. It's something different  
14 from what you've just said.

15 MR. BOND: I don't think it's an aside  
16 here. I think the parenthetical shows you that  
17 it's clearly related to and even more clearly  
18 linked to the first clause. It's more closely  
19 connected than if the second clause that's  
20 currently in parentheses with the conjunction  
21 were in a separate provision and all we had  
22 were "such matter" in (e)(1). I think that  
23 would be a closer case than -- than what you  
24 have here.

25 Here, it's -- I think it's clear from

1 the placement of this parenthetical along with  
2 the "such matter" reference, back to the first  
3 clause, that all agree refers to the first  
4 clause petition, that Congress is modifying or  
5 is -- is clarifying the scope of the Tax  
6 Court's jurisdiction.

7 Recall that the Tax Court is one of  
8 very specified jurisdiction. There's not a  
9 1331 equivalent. It only has the jurisdiction  
10 that Congress has expressly conferred.

11 I think the odd thing on Petitioner's  
12 view is that Petitioner can't explain why this  
13 parenthetical is there at all because the  
14 statement that a person may petition the Tax  
15 Court for review of such determination would  
16 necessarily signal that the Tax Court can  
17 decide it.

18 I think the point of the parenthetical  
19 is to make emphatic that the Court's  
20 jurisdiction is limited to petitions that are  
21 authorized in the first clause.

22 JUSTICE GORSUCH: Mr. Bond, on -- on  
23 that score, just to follow up on Justice Alito,  
24 "such matter" could, it seems to me, refer to  
25 -- talking about last antecedents -- at least

1 three things here.

2 One, it could refer to a determination  
3 under this section, in which case, as -- as --  
4 as Justice Sotomayor suggested, you might face  
5 difficulty because there's been a determination  
6 under this section. So that -- that -- that --  
7 that -- that confronts the government with  
8 problems, number one.

9 Number two, it could be a petition, as  
10 -- as -- your colleague on the other side  
11 argues, Ms. Sherry, without respect to time, in  
12 which case that would also present the  
13 government with problems.

14 Or, number three, it could be the  
15 petition taking cognizance of the time, which  
16 is the government's position.

17 So acknowledging that there are at  
18 least three possibilities here and only one of  
19 which obviously helps the government, what am I  
20 supposed to do?

21 MR. BOND: So I think you have to look  
22 carefully at each of those possibilities  
23 because, as the Court says time and again,  
24 ambiguity is not a function of --

25 JUSTICE GORSUCH: But -- but do you



1 agree with me those are the three possibilities  
2 and two of them are rather difficult for the  
3 government?

4 MR. BOND: There are three things that  
5 have been posited, but if I could explain why  
6 the first two aren't tenable when you look at  
7 the statutory context --

8 JUSTICE GORSUCH: Of course, you may,  
9 but -- but before you do --

10 MR. BOND: Yes, that's the universe of  
11 arguments that have been advanced.

12 JUSTICE GORSUCH: Those -- that's the  
13 universe, and two of them are -- are  
14 challenging for the government?

15 MR. BOND: They -- they would be if  
16 they could be squared with this text and  
17 context --

18 JUSTICE GORSUCH: All right. Okay.

19 MR. BOND: -- but they cannot.

20 JUSTICE GORSUCH: Now you can go  
21 ahead. All right. All right.

22 MR. BOND: Sure. I think, with  
23 respect to "determination," that's not a  
24 plausible reading in this context, not only  
25 because of (e)(1) in the backdrop but just on

1 the word "determination," that word appears a  
2 dozen times in this provision. And Congress  
3 conspicuously switched to "matter" in this  
4 parenthetical. If Congress meant  
5 "determination," that would have been the  
6 easiest way for it to say so. Petitioner  
7 cannot explain that switch.

8           It's true that Congress sometimes uses  
9 synonyms, but there needs to be a reason to  
10 conclude that Congress did that here. And  
11 there's no basis in the statute or in its  
12 history to conclude that Congress used that  
13 imprecise language.

14           JUSTICE GORSUCH: Well, I'll look  
15 forward to hearing Ms. Sherry's thought on that  
16 one.

17           MR. BOND: Sure.

18           JUSTICE GORSUCH: Okay.

19           MR. BOND: And on the second  
20 possibility, that it refers only to a petition  
21 of a particular kind, I don't think there's a  
22 textual basis for disaggregating the  
23 requirements that are in that first clause,  
24 particularly when the time limit is embedded in  
25 the verb phrase. It's "may within 30 days of

1 such determination petition."

2 I think Congress is signaling that  
3 time is of the essence, that time is part and  
4 parcel to this avenue of review that's meant to  
5 be a limited pause and is consistent with the  
6 way the model for these provisions had been  
7 understood by lower courts for 70 years.

8 JUSTICE BARRETT: Mr. Bond, can I ask  
9 you -- so -- so Justice Gorsuch has just  
10 identified the universe of possible  
11 interpretations. Let's say that I think the  
12 government's interpretation is maybe a little  
13 bit more plausible but not a slam dunk.

14 In light of the backdrop of the clear  
15 statement rule, what am I supposed to do with  
16 that? I mean, how clear does it have to be?

17 MR. BOND: I think, once you've  
18 exhausted the interpretive tools, you have to  
19 conclude whether that other interpretation is  
20 actually -- is -- is actually tenable. And so  
21 it's -- it's not a clearest possible statement.  
22 It just has to be that, after you've looked at  
23 all of the context, you conclude that that  
24 alternative interpretation --

25 JUSTICE BARRETT: But that sounds like

1 you're saying what we do in ordinary  
2 interpretation, which is just conclude what the  
3 most plausible interpretation of the ordinary  
4 language would be. But a clear statement rule  
5 requires a little bit more than that, doesn't  
6 it?

7 MR. BOND: Well, I think, as this  
8 Court has described the clear statement rule,  
9 its goal is to approximate Congress's likely  
10 intent in the setting, as I think the Court  
11 said in Henderson. The clear statement rule is  
12 justifiable if it's gauging what Congress would  
13 have intended in this setting, not if it's  
14 imposing drafting rules on Congress.

15 And so, if you look at the text and  
16 the context and the history and conclude that,  
17 in fact, Petitioner's reading at the end of the  
18 day can't be reconciled with all of those  
19 things, then the statute is clear in making it  
20 jurisdictional.

21 It's only ambiguous if, after  
22 exhausting everything, you don't have an  
23 answer.

24 JUSTICE KAVANAUGH: I thought --

25 JUSTICE BARRETT: So you think that

1 the rule kicks in only in a case of ambiguity?

2 MR. BOND: That's right, yeah,  
3 because, if it's unambiguous, then it's  
4 necessarily a clear statement that something is  
5 jurisdictional. And, here, Congress has  
6 provided the kind of clear statement this Court  
7 has called for by addressing the Court's  
8 jurisdiction in the same provision, referring  
9 back to the time limit, and then adding in the  
10 year 2000 the (e)(1) language that appears  
11 elsewhere in the code that says the Tax Court's  
12 jurisdiction to grant a remedy that's necessary  
13 to prevent mootness in some circumstances is  
14 contingent on a timely petition.

15 And I don't think Petitioner can  
16 explain why Congress would do that if timely --  
17 timely means, as we say, one that actually  
18 satisfies the timeline in the statute.

19 JUSTICE KAGAN: Mr. Bond --

20 JUSTICE SOTOMAYOR: Mr. Bond, my law  
21 clerk tried to explain my simple thinking when  
22 I was reading this provision, and I'm not sure  
23 I fully understand her response, and perhaps  
24 you can explain it to me.

25 If your reading is that the (d)

1 provision provides the court with -- is a  
2 jurisdictional time limit, that means in my  
3 mind that the Tax Court has no jurisdiction to  
4 do anything unless the petition is filed on  
5 time, correct?

6 MR. BOND: That's right.

7 JUSTICE SOTOMAYOR: So why do you need  
8 (e)(1) at all?

9 MR. BOND: Because of the sentence  
10 before the one we've been talking about in  
11 (e)(1) that was added at the same time as the  
12 final sentence, which granted the Tax Court and  
13 another proper court -- or -- or the -- the  
14 proper court or the Tax Court jurisdiction to  
15 enjoin levy activities notwithstanding the  
16 injunction act.

17 So, as we understand the final  
18 sentence, it's clarifying that this is not a  
19 freestanding grant of authority to the Tax  
20 Court to enjoin levy activities outside of  
21 cases in which it has jurisdiction because  
22 there's a timely petition.

23 Now, without that final sentence, I  
24 think, as -- as you suggest, we would still say  
25 the Tax Court doesn't have injunctive

1 authority. That would be the better reading.  
2 But Congress left nothing to chance here given  
3 its concern with having judicial intrusion --

4 JUSTICE SOTOMAYOR: So --

5 MR. BOND: -- into collection causes  
6 of --

7 JUSTICE SOTOMAYOR: -- under normal  
8 circumstances, you would say we don't really  
9 need (e)(1)?

10 MR. BOND: Under normal circumstances,  
11 we would say it's -- it -- in -- in our view,  
12 it's not strictly necessary, but it's there and  
13 it serves the function of removing any doubt  
14 about the Tax Court's jurisdiction.

15 JUSTICE SOTOMAYOR: So why doesn't  
16 that add to your adversary's position that  
17 there is enough ambiguity given that it is,  
18 even by your definition, a belt-and-suspenders  
19 provision?

20 MR. BOND: Oh, I don't think it -- it  
21 helps Petitioner at all. I think quite the  
22 opposite. The fact that Congress went further  
23 than arguably necessary to make clear that the  
24 Tax Court's jurisdiction over this remedy is  
25 contingent on a timely petition, I think that

1 belt-and-suspenders approach points strongly in  
2 our direction.

3 And I would add as well that this same  
4 kind of language occurs in 6015(e), which  
5 Petitioner was discussing earlier. In  
6 particular, it -- it appears at page 2a of our  
7 appendix in a provision that I understand  
8 Petitioner to agree is jurisdictional. We have  
9 the same language there about the Tax Court  
10 shall have no jurisdiction absent a timely  
11 petition.

12 And, there, it performs the same  
13 function of avoiding any doubt about the Tax  
14 Court's injunctive authority. And if the Tax  
15 Court can't enjoin act -- collection actions  
16 that violate the suspension period, there's no  
17 reason to think that Congress intended it to  
18 have authority to adjudicate the underlying  
19 collection due process proceeding.

20 JUSTICE SOTOMAYOR: Thank you,  
21 counsel.

22 JUSTICE KAGAN: Mr. Bond, this may be  
23 an out-of-left-field question, but how should I  
24 think about this clear statement rule, how  
25 should I think about applying it in this case



1 or more generally, if I'm -- if I have more  
2 than a suspicion that Congress has no idea what  
3 we're talking about in this area, that we keep  
4 on saying these words and presuming that  
5 Congress understands them, and I don't see any  
6 evidence that Congress really does.

7 And if I think that's so, I mean, I  
8 guess you can argue with me, because you can --  
9 you've talked a lot about Congress signaling  
10 this and Congress saying that. But, I mean, my  
11 gut is that Congress has never read any of our  
12 cases in this area.

13 What should I do then?

14 MR. BOND: I think you should resist a  
15 version of a clear statement rule that requires  
16 particular phrasing or adds new bells and  
17 whistles to the -- the Court's past cases and  
18 treats it as simply and directly as possible.  
19 It's simply a tiebreaker rule to say whether  
20 Congress has made a requirement jurisdictional  
21 or not.

22 And I think the in -- the insight  
23 underlying the clear statement rule is that  
24 because of the consequences we don't think  
25 Congress does this inadvertently.

1           But there's nothing inadvertent about  
2 Congress's approach to jurisdiction in this  
3 statute or in the Tax Court context.

4           JUSTICE BREYER: But you're -- but I  
5 think Justice Kagan's question is more general.  
6 You know there have been efforts from time to  
7 time in the lower federal courts to send  
8 opinions to Congress. There is a drafting  
9 section in both houses.

10           Does the Solicitor General's Office  
11 ever get together with them and say: Look,  
12 here -- here are some general statements in  
13 these opinions, we're just calling them to your  
14 attention? And so --

15           JUSTICE KAGAN: Gosh, you could wipe  
16 out half of our docket.

17           JUSTICE BREYER: Well, that's a good  
18 question.

19           (Laughter.)

20           JUSTICE BREYER: But, I mean, as a --

21           CHIEF JUSTICE ROBERTS: Not to mention  
22 the separation of powers between the executive  
23 branch and Congress.

24           JUSTICE BREYER: They're always  
25 sending stuff to Congress.

1           MR. BOND:  So I can't speak to any  
2   specific --

3           JUSTICE BREYER:  No.

4           MR. BOND:  -- dialogue on -- on that  
5   kind of drafting issue or on the lower court's  
6   opinions.

7           I take the point that Congress may not  
8   have -- be paying the -- as close attention to  
9   the Court's opinions about which specific  
10   features of statutes have jurisdictional  
11   significance.  And that's all the more reason  
12   not to ratchet up the requirements or say --

13          JUSTICE BREYER:  Well, so you could  
14   help there.  You could help.  The SG's office,  
15   I mean.

16          MR. BOND:  And we will take that to  
17   heart.  But I think, as the Court decides the  
18   case in front of you, I think the -- the answer  
19   is not to say, well, Congress used the word  
20   "jurisdictional," but it didn't use "if" or  
21   "where," or it didn't put "jurisdiction" in the  
22   right place in the sentence, or it used paren  
23   -- parentheses instead of a semicolon.

24          I think that does a disservice to  
25   Congress and becomes a drafting instruction to

1 the legislature instead of approximating what  
2 Congress would have had in mind.

3 JUSTICE KAVANAUGH: But the point of a  
4 clear statement rule, to pick up on Justice  
5 Kagan's question, is when legislation's  
6 drafted, first of all, there are expert  
7 drafters who are involved in the process and  
8 who do know some of the background principles.

9 Usually, on something affecting the  
10 IRS or Treasury, people would be up there in  
11 the room going through the language, and they  
12 presumably are aware of the Court's  
13 jurisprudence.

14 And, therefore, maybe not all of  
15 Congress or even many of Congress, but the  
16 people typing it into the computer and the  
17 people in the room negotiating the language are  
18 often aware of the background principles and,  
19 therefore, we should require a clearer  
20 statement than what we have here -- the last  
21 part of this you're not going to like --  
22 because they are aware of the clear statement  
23 rule that the Court's put forth over the last  
24 couple decades.

25 MR. BOND: So I think, if the Court

1 stands in the shoes of -- of Congress in  
2 enacting this in -- in -- in 1998 originally  
3 and in 2006 when it took substantially its  
4 current form or in the mind of experts who are  
5 focused on the issue, you'd come to the same  
6 conclusion.

7 In 1998, it was clear that the  
8 statutes like this on which this were -- were  
9 modeled were jurisdictional. Congress had no  
10 reason to think that by enacting a  
11 substantially similar provision, with even more  
12 explicit jurisdictional language, would not  
13 achieve jurisdictional effect.

14 And, in 2006, and this is after  
15 Arbaugh, when Congress enacted it into -- into  
16 its current form and got rid of district court  
17 review, it removed the one structural feature  
18 that Petitioner says historically led to a  
19 different interpretation.

20 JUSTICE KAVANAUGH: Well, to pick up  
21 on Justice Kagan's question some more, because  
22 I think it is an important point, and the  
23 separation of powers point, Treasury is  
24 constantly going to Congress and saying we have  
25 a problem with this, that, and the other thing,

1 right, in the legislative -- in the -- in the  
2 statutes, right, and to fix this and fix that.

3 And one of the things presumably  
4 Treasury could emphasize is we need to be clear  
5 about the importance of these deadlines. We  
6 need to be clear about the word "jurisdiction."  
7 That's very -- it wouldn't be the SG's office,  
8 but Treasury, legislative affairs, would be up  
9 there all the time, right?

10 MR. BOND: Certainly would be open if  
11 the Court rules that way for Treasury to do  
12 that. But I think against the backdrop of  
13 decades of decisions of lower courts  
14 consistently treating this and other deadlines  
15 as jurisdictional, I think it -- it's, I think,  
16 inappropriate for the Court to assume that if  
17 we rule against the direction of our  
18 precedents, it's fine because the executive  
19 branch can go to Congress and seek --

20 JUSTICE KAVANAUGH: Well, it's not --

21 MR. BOND: -- a different  
22 dispensation.

23 JUSTICE KAVANAUGH: -- this has been a  
24 process over a bunch of cases but has  
25 established a clear baseline instead of

1 muddling through.

2           And now everyone -- the legislative  
3 affairs offices, IRS, and Treasury know what  
4 the situation is, and when they're discussing  
5 legislative needs with Congress, which they do  
6 all the time, with Ways and Means staff or  
7 whatever, they can emphasize we need to be  
8 clear about the word jurisdiction with these  
9 time limits because that's the rule now. We  
10 can't just assume anything.

11           Now I realize there's a transition  
12 period, but I don't see why that's so hard.

13           MR. BOND: I think the difficulty, as  
14 the argument this morning has illustrated, is  
15 it's not even clear to me now what Petitioner  
16 thinks would be sufficient in -- for -- and  
17 what the -- those in Congress or at Treasury  
18 could conclude.

19           JUSTICE KAVANAUGH: The Tax Court  
20 shall have jurisdiction only if it's filed  
21 within 30 days. That would be sufficient.

22           MR. BOND: And so that's -- that's  
23 even beyond what Petitioner has suggested here.

24           JUSTICE KAVANAUGH: I -- I agree, but  
25 that would be sufficient.

1           MR. BOND: And that turns into a  
2           clearest possible statement rule, which I don't  
3           think accords with the justification for the  
4           clear statement rule of Arbaugh, which is  
5           trying to capture Congress's likely intent, and  
6           it is out of step with, I think, the -- the  
7           comment earlier that Congress may not be aware  
8           of all of these decisions and we're simply  
9           requiring the clearest possible statement, even  
10          though Congress may not know in every single  
11          context exactly what that phrase should be.

12                    And there are settings where different  
13          -- oh, I'm sorry.

14                    CHIEF JUSTICE ROBERTS: You can finish  
15          your sentence.

16                    MR. BOND: There are settings where  
17          different language may be appropriate for  
18          specific -- context-specific reasons that  
19          Congress may not appreciate without guidance  
20          from this Court.

21                    CHIEF JUSTICE ROBERTS: Thank you.  
22                    Justice Thomas?

23                    JUSTICE THOMAS: One small question.  
24          Mr. Bond, you mentioned several times that this  
25          would have significant effect, a spillover



1 effect to other provisions if we rule against  
2 you.

3 But, with that aside, how many appeals  
4 are we talking about, these collection due  
5 process appeals are we talking about?

6 MR. BOND: So the universe of cases in  
7 which a person could petition is, on average,  
8 26,000 or so a year.

9 JUSTICE THOMAS: No, how many are  
10 there?

11 MR. BOND: Yes. So --

12 JUSTICE THOMAS: How many actual  
13 appeals are there?

14 MR. BOND: Appeals that are taken, I  
15 think, is around 1100 a year.

16 JUSTICE THOMAS: Okay. And -- and how  
17 much -- if -- if we rule against you, how will  
18 that number change? Not the universe, but  
19 those numbers -- the 1100?

20 MR. BOND: So, of the 11- or 1200  
21 petitions that are filed each year, roughly  
22 22 percent or so, around 300 of them, are  
23 dismissed for lack of jurisdiction. So that  
24 universe of cases would be affected by  
25 Petitioner's -- that's a five-year average --

1 would be affected by Petitioner's rule that  
2 tolling is available in those -- in those  
3 cases.

4 The broader point I only -- I meant to  
5 make is that Petitioner's rule about equitable  
6 tolling affects the IRS's collection efforts in  
7 every case where a petition could be filed.  
8 That's why the 26,000 is in the picture.

9 JUSTICE THOMAS: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Breyer?

12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: No, thank you.

14 CHIEF JUSTICE ROBERTS: All right.

15 Justice Kagan?

16 Justice Gorsuch?

17 JUSTICE KAVANAUGH: I have two more  
18 questions. One, I am concerned about what you  
19 said about the implications for 6013(a) --  
20 6213(a). I'm sorry. And -- but I thought the  
21 language in there was clearer in tying it to  
22 jurisdiction, so I'm not sure a holding that  
23 you lose here would affect 6213 --

24 MR. BOND: We -- we agree that 6213(a)  
25 should stand as it is, and courts have

1 understood it that way for a long time. All  
2 I'm saying is that when Congress enacted  
3 6330(d)(1) in 1998, it added on top of what  
4 6213 had.

5 JUSTICE KAVANAUGH: I got that point.  
6 But you're not worried -- or correct me if I'm  
7 wrong, because I'd like to know this -- if we  
8 rule against you here, you still have a good  
9 argument that 6213(a) is jurisdictional?

10 MR. BOND: Yes.

11 JUSTICE KAVANAUGH: Correct?

12 MR. BOND: Yes.

13 JUSTICE KAVANAUGH: Okay. And then  
14 the second argument, picking up on Justice  
15 Barrett's question, I -- I'm -- I struggle with  
16 the question she asked too: How -- how clear  
17 is clear?

18 I thought you were saying, to satisfy  
19 the clear statement rule, so long as the word  
20 "jurisdiction's" been used, then you go to the  
21 best -- the best reading.

22 Is that not what you're saying? Maybe  
23 that's not what you're saying.

24 MR. BOND: So I guess I'm saying two  
25 things. When we're trying to determine whether

1 the statute --

2 JUSTICE KAVANAUGH: In other words,  
3 the clear statement requires using the word  
4 "jurisdiction." Once you've used that, then  
5 just -- you've cleared that hurdle and then you  
6 go to the best reading. Maybe I'm wrong.

7 MR. BOND: So I think there are two  
8 separate things going on. You know, one is,  
9 when we're trying to figure out whether a  
10 particular requirement is jurisdictional in a  
11 statute that expressly addresses jurisdiction,  
12 I don't think we continue to apply the clear  
13 statement rule at every single requirement.

14 JUSTICE KAVANAUGH: That's what I  
15 thought.

16 MR. BOND: Yeah, that's right. But I  
17 think the -- the thing I was saying in response  
18 to Justice Barrett is how do we know whether  
19 something is clear. And I think it's like any  
20 other context where you've -- like in Chevron  
21 or something else, where we apply all the  
22 interpretive tools before we conclude it's  
23 ambiguous or not.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett? No?

2 Thank you, counsel.

3 Rebuttal, Ms. Sherry?

4 REBUTTAL ARGUMENT OF MELISSA ARBUS SHERRY

5 ON BEHALF OF THE PETITIONER

6 MS. SHERRY: Thank you. Let me try to  
7 make three points.

8 First, with respect to the clear  
9 statement rule, I think the Commissioner's view  
10 of the clear statement rule is inconsistent  
11 with how this Court applies it in other  
12 contexts, and it would undermine it in other  
13 contexts.

14 FAA versus Cooper says, number one, to  
15 the point that was just made, it's not that you  
16 just apply it at the threshold, whether there's  
17 a waiver of sovereign immunity. You apply it  
18 to actually decide the scope question. And  
19 that's really what we're talking about here.  
20 It's a jurisdiction-conferring provision. What  
21 is the scope of that jurisdiction? It's the  
22 exact same question the Court was asking in FAA  
23 versus Cooper, and it has to apply in the same  
24 way.

25 As far as whether Congress is thinking

1 about this, and we don't know what Congress's  
2 preference is, we think that means that we have  
3 to win on this because, as the Court said in  
4 Henderson, this Court has a preference to treat  
5 time limits like claim-processing rules. If  
6 Congress has a different preference and  
7 actually thinks about it, then Congress has to  
8 speak clearly, and it hasn't done so here.

9 As far as (e)(1) goes, a few points on  
10 that. Number one, it is very much the tail  
11 wagging the dog. We think "timely" absolutely  
12 has the interpretation we give it, which is it  
13 includes equitable tolling. Look no further  
14 than this Court's decision in Artis, which said  
15 that tolling is pausing, it's stopping the  
16 clock. Even the dissent that disagreed with  
17 that with respect to that statute said in  
18 Footnote 10 that is how we understand equitable  
19 tolling. So we think that answers it, and  
20 there's no incongruity at all.

21 But the other thing I think is worth  
22 looking at is the first sentence in (e)(1).  
23 That's the one that tells the IRS that it can't  
24 collect. And that is not tied at all to  
25 whether or not a petition is timely. As soon

1 as any petition is filed, there's an appeal  
2 pending. Then the IRS cannot levy during that  
3 period of time.

4 And then, Justice Sotomayor, to your  
5 point, you know, does that mean that the final  
6 sentence means nothing, the final sentence is  
7 there to say that a taxpayer can't go to the  
8 Tax Court and has to go to another court before  
9 there's an appeal in the Tax Court. And so, to  
10 the extent the IRS levies while a CDP hearing  
11 is happening before the Office of Appeals, that  
12 taxpayer has to go to district court.

13 So the final sentence, understood our  
14 way, makes complete sense. What Congress was  
15 saying is that when you have an appeal that the  
16 Tax Court is actually going to adjudicate on  
17 the merits, you can go to Tax Court.  
18 Otherwise, you have other courts that are  
19 available to you.

20 As far as administrability goes, you  
21 know, the idea that the -- you know, that this  
22 certainty exists in the real world, I think, is  
23 more a myth than anything. I heard for the  
24 first time that there is a list of, you know,  
25 combat zones and that they know what every

1 taxpayer is doing. I think that narrows those  
2 exceptions.

3 I mean, it's not just those who are  
4 serving in combat zones. It's a person  
5 affected by a terrorist action. It covers a  
6 relief worker assisting a disaster area. The  
7 list goes on and on.

8 And it's not just those exceptions.  
9 There's a mailbox rule. There's other  
10 instances in which the 30 days are going to  
11 come and go, and the IRS is not going to know  
12 whether a petition may ultimately be accepted  
13 as timely.

14 And administrability concerns, more  
15 generally, to the number of cases, this looks  
16 nothing like the refund actions that were at  
17 issue in Brockamp, where there were 90 million  
18 refunds that the IRS had to deal with. There  
19 are about 1200 cases that are petitioned to the  
20 Tax Court. And I know they said -- I forgot  
21 what the number was, but however many are  
22 dismissed right now for lack of jurisdiction,  
23 that's not just because they weren't filed  
24 within 30 days. There's a number of other  
25 reasons why those cases are dismissed for lack



1 of jurisdiction.

2 And before the Eighth Circuit, the IRS  
3 said we just don't know the numbers of how many  
4 are dismissed because of timeliness when we're  
5 dealing with a pro se or a low-income taxpayer.

6 And to get back to Congress's intent  
7 here and to Henderson specifically, they say --  
8 you know, the Commissioner says that 30 days,  
9 it was meant to be very, very short and quick.  
10 The same argument was made in Henderson and  
11 rejected. The argument there was, before this  
12 legislation was passed, there was absolutely no  
13 judicial review at all. And so the government  
14 argued, well, yeah, they gave you judicial  
15 review, but they meant it to be strict and  
16 jurisdictional. And the Court rejected that  
17 argument there because it was veteran-friendly  
18 legislation. The same is true here. It was  
19 intended to protect the taxpayer.

20 If Congress wanted it to be especially  
21 fast, it would have put in other deadlines to  
22 require a CDP hearing to be heard in a  
23 particular period of time, a determination to  
24 be made. Instead -- I think we talked about  
25 (d)(3) earlier -- it says that the Office of

1 Appeals retains jurisdiction with respect to  
2 the determination.

3 This is an iterative process. There  
4 is a back and forth. And in the end, it's  
5 about providing equity to the taxpayer.

6 The amicus briefs are replete with  
7 examples of individuals who did not get their  
8 day in court because the Tax Court deemed this  
9 deadline to be jurisdictional and not subject  
10 to equitable tolling. Ms. Castillo's case is  
11 currently pending in the Second Circuit. It is  
12 a perfect example of why this Congress who  
13 passed this statute would not have wanted this  
14 to be the rare and harsh jurisdictional  
15 deadline.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, at 11:08 a.m., the case  
20 was submitted.)

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