Nos. 17-55115 & 17-55354

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HOWARD L. BALDWIN; KAREN BALDWIN,

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Statutes:

Statutes (continued): **Page(s)**

Rules:

Regulations:

Other Authorities: **Page(s)**

GLOSSARY

Abbreviation	Definition
Doc.	Document filed in the district court
ER	Excerpts of Record
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service

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STATEMENT OF JURISDICTION

Howard L. and Karen Baldwin (taxpayers) paid their 2005 income tax liability of $170,951. (ER 6.) Taxpayers later claimed a net operating loss of $167,663 for 2007 and eventually attempted to carry that loss back and apply it to their 2005 tax liability. (ER 6-7.) Under Section 6511(d)(2) of the Internal Revenue Code of 1986 (I.R.C.) (26 U.S.C.), the due date for the amended 2005 tax return claiming the net operating loss carryback was October 15, 2011 (three years from the extended due date for taxpayers' 2007 tax return). (ER 6-7.) On August 12, 2013, the IRS denied as untimely an amended 2005 tax return it received on July 13, 2013, which sought a refund of $167,663 based on the net operating loss carryback. (ER 7, 199, 202.) Taxpayers then commenced this action.

As discussed below, the district court lacked jurisdiction of this action under 28 U.S.C. § 1346(a) because taxpayers' refund claim was not timely filed with the IRS, and a timely claim for refund is a jurisdictional prerequisite to a refund suit.

On December 7, 2016, the district court entered a judgment in favor of taxpayers, and against the United States, for $167,663 plus statutory interest. (ER 10-11.) On January 24, 2017, the district court awarded taxpayers $25,515 in litigation costs. (ER 15.) The United States appealed the judgment on January 30, 2017, and the order awarding litigation expenses on March 17, 2017. (ER 189, 192.) These appeals are timely. *See* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court thus has jurisdiction over these appeals under 28 U.S.C § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in ruling that Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference, and thus erred in determining that the taxpayers' refund claim was timely filed when the IRS never received it.

2. Whether the district court erred in concluding that taxpayers demonstrated that they are entitled to the net operating loss upon which their tax refund claim was based.

3. Whether the district court erred in awarding litigation costs to taxpayers under I.R.C. § 7430.

APPLICABLE STATUTES AND REGULATIONS

The statutes and regulation relevant to the disposition of these appeals are included as an addendum to this brief. *See* Fed. R. App. P. 28(f); 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Overview of the case and proceedings below

Taxpayers filed suit in the district court seeking to recover an income tax refund of $167,663 for 2005 based on a net operating loss carryback from 2007. (ER 6-7.) The key issue in the case was the validity of the Treasury Department's interpretation of I.R.C. § 7502—

the statute that establishes the rules for determining whether and when a tax return or other document is filed by the taxpayer.

The applicable regulation interprets I.R.C. § 7502 to delineate the "exclusive means" by which a taxpayer may establish delivery (and thus filing) of a document: "direct proof of actual delivery" or "proof of proper use of registered or certified mail, and proper use of a duly designated [private delivery service]." Treas. Reg. § 301.7502-1(e)(2). This regulation was enacted to resolve a circuit split over whether I.R.C. § 7502 supplanted the common law mailbox rule, under which evidence of proper and timely mailing of a document raises a rebuttable presumption of receipt. The regulation interprets I.R.C. § 7502 as supplanting the common-law mailbox rule.

Taxpayers nonetheless sought to employ the common-law mailbox rule to establish timely filing of their amended 2005 tax return. (ER 6.) To that end, taxpayers offered the testimony of an assistant who claimed to have mailed the return by regular mail several months before it was due. (ER 6.)

The United States moved for summary judgment and argued that the district court lacked jurisdiction over the case. The Government contended that applicable law (*i.e.*, I.R.C. § 7502 and Treas. Reg. § 301.7502-1(e)(2)) barred taxpayers' invocation of the common-law mailbox rule to establish timely filing of the amended 2005 tax return requesting a refund. (Doc. 32 at 10.) The United States also contended that the regulation appropriately interprets I.R.C. § 7502 and is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). (Doc. 27 at 7-10; Doc. 32 at 2-10.). The United States thus argued that taxpayers could not establish timely filing of the refund request and that the refund suit must be dismissed. (*Id.*)

But the district court declined to apply Treas. Reg. § 301.7502-1(e)(2) and concluded that the regulation did not warrant *Chevron* deference. (ER 2-5.) So, after summarily overruling the United States' evidentiary objections (ER 112), the district court held a nonjury trial (ER 113-187). In its post-trial opinion, the court determined, among other things, (1) that the testimony of taxpayers' assistant established timely filing of their refund claim, and (2) that taxpayers had established sufficient losses from Baldwin Entertainment Group LTD, their movie production company, and a sufficient tax basis therein to give rise to the net operating loss carryback that was the basis for their 2005 refund claim. (ER 7-8.) Subsequently, the court awarded taxpayers litigation costs of $25,515. (ER 15.)

B. Legal Background

In the administration of the tax laws, it is often important to determine whether and when a particular tax return or other document was filed by the taxpayer. Section 7502 of the Internal Revenue Code establishes a set of rules for answering these questions. Section 7502(a)(1) provides that, if the IRS receives a document sent by U.S. mail, the postmark date (rather than the date of receipt) will be treated as the filing date. Section 7502(c)(1) provides that, for documents sent by registered mail, registration will be prima facie evidence of actual delivery, and the registration date will be treated as the postmark date, and thus as the filing date. Sections 7502(c)(2) and 7502(f)(3) authorize the Secretary of the Treasury to promulgate regulations establishing a similar rule for documents sent by certified mail, electronic mail, or private delivery service.

Because courts interpreting I.R.C. § 7502 have differed on the question whether the statute precludes application of the common-law mailbox rule, under which proof that something was placed in the mail creates a rebuttable presumption of delivery, the Department of Treasury amended the applicable regulation to make clear that the I.R.C. § 7502's specified means of establishing the fact and time of filing are exclusive. 76 Fed. Reg. 52561-01 (Aug. 23, 2011). That regulation provides:

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

Treas. Reg. § 301.7502-1(e)(2)(i). The regulation was amended on August 23, 2011, but the amendment was made applicable to "all documents mailed after September 21, 2004." 76 Fed. Reg. 52561-01 (Aug. 23, 2011); Treas. Reg. § 301.7502-1(g)(4).

C. Facts: taxpayers' claimed net operating loss carryback

Taxpayer Howard Baldwin is the president and sole shareholder of a movie production business called Baldwin Entertainment Group. (ER 22.) Taxpayer Karen Baldwin is married to Howard and also worked for Baldwin Entertainment Group from 2003 to 2007. (ER 31-32.) In 2005 and 2007, the tax years at issue here, Howard and Karen filed joint tax returns. (ER 23, 27-28.)

Taxpayers' 2007 tax return reported a net operating loss of $2,569,969. (ER 29.) This reported loss was principally based on movie projects that were written off as of December 31, 2007. (ER 129.) Taxpayers' movie production company had acquired movie rights to books, movie scripts, and other movie development rights, and it developed this intellectual property to ready it for producing movies. (ER 138-40.) The costs to acquire and develop movie projects were capitalized. (ER 26.) The movie rights that the Baldwin Entertainment Group acquired had expiration dates, at which time the property rights would revert back to the original owner if the movie was not produced or the rights were not extended. (ER 141-42.) According to accounting records, several movie projects taxpayers had purchased the rights for, and invested in, expired in 2007. (ER 24, 236-37.) Others allegedly expired either in 2005 or 2006. (ER 24, 236-37.) Taxpayers asserted that they continued to negotiate renewal of the legal rights to projects that expired in 2005 and 2006 into 2007. (Doc. 59 at 8; ER 154-55.) But taxpayers conceded that, once the legal rights expired, the company had no right to make a movie. (ER 148.)

Taxpayers planned to carry back the 2007 net operating loss to the 2005 tax year in order to offset their 2005 tax liability. *See* I.R.C. §§ 172 & 6511(d)(2)(A). Taxpayers' initial 2005 tax return reported a tax due of $170,951, which taxpayers paid. (ER 6.) In order to offset this tax liability against the 2007 net operating loss, taxpayers had to file an amended 2005 tax return by October 15, 2011—three years from the extended due date for their 2007 tax return. *See* I.R.C. § 6511(d)(2)(A).

Taxpayers contend that their amended 2005 tax return was mailed on June 21, 2011, several months before it was due. According to taxpayers, they received the amended 2005 tax return from their return preparer on June 21, 2011. (ER 35.) Taxpayers allegedly signed the amended 2005 return and gave it to their employee, Nicholas Ruta, who, in turn, gave it to another employee, Ryan Wuerfal. (ER 23, 35-36, 126-27.) Wuerfal asserted that on June 21, 2011, he received the amended return from Ruta, put it in an envelope addressed to the IRS and containing the proper postage, and placed it in the mail at the post office in Hartford, Connecticut. (ER 21, 218-24.)

The IRS never received this amended 2005 tax return, and has no record of receiving any other amended 2005 tax return claiming a refund before the October 15, 2011 due date. (ER 17.) According to its records, the IRS only received taxpayers' amended 2005 tax return on July 26, 2013, more than 21 months after its due date. (ER 199, 202.) That amended return claimed a refund of $167,663 based on the 2007 net operating loss. (ER 7.) The IRS promptly denied that refund claim as untimely. (ER 199, 202.) Taxpayers objected to the denial, but the IRS appeals office determined that there was no basis to allow any part of taxpayers' claim. (ER 199-200, 203.)

Taxpayers then filed this refund suit in the district court.

D. Proceedings before the district court

The Government moved for summary judgment. It contended that the amended return allegedly mailed on June 21, 2011, was not received by the IRS by October 15, 2011, as required, and that taxpayers' evidence of timely mailing the amended return was inadmissible under Treas. Reg. § 301.7502-1(e)(2), which disallowed use of the common-law mailbox rule to prove timely filing. (Doc. 27 at 1-5.) The Government urged the district court to defer to the regulation under *Chevron* because the statute, I.R.C. § 7502, did not directly address whether the common-law mailbox rule is foreclosed and the regulation reasonably filled that gap. (Doc. 27 at 6-8.)

Taxpayers, in addition to contending that the regulation was inapplicable, argued that it was not entitled to *Chevron* deference because it conflicts with this Court's interpretation of I.R.C. § 7502 in *Anderson v. United States,* 966 F.2d 487 (9th Cir. 1992). (Doc. 29 at 4-9.)

The district court held the regulation invalid and thus denied summary judgment. According to the court, the regulation failed *Chevron*'s first step because I.R.C. § 7502 was neither explicitly nor implicitly ambiguous, and thus a regulation was unwarranted. (ER 3-4.) The court added that the regulation "materially alters an otherwise clear statute," which in its view was enacted "to alleviate the hardship of postal service malfunctions by giving taxpayers a means to *conclusively* establish a receipt of the return," not "to foreclose other evidentiary means that might assist in establishing a presumption of delivery." (ER 4 (emphasis in original).) The court also ruled that taxpayers had provided sufficient evidence to show a triable issue of material fact with respect to the timely filing of their refund claim. (ER 4-5.)

The district court then scheduled a nonjury trial. In advance of the trial the Government filed written objections to various statements contained in the declarations taxpayers submitted with respect to the claimed net operating loss. (ER 46-101.) The Government objected that statements in the declarations about the contents of documents not in evidence violated the best evidence rule (Fed. R. Evid. 1001-1003), which requires that a document, such as a contract, be offered to prove its contents. (ER 78, 87-91.) The Government contended that the expiration dates of taxpayers' movie rights should be proved via the documents (*i.e.*, the contracts) themselves. (*Id.*) The district court overruled these evidentiary objections without explanation. (ER 8, 110-12.)

At trial, taxpayers' employee, Nicholas Ruta, testified about the mailing of the amended 2005 tax return. He stated that he turned the tax return over to another Baldwin Entertainment Group employee for mailing. (ER 127, 129.) He also testified that he oversaw accounting for Baldwin Entertainment Group, but did not himself record taxpayers' business expenses. (ER 127-29.)

Taxpayer Howard Baldwin testified about the net operating loss deduction. He explained that a significant part of his business involved incurring costs to develop movie projects that do not ultimately come to fruition and that, because of market conditions, he took a break from the movie business in 2007. (ER 139-40, 142.) He also explained that when an option contract for particular movie project expires, the project is worthless unless a new contract is ratified. (ER 148.) And he conceded that particular projects that were written off in 2007 had expired in previous years. (ER 152 (explaining, for example, that, for the Phantom project, "in 2006 everything was off" and they "didn't do work on it in 2007"); *see also* ER 154, 236-37.)

In its post-trial opinion, the district court ruled that taxpayers' 2005 amended tax return was timely filed. It found that taxpayers' employee Ryan Wuerfel "mailed the [2005] Amended Return to the IRS via regular mail at the Hartford post office." (ER 7.) It then applied the common-law mailbox rule to determine that the evidence that the return was mailed entitled taxpayers to a presumption of delivery, and that "[t]he Government failed to rebut this presumption." (ER 8.)

The district court also found that taxpayers "had sufficient losses from Baldwin Entertainment Group LTD included on their 2007 Return to entitle them to a refund in the amount of $167,663 when carried back to tax year 2005." (ER 7.) The court did not make any findings regarding either the worthlessness or abandonment of the assets (*i.e.*, movie projects) that gave rise to the claimed losses.[1]

Taxpayer then sought litigation costs under I.R.C. § 7430. (ER 11.) The Government opposed an award of litigation costs on the ground that its litigating position was substantially justified. (ER 12.) The district court held that the Government's litigating position was substantially justified until the court denied the Government's motion for summary judgment. (ER 14.) The court concluded, however, that the Government's position was thereafter unreasonable and awarded

[1] The district court also rejected the Government's argument that taxpayers' mailing the amended 2005 tax return to the wrong IRS address is fatal to their refund claim. (ER 8.) The Government does not challenge that ruling in this appeal.

taxpayers $25,515 in litigation costs incurred after its denial of summary judgment. (ER 14-15.)

SUMMARY OF ARGUMENT

The timely filing of a claim for refund is a jurisdictional requirement in a refund suit. Here, taxpayers' contention that their refund claim was timely depends wholly on their invocation of the common-law mailbox rule, under which courts may consider circumstantial evidence of timely mailing to establish timely filing. But the applicable regulation, Treas. Reg. § 301.7502-1(e)(2)(i), expressly forecloses use of the common-law mailbox rule, and the district court's holding that the regulation is not entitled to *Chevron* deference is manifestly incorrect.

1. Treasury Regulation § 301.7502-1 was promulgated pursuant to I.R.C. § 7502, which provides that, for documents the IRS receives, the postmark date is considered the delivery date, and thus, the filing date. The statute also provides that, for documents sent by registered mail, a registration receipt may serve as evidence of both the fact and date of filing, and the statute allows Treasury to adopt regulations

authorizing similar exceptions for certified mail and other forms of delivery.

The statute contains a gap that the Treasury Department was entitled to fill with a reasonable regulation: the statute is silent on whether the common-law mailbox rule is foreclosed. The statute neither explicitly displaces the common-law mailbox rule, nor adopts it as an alternate method of proving delivery.

The regulation reasonably interprets the statute as supplanting the common-law mailbox rule. If the common-law mailbox rule continued to apply, it would run counter to the system I.R.C. § 7502 establishes, which uses objective indicia to determine the fact and date of delivery of tax documents. It would also violate the *expressio unis est exclusion alterius* canon of statutory construction, under which the provision of express exceptions to a general rule counsels against further implied exceptions.

Additional factors also support *Chevron* deference. The circuit split of authority that led to the regulation is itself strong evidence that there is more than one reasonable interpretation of the statute's effect on the common-law mailbox rule. It is highly unlikely that numerous federal judges would arrive at conflicting interpretations of an issue directly addressed by a statute and regarding which there is just one clear answer. Likewise, the inconsistent treatment of taxpayers that would surely result if the common-law mailbox rule applied, because of courts' varying credibility determinations, is yet another factor supporting *Chevron* deference. Finally, and not surprisingly, the other district courts that have addressed the issue have deferred to the regulation.

This Court's decision in *Anderson v. United States,* 966 F.2d 487 (9th Cir. 1992), prior to the regulation's issuance, to allow reliance on the common-law mailbox rule presents no impediment to *Chevron* deference. That decision expressly recognized that the statute does not clearly address the common-law mailbox rule's applicability and that courts of appeals had filled this gap in conflicting ways. *Id.* at 491. Under *Brand X*, *Anderson* would only be an impediment to *Chevron* deference if this Court had concluded that its construction of the statute followed from the statute's unambiguous terms and thus that there was no room for agency discretion. *Anderson*, quite explicitly, did not so conclude.

2. Even if this Court were to hold that the regulation is invalid and that timeliness may be established via the common-law mailbox rule, it should reverse on the merits because taxpayers did not produce any admissible evidence supporting their claimed abandonment of the movie rights. Taxpayers' claimed entitlement to the net operating loss deduction in 2007 depended largely on proof of the expiration of rights to various movie projects in 2007. But the contracts showing the date of expiration of these rights were not introduced into evidence. Instead, taxpayers relied on secondary evidence, *e.g.*, the corporation's financial books, which contain a two-page list of movie projects allegedly expiring in 2005, 2006, or 2007 and that were written off as of December 31, 2007. The introduction of these records violated the best evidence rule, and the district court abused its discretion in allowing these records to be used to prove the truth of their contents. Without the inadmissible secondary evidence, there was no evidence that supported taxpayers' claim that certain movie rights expired in 2007.

The supposed cessation in 2007 of efforts to renew movie projects that expired in previous years also fails to support the net operating loss deduction because taxpayers presented no objective evidence observable to outsiders revealing such cessation. Instead, they relied on their own self-serving declarations, which are insufficient as a matter of law to establish an abandonment loss.

3. Finally, if this Court accepts either of the above arguments, the United States will be the prevailing party and the district court's award of litigation costs also must be reversed.

ARGUMENT

I

The district court lacked jurisdiction over this refund suit because taxpayers failed to file a timely claim for refund

Standard of review

This Court reviews "a district court decision regarding subject matter jurisdiction de novo." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 861 (9th Cir. 2017) (citation omitted). As explained below, this Court defers, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to agency regulations that reasonably construe a statute the agency enforces. The question whether a regulation's construction of a statute is permissible "is a question of law reviewed de novo." *Bona v. Gonzales*, 425 F.3d 663, 668 (9th Cir. 2005).

A. Introduction

The United States, as sovereign, may not be sued without its consent, and the terms of its consent define the court's jurisdiction. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Dalm*, 494 U.S. 596, 608 (1990). A limited waiver of sovereign immunity is found in 28 U.S.C. § 1346(a)(1) for suits in the federal courts for the recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected. I.R.C. § 7422(a), however, provides in pertinent part that "[n]o suit [for refund] . . . shall be maintained in any court . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." Section 6511(d)(2)(A) requires a claim for refund of tax overpayment attributable to a net operating loss to be filed within three years of the due date for the return in which the net operating loss is reported.

The first, and dispositive, question in this appeal is whether taxpayers' refund claim was timely. If not, the district court lacked jurisdiction because timely filing of a claim for refund is a jurisdictional requirement in a refund suit. *See Dalm*, 494 U.S. at 609 ("For the

District Court to have jurisdiction over her suit for refund, Dalm was required to file a claim for refund of the tax within three years of the time the gift tax return was filed or two years of the time the tax was paid, whichever period expires later."); *Imperial Plan, Inc. v. United States*, 95 F.3d 25, 26 (9th Cir. 1996) ("A timely claim is a jurisdictional prerequisite to an action for recovery of taxes paid") (citation omitted).

Here, three key undisputed facts establish that taxpayers' refund claim was *not* timely under the governing law. First, taxpayers' refund claim, *i.e.*, the amended 2005 return, was due on October 15, 2011. (ER 7.) *See* I.R.C. § 6511(d)(2)(A). Second, the IRS has no record of receiving taxpayers' refund claim by that date. (ER 17.) And third, taxpayers cannot produce a registered mail receipt, or any of the other modes of proof required by I.R.C. § 7502, to show that they mailed the refund claim before its October 15, 2011 due date.

Boxed in by these facts, taxpayers resort to the common-law mailbox rule, which generally allows reliance on testimonial and circumstantial evidence that something was placed in the mail to establish presumptively both the timing and fact of delivery. *See Anderson v. United States,* 966 F.2d 487, 491-92 (9th Cir. 1992). They rely on the testimony of a former assistant who claims to recall mailing the refund claim on June 21, 2011. Such evidence, however, is expressly foreclosed by the relevant regulation. *See* Treas. Reg. § 301.7502-1(e)(2)(i). Thus, this refund suit can go forward only if that regulation is ruled invalid. But though they prevailed below, taxpayers' arguments for invalidating the regulation, as well as the district court's reasons for doing so, are unconvincing. As discussed below, the district court should have deferred to the regulation under *Chevron*.

B. Treas. Reg. § 301.7502-1(e) warrants *Chevron* deference

Before the enactment of I.R.C. § 7502 in 1954, it was well established that, to satisfy filing requirements, tax documents not only had to be actually received by the IRS, but also had to be timely received. *See United States v. Lombardo*, 241 U.S. 73, 76 (1916). Under the physical-delivery rule, a document that was timely mailed but not timely received was not treated as having been timely filed. *Phinney v. Bank of SW. Nat'l Assn., Houston*, 335 F.2d 266, 268 (5th Cir. 1964). *Accord Anderson*, 966 F.2d at 490 ("The physical delivery rule . . . required that tax documents must be physically received by the IRS on time to be timely filed" and "left taxpayers vulnerable to postal service malfunctioning.”). Nevertheless, some courts departed from this physical-delivery rule and applied the common-law mailbox rule. *See, e.g., Detroit Auto. Prods. Corp. v. Commissioner*, 203 F.2d 785 (6th Cir. 1953); *Arkansas Motor Coaches Ltd. v. Commissioner*, 198 F.2d 189 (8th Cir. 1952).

Against this background, in 1954 Congress enacted Section 7502 to establish a uniform rule that would alleviate the harshness of the physical-delivery requirement. *See* H.R. Rep. No. 83-1337, at A434-35 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4583; S. Rep. No. 83-1622, at 615 (1954), *reprinted in* 1984 U.S.C.C.A.N. 4621, 5266; *Anderson*, 966 F.2d at 490. Section 7502(a)(1) treats timely mailing as timely filing. That is, if a document required to be filed (or payment required to be made) is received after, but postmarked before, a date prescribed under the internal revenue laws, the postmarked date shall be deemed to be the date of delivery (or date of payment). In order for Section 7502(a)(1) to apply, however, the document or payment must have been actually delivered by the United States Postal Service to the agency, officer, or office with which the document (or payment) was required to be filed.

Section 7502(c)(1) contains the second exception to the physical-delivery rule. It provides that if a document or payment is sent by U.S. registered mail, such registration shall be prima facie evidence that the document was actually delivered, and the date of registration shall be deemed the postmark date. Section 7502(c)(2) authorizes the Secretary of Treasury "to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing." Section 7502(f)(3) authorizes the Secretary to "provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail."[2]

After the adoption of I.R.C. § 7502, the courts of appeals split on the question whether the exceptions to physical delivery contained in § 7502 are the exclusive exceptions to the physical-delivery rule and whether the common-law mailbox rule still applies. The Second and

[2] Section 7502(f) was added to the Code in 1996 by the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452, § 1210.

Sixth Circuit held that I.R.C. § 7502 preempts the common law mailbox rule. *See Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986). The Eighth Circuit and this Court, on the other hand, held that § 7502 does not displace the common law mailbox rule. *See Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir. 1990); *Anderson*, 966 F.2d at 491. Subsequently, in *Sorrentino v. Internal Revenue Service*, 383 F.3d 1187 (10th Cir. 2004), a Tenth Circuit panel issued three different opinions on the question whether § 7502 supplanted the common-law mailbox rule—one for, one against, and one carving out a middle position.

Faced with these disparate holdings, Treas. Reg. § 301.7502-1(e) was amended in 2011 to clarify that I.R.C. § 7502 provides the exclusive means to prove that a document was delivered. *See* T.D. 9543, 2011-2 C.B. 470. Treasury Regulation § 301.7502-1(e)(2)(i) provides:

> Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated [private delivery service] . . . , are *the exclusive means* to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed.

(Emphasis added). It then emphasizes this point, stating that "[n]o other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered." *Id.* The regulation thus bars consideration of the testimony of taxpayers' former assistant who claimed he mailed the amended 2005 return before its due date.

Chevron established a two-step procedure for determining the validity of an agency's statutory construction:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted). *See also Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246 (9th Cir. 2013). In other words, "it is for agencies, not courts, to fill statutory gaps." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

As discussed below, Treas. Reg. § 301.7502-1(e)(2)(i) is valid under *Chevron*.

1. I.R.C. § 7502 contains a gap that the Treasury Department was entitled to fill with a reasonable regulation

Section 7502 establishes rules that allow tax documents to be considered timely filed, under certain conditions, even though they are received late or not at all. Section 7502(a)(1) provides that when tax documents are received after they are due, the postmark date will be treated as the date of delivery, *i.e.*, as the filing date:

> 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 . . . 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 . . . shall be deemed to be the date of delivery or the date of payment, as the case may be.

I.R.C. § 7502(a)(1).

Section 7502(c)(1) establishes that, for tax documents sent by registered mail, the registration is evidence of delivery and that the registration date is treated as the postmark date, and thus the filing date:

> [I]f any return, claim, statement, or other document, or payment, is sent by United States registered mail—

> **(A)** such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and
>
> **(B)** the date of registration shall be deemed the postmark date.

The statute authorizes similar presumption-of-delivery rules to be established by regulation for certified mail, for electronic filing, and for private delivery services. I.R.C. §§ 7502(c)(2) & (f)(3). And the Treasury Department has enacted such rules. *See* Treas. Reg. § 301.7502-1(e)(2)

Section 7502 is silent on the question presented here: if the IRS did not actually receive a tax document, can a taxpayer who chose to send a tax document by regular mail establish a prima facie case that a tax document was delivered? In other words, I.R.C. § 7502 contains a gap on the question of the common-law mailbox rule's applicability; the statute neither explicitly displaces the common-law mailbox rule, nor adopts it as an alternative method of proving delivery. And because the statute does not directly and precisely address the common-law mailbox rule's viability, step one of the *Chevron* test is met.

The district court's contrary conclusion is unsupportable. The district court misconstrued *Chevron*, concluding that implicit statutory authorization for an agency to adopt a regulation is present only "where Congress remains silent as to the definition of a statutory term." (ER 4). In reality, *Chevron* applies more broadly. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) ("[A] statute's *silence or ambiguity as to a particular issue* means that Congress has . . . likely delegat[ed] gap-filling power to the agency[.]") (emphasis added; internal quotation marks omitted). The only support the district court offered for its overly narrow construction of *Chevron* was the observation that *Chevron* itself and *Brand X* involved the interpretation of undefined statutory terms. (ER 4.)

But that is just happenstance. An undefined term is merely one reason among many that a statute may contain a gap that the agency administering the statute can appropriately fill. This Court has often applied *Chevron* in situations in which a statute contains a gap for some other reason. *See, e.g., Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512 (9th Cir. 2012) (deferring, under *Chevron*, to a regulation that filled a gap by making clear which of two statutory provisions should take precedence); *Schneider v. Chertoff*, 450 F.3d 944, 960 (9th Cir. 2006) (concluding that statutory silence about what is required to demonstrate compliance with a statutory mandate constitutes a gap and deferring, under *Chevron*, to regulations that fill that gap). Moreover, Congress explicitly authorized the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code. I.R.C. § 7805(a). It did not restrict that authorization to supplying definitions for undefined statutory terms.

The district court's own description of I.R.C. § 7502 unwittingly confirms that the statute *does* contain a gap. In support of its determination that I.R.C. § 7502(c) should be read as merely creating a safe harbor for registered or certified mail, the district court stated that "there is no indication that [the statute] intended to foreclose other evidentiary means that might assist in establishing a presumption of delivery." (ER 4.) What the district court failed to apprehend is that the statute's silence on this critical point is itself a gap that the Treasury Department may appropriately fill. *See Oregon Restaurant and Lodging Ass'n v. Perez*, 918 F.3d 1080, 1088 (9th Cir. 2016) (explaining that "if a court holds that a statute does not prohibit conduct because it is silent, the court's ruling leaves room for agency discretion"). The district court *did not* conclude that I.R.C. § 7502 affirmatively requires application of the common-law mailbox rule.

Put simply, while the district court correctly concluded that the statute is silent on the common-law mailbox rule's applicability, it drew the wrong inference from the statute's silence. Its conclusion that the statute is silent on the issue of the common-law mailbox rule's viability should have led it to recognize that the statute does not speak directly and clearly to that issue and that the Department of the Treasury, therefore, could fill the gap with a reasonable regulation. *See Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (internal quotation marks omitted).

2. The regulation is a permissible construction of I.R.C. § 7502

When the common law fills a gap in a statutory scheme, the agency that administers the statute clearly may supersede the gap-filling presumption the common law supplies. *See United States v.*

Chestman, 947 F.2d 551, 558 (2d Cir. 1991) (rejecting the notion that the common-law definition of "fraud" cabined the SEC's authority to define that term via regulation); *Prussner v. United States*, 896 F.2d 218, 225 (7th Cir. 1990) (determining that while "common law supplementation of the tax code and regulations" can sometimes be appropriate, "a power of judicial supplementation should not be used to nullify valid regulations").

But the regulation also satisfies *Chevron*'s second step in a more direct way because the statute itself can reasonably be read as supplanting the common-law mailbox rule. The statute sets out a system of objective rules under which the questions whether and when a document is filed are determined by designated objective indicia. Regarding the date of delivery, the postmark is the primary objective indicia, but other indicia, such as the date of registration for a document sent by registered mail, or the date of certification for a document sent by certified mail, may act as substitutes. *See* I.R.C. §§ 7502(a)(1), (c) & (f).

In general, a postmark made by the United States Postal Service will bear the date an item was deposited in the mail. But there is a risk that an envelope containing a tax document may not be postmarked on the day it was deposited in the mail. *See* Treas. Reg. 301.7502-1(c)(1)(iii) (contemplating this possibility). Taxpayers can guard against this risk by using a substitute indicia of timely mailing, *e.g.*, registered or certified mail. *See* I.R.C. § 7502(c)(1)(B); Treas. Reg. § 301.7502-1(c)(2) ("[T]he risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail."). In other words, a tax document that is due on April 15 but postmarked April 16 is late *unless* the taxpayer produces a receipt for registered or certified mailing that shows that the document was deposited in the mail on April 15.

The system works in much the same way when it comes to establishing the fact of delivery. When a document is not received, the postmark is obviously unavailable. Thus, the authorized substitute objective indicia supply both evidence of the fact of delivery and of its timing. *See* I.R.C. § 7502(c)(1); Treas. Reg. § 301.7502-1(e)(2).

The common-law mailbox rule is directly at odds with I.R.C. § 7502's system of designated objective indicia for determining the fact and date of delivery of tax documents. *See Deutsch*, 599 F.2d at 46 (observing that I.R.C. § 7502 "demonstrate[s] a penchant for an easily applied, objective standard"). The common-law mailbox rule generally depends on testimonial and circumstantial evidence that something was placed in the mail to establish presumptively both the fact and timing of delivery. *See Anderson*, 966 F.2d at 491-92. Thus, because the common-law mailbox rule is not in harmony with I.R.C. § 7502, the Treasury Department reasonably concluded that, absent "direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated [private delivery service] . . . , are *the exclusive means* to establish prima facie evidence of delivery of a document . . . ." Treas. Reg. § 301.7502-1(e)(2)(i) (emphasis supplied).

The statutory canon of construction *expressio unius est exclusio alterius* provides additional support for this conclusion. As described above, § 7502 expressly creates a limited statutory mailbox rule by providing that particular objective indicia, such as a registered mail receipt, can supply evidence of the fact and date of delivery. *Anderson*, 966 F.2d at 490. That Congress expressly created a statutory exception to the physical-delivery rule strongly indicates that it did not intend there to be a further exception to that rule.

This Court has explained that when a statute creates an express exception to a general rule, "the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017); *see also Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("We have explained that [w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (internal quotation marks omitted). The correct inference in such a situation "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). This is particularly true concerning I.R.C. § 7502, since the very purpose of the statute was to create a set of exceptions to the requirement of actual delivery in circumstances where a tax document or payment is delivered late or not at all.

Moreover, courts should be especially reluctant to create an implied exception that would swallow up the express exception. In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the Supreme Court considered whether the general discovery rule—that a federal statute of limitations will not begin to run until an injury is discovered—applied in the face of statutory language that expressly set out, as an exception to the normal 2-year statute of limitations, a discovery rule applicable only in particular circumstances. 534 U.S. at 26-28. The Court determined that the *expressio unis* canon counseled against application of the general rule in the face of a more specific one. *Id.* at 28-29. It reasoned that "incorporating a general discovery rule into [the Fair Credit Reporting Act] would not merely supplement the explicit exception contrary to Congress' apparent intent; it would in practical effect render that exception entirely superfluous in all but the most unusual circumstances." *Id.* at 29.

So, too, here. If it remained applicable, the common-law mailbox rule would, as a practical matter, render the specific exceptions to physical delivery contained in I.R.C. § 7502 superfluous. For instance, under the common law mailbox rule, testimony that a tax document was mailed on a particular date could create a presumption that it was delivered. Thus, if the common-law mailbox rule applied, the objective indicia required by I.R.C. § 7502, *e.g.*, registered mailing or certified mailing, would be redundant because they would merely give taxpayers protection that they already had under the common law.

3. The judicial construction of I.R.C. § 7502 provides additional support for the conclusion that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

As discussed below, before the adoption of the regulation, there was a circuit split on the question whether I.R.C. § 7502 supplanted the common-law mailbox rule. This split of authority also supports *Chevron* deference. It is highly unlikely that numerous federal judges would reach conflicting interpretations of an issue if there were a statute that precisely addressed the matter and regarding which there was only one permissible construction. *See Chevron*, 467 U.S. at 842-43. In other words, where, as here, the federal courts of appeals have split on a question of statutory construction, that state of affairs is itself strong evidence that there is more than one reasonable interpretation of the statute.

The Second and Sixth Circuits construed I.R.C. § 7502 as supplanting the common-law mailbox rule. In *Deutsch*, the Second Circuit rejected taxpayer's attempt to resort to the mailbox rule to prove delivery and timeliness of his Tax Court petition, explaining that the statute "demonstrate[s] a penchant for an easily applied, objective standard." 599 F.2d at 46. In *Miller*, the Sixth Circuit likewise concluded that the exceptions to the physical delivery rule set out in I.R.C. § 7502 are exclusive and thus preclude reliance on the common-law mailbox rule. 784 F.2d at 731. *See also, e.g.*, *Martinez v. United States*, 101 Fed. Cl. 688, 692 (2012) ("[T]he Court of Federal Claims has consistently ruled that § 7502 provides the only exceptions [to the physical delivery rule].") (citing cases).

On the other side of the circuit split, a divided panel in the Eighth Circuit held that I.R.C. § 7502 does not supplant the common-law mailbox rule. In *Estate of Wood*, the Eighth Circuit concluded that, because I.R.C. § 7502 does not affirmatively indicate that it displaces the mailbox rule, the presumption should be that it does not. 909 F.2d at 1160. The court concluded that I.R.C. § 7502(c)'s express exception to the physical-delivery rule for certified and registered mail "is better read as a safe harbor" that does not exclude application of the common-law mailbox rule. *Id.* at 1161. This Court in *Anderson* (discussed below) reached the same conclusion for similar reasons.

Finally, the Tenth Circuit in *Sorrentino, supra,* p. 25, issued three different opinions on the question whether § 7502 supplanted the common-law mailbox rule.[3] If *Sorrentino* makes anything clear, it is that, before the regulation was issued, the question of the mailbox rule's viability was a close one. Indeed, Judge Baldock, delivering the Judgment of the Court and an Opinion, said "[a]s the case law illustrates, the question of what, if anything, remains of the common law mailbox rule after § 7502 is not easily answered." *Id.* at 1193 (footnote omitted).

In sum, two circuit courts of appeals—the Second and the Sixth—and two judges in other circuits—Judge Hartz concurring in *Sorrentino* and Chief Judge Lay dissenting in *Estate of Wood*—interpreted Section 7502 in the same way the Treasury Department interpreted it in Treas. Reg. § 301.7502-1(e). That fact decisively supports the regulation's reasonableness.

[3] Two years after *Sorrentino*, the Tenth Circuit, in an unpublished decision, stated that "[w]e have not yet decided whether § 7502 provides the exclusive method by which timely mailing can be proven," and described *Sorrentino* as "equivocal at best." *Crook v. Commissioner*, 173 F. App'x 653, 657 (10th Cir. 2006).

4. The inconsistent treatment of taxpayers that would result if the common-law mailbox rule were applicable further supports the conclusion that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

The approach reflected in the Treasury regulations should produce much greater uniformity of treatment among similarly situated taxpayers than is the case under the common-law mailbox rule. As even the district court recognized (ER 8), under the common-law mailbox rule, the presumption of delivery of a document placed in the mail is rebuttable. A district court faced with a document allegedly mailed but not received could conclude that, because the IRS's records are generally accurate and complete, its attestation that it has no record of receiving a particular document is sufficient to rebut the presumption of delivery that the evidence of mailing created.

A different district court might, as here, credit testimony presented by taxpayers of timely mailing. Still another district court might have discredited the testimony of taxpayers' former employee

Ryan Wuerfel about mailing the amended return based on his close relationship to taxpayers.[4]

So if the question before the district court is whether, in light of all the facts and circumstances, it is more likely than not that a particular item was delivered to the IRS, the court could resolve the issue either way and be affirmed on appeal under the clearly erroneous standard of review. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") Thus, under the common-law mailbox rule, similarly situated taxpayers will be treated differently because the same evidence of timely mailing will be accepted by some courts but rejected by others.

This is an unsatisfactory state of affairs in a legal regime where hundreds of millions of documents are mailed to the IRS each year, and the determination of whether the documents were actually delivered may have very significant practical consequences. The approach

[4] Wuerfal gave deposition testimony that he considers taxpayers as family, that "they were the best people to ever work for," that he considers taxpayer Howard Baldwin "probably the closest thing to a grampa that I have," and that he will "always be grateful" to taxpayers for giving him his first opportunity. (ER 215-18.)

reflected in the Treasury regulations, in addition to preventing taxpayer abuse, will produce greater uniformity of treatment among similarly situated taxpayers.

5. Other district courts have ruled that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

In light of the overwhelming evidence of the reasonableness of the regulation, it is not surprising that two recently decided district court cases have upheld its validity under *Chevron*. *See McBrady v. United States*, 167 F. Supp. 3d 1012, 1017 (D. Minn. 2016) ("perceiv[ing] no reason why it should not defer, under *Chevron* . . . to these regulations as reasonable interpretations of § 7502".); *Jacob v. United States*, No. 15-10895, 2016 WL 6441280 at *2 (E.D. Mich. Nov. 1, 2016) ("Given that Congress had expressly delegated to the Secretary of the Treasury the authority to regulate in this area, 26 U.S.C. § 7502(b), the court deems it appropriate to defer under *Chevron* . . . to the agency's reasonable interpretations of §7502.").

Indeed, the *McBrady* court upheld the regulation even though the Eighth Circuit, to which its decision was appealable, had, like this Court in *Anderson*, previously held that I.R.C. § 7502 does not supplant the common law mailbox rule. 167 F. Supp. 3d at 1017. The *McBrady* court correctly concluded that "in light of the regulations," the Eighth Circuit's decision in *Estate of Wood* was no longer "viable." *Id.*

6. This Court's prior construction of I.R.C. § 7502 in *Anderson* presents no impediment to deferring under *Chevron* to Treas. Reg. § 301.7502-1(e)(2)(i)

As noted above, this Court in *Anderson* embraced one of two competing interpretations of Section 7502, and that interpretation differs from the one subsequently adopted in Treas. Reg. § 301.7502-1(e)(2). But that fact does not affect the validity of the regulation.

Under *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. The Supreme Court explained that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's" and that "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." *Id.* at 982.

This Court has applied *Brand X* in several cases to uphold an agency interpretation of a statute even though that interpretation conflicted with one of this Court's prior decisions. *See, e.g., Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013); *Garfias-Rodriquez v. Holder*, 702 F.3d 504, 512 (9th Cir. 2012) (en banc); *Gonzales v. Department of Homeland Sec.*, 508 F.3d 1227, 1242 (9th Cir. 2007). In each case, this Court determined that its interpretation of the statute was not the only reasonable interpretation. *See, e.g., Managed Pharmacy Care*, 716 F.3d at 1246 (observing that "[a]lthough *Orthopaedic Hospital* [this Court's prior decision] was grounded in the language of the statute—as are all of our statutory interpretation cases—we did not hold that our view of [a particular statutory provision] represented the *only* reasonable interpretation of that statute"); *Gonzales*, 508 F.3d at 1237 (noting that "despite some language to the contrary, *Perez-Gonzalez* [this Court's prior decision] was based on a finding of statutory ambiguity that left room for agency discretion").

This Court should reach the same conclusion here. In *Anderson*, this Court did not indicate that it was interpreting unambiguous, gapless statutory language. Quite the contrary, in explaining why it declined to hold that § 7502 "displac[ed] the common law presumption of delivery," the court merely stated that "the statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule." 966 F.2d at 491. Of course, *Anderson* "was grounded in the language of the statute—as are all of [this Court's] statutory interpretation cases." *See Managed Pharmacy Care*, 716 F.3d at 1246. But *Anderson* nowhere suggests that the plain language of Section 7502 addresses the delivery-presumption question in a way that would foreclose either of the two competing interpretations. Nor did it identify anything in the statute that would prevent the Treasury Department from interpreting Section 7502 to supplant the common-law mailbox rule.

Instead, *Anderson*'s statutory analysis reflected an awareness that this Court was acting to fill a gap in the statute. *See, e.g., id.* at 490 ("[T]he language of section 7502 itself does not indicate that [§ 7502(c)] is the only exception to the statutory mailbox rule.").[5] This is not

[5] *Anderson* also invoked the statutory canon of construction that a new statute is presumed to be harmonious with existing law and its

surprising; in *Anderson*, this Court recognized that it was deciding a difficult statutory construction issue and that "other circuits ha[d] decided the matter differently." *Id.* at 491. This was hardly a situation in which this Court held (or even suggested) that its "view of [I.R.C. § 7502] represented the *only* reasonable interpretation of that statute." *Managed Pharmacy Care*, 716 F.3d at 1246. Thus, under *Brand X*, *Anderson* presents no impediment to applying *Chevron* deference to Treas. Reg. 301.7502-1(e)(2).

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judicial construction. *See* 966 F.2d at 491. But invocation of that canon does not indicate that the Court believed the statute lacks any gap that the Treasury Department can properly fill. To the contrary, it is when a statute is ambiguous, not when its meaning is plain, that canons of statutory construction are useful. *See, e.g., Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (explaining that application of a particular canon of statutory construction "simply informed the choice among plausible readings of [the statute's] text"); *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) (similar). *See also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("canons . . . are guides that need not be conclusive.") (citation and internal quotation marks omitted).

II

The district court erred in concluding that taxpayers demonstrated that they are entitled to the net operating loss deduction upon which their tax refund claim was based.

Standard of Review

An income tax deduction is a matter of legislative grace, and "the burden of clearly showing the right to the claimed deduction is on the taxpayer." *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992) (internal quotation marks omitted). This Court applies *de novo* review to questions of law, such as the legal requirements for demonstrating entitlement to a deduction under a particular provision of the internal revenue code. *Boise Cascade Corp. v. United States*, 329 F.3d 751, 754 (9th Cir. 2003). This Court reviews a district court's evidentiary rulings for abuse of discretion and will "reverse if the exercise of discretion is both erroneous and prejudicial." *Wagner v. County of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013).

A. Introduction

The loss taxpayers sought to deduct in 2005 is a net operating loss carryback from 2007. The Code provides that a net operating loss can be carried back to each of the two preceding taxable years and authorizes a net operating loss deduction from taxable income. I.R.C. § 172(a) & (b)(1)(A)(i). This case presents the question whether taxpayers demonstrated entitlement to a net operating loss for 2007.

A taxpayer may take a deduction for any loss sustained during the taxable year and not compensated for by insurance or otherwise. I.R.C. § 165(a). A deduction is allowed only in the taxable year in which the loss is sustained, as evidenced by closed and completed transactions and as fixed by identifiable events occurring in the taxable year. Treas. Reg. § 1.165-1(d)(1). The "identifiable event" must be observable to outsiders and constitute "some step which irrevocably cuts ties to the asset." *Corra Resources, Ltd. v. Commissioner*, 945 F.2d 224, 227 (7th Cir. 1991). As the Seventh Circuit explained:

> [A] taxpayer may not hedge bets at the Treasury's expense. . . . Until some observable event (the burning of a warehouse, the sinking of a ship, the sale or scrapping of inventory, the repudiation of a lease) marks the loss, the taxpayer may try to recharacterize the transaction. [Cases omitted.] Intra-corporate affairs (what Eatman said to Corra, what Corra said to Eatman, what either or both intended) do not generate signs visible to outside observers and therefore do not mark the crossing of the Rubicon.

Id. at 226 (opinion by Easterbrook, J.). The expiration of rights to a screenplay or other rights is an identifiable event evidencing a closed and completed transaction. *See Corra Resources*, 945 F.2d at 227 (I.R.C. § 165 loss was realized in 1986, the year the lease expired); Rev. Rul. 2004-58, 2004-1 C.B. at 1046 ("X may deduct X's adjusted basis in screenplay *b* under § 165(a) in 2007 because X's rights to screenplay *b* expired in that year.").

A deduction is permitted under I.R.C. § 165(a) on either of two alternative grounds: abandonment or worthlessness. *Echols v. Commissioner*, 935 F.2d 703, 707, *rehearing denied*, 950 F.2d 209 (5th Cir. 1991). As we demonstrate below, taxpayer produced no admissible evidence supporting abandonment, and their argument based on worthlessness is merely a rehash of their abandonment argument. The district court, therefore, erred as a matter of law in upholding that claimed deduction.

B. Taxpayers did not produce any admissible evidence supporting their claimed abandonment of the movie rights

Under Section 165, "[a]n abandonment loss" deduction "is proper if there is '(1) an intention on the part of the owner to abandon the asset, and (2) an affirmative act of abandonment.'" *Washington Mut., Inc. v.*

United States, 856 F.3d 711, 727 (9th Cir. 2017) (*quoting A.J. Indus., Inc. v. United States*, 503 F.2d 660, 670 (9th Cir. 1974)).

The affirmative act of abandonment must be observable to outsiders and constitute "some step that irrevocably cuts ties to the asset." *Corra Resources*, 945 F.2d at 226. "Merely abandoning . . . [properties] on paper because they are deemed worthless is insufficient to demonstrate abandonment for purposes of an I.R.C. § 165 loss deduction." *Gulf Oil Corp. v. Commissioner*, 914 F.2d 396, 402 (3d Cir. 1990) (disallowing deduction for abandonment of leases due to absence of an act, such as relinquishment of the lease or nonpayment of delay rentals, which would support claimed abandonment.). *See also A.J. Indus*, 503 F.2d at 670 ("The mere intention alone to abandon is not, nor is non-use alone, sufficient to accomplish abandonment.").

Here, taxpayers' net operating loss deduction for the 2007 tax year depended upon their claim that the legal rights to various movie projects, for which they had made capitalized expenditures, either expired in 2007, or expired in 2005 or 2006 but efforts to renew those rights were abandoned in 2007. These bases for taxpayers' abandonment loss fail as a matter of law. As demonstrated below, taxpayers failed to introduce admissible evidence that the movie projects they allege expired in 2007 actually did so. Further, as to movie projects that expired before 2007, taxpayers failed to introduce any evidence of an affirmative act of abandonment in 2007 of efforts to renew those movie projects.

1. Taxpayers' only evidence of the expiration of movie rights in 2007 violated the best evidence rule

According to the declarations of Howard Baldwin (Howard) and Karen Baldwin (Karen), the Baldwin Entertainment Group entered into legal agreements that assigned certain intellectual property to it with respect to all the movie projects in issue. (ER 24, 32.) But these contracts were not introduced into evidence. Instead, to prove that the movie rights had expired, taxpayers produced secondary evidence, *e.g.*, the financial records of the Baldwin Entertainment Group—the 2007 QuickBooks—which contains a two-page list of movie projects that allegedly expired in 2005, 2006, or 2007 and that were written off as of December 31, 2007, as well as amounts of the capitalized costs that were written off on a project-by-project basis. (ER 236-37.) Taxpayers also relied on their self-serving declarations concerning the years of expiration of certain movie rights. (*See, e.g.*, ER 23-26.)

The United States objected to taxpayers' unsupported assertions that their legal rights to particular movie projects expired in either 2005, 2006, or 2007. (ER 78, 87-91.) It argued that, if the assertion that the Baldwins' legal rights to particular movie projects expired in either 2005, 2006, or 2007 was based on documents, *i.e.*, on the contracts that defined the Baldwins' legal rights in those movie projects, those documents were "required to prove [their] contents." (ER 78; *see also* ER 87-91.) But those contracts were not placed in evidence. The district court abused its discretion in overruling the Government's objections.

Under the best evidence rule, production of the underlying contracts was required. The Federal Rules of Evidence require the production of "[a]n original writing . . . in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. A contract is one of the quintessential documents to which the best evidence rule applies. *See United States v. Diaz-Lopez*, 625 F.3d 1198, 1201 (9th Cir. 2010) ("'[P]resenting to a court the exact words of a writing is of more than average importance, particularly in the case of operative or dispositive instruments such as deeds, wills or contracts, where a slight variation of words may mean a great difference in rights.'") (quoting 2 George F. Dix *et al.*, *McCormick on Evidence* § 232 (6th ed. 2009)); *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1320 (9th Cir. 1986) (determining that drawings were covered by the best evidence rule because they were similar to contracts); *see also Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 222 (3d Cir. 2009) ("The best evidence rule clearly applied to . . . testimony regarding buy-out clauses contained in appellant's contracts."). Thus, the district court erred in overruling the Government's objections to taxpayers' secondary evidence concerning the expiration of movie rights when taxpayers did not produce the contracts concerning these rights.

This error was prejudicial. This Court has explained that it considers an erroneous admission of evidence that violates the best evidence rule "to be prejudicial unless it is more probable than not that the error did not materially affect the verdict." *United States v. Bennett*, 363 F.3d 947, 954 (9th Cir. 2004); *see also GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011) (explaining, in a civil case resolved after a bench trial, that this Court will reverse when "it is more probable than not" that an erroneous evidentiary ruling "tainted the outcome").

Here, there is little doubt that the inadmissible evidence concerning the expiration of taxpayers rights in various movie projects "tainted the outcome." *GCB Commc'ns*, 650 F.3d at 1262. The only evidence taxpayers produced to establish the essential expiration dates of the movie rights was inadmissible secondary evidence about the movie rights contracts, which were not in evidence. Without this evidence, there was no evidence that the movie rights in question expired in 2007.

2. With respect to movie rights allegedly expiring in 2005 and 2006, taxpayers presented no objective evidence, observable to outsiders, that they were attempting to renew these rights and abandoned the renewal attempts in 2007

The list of movie projects that taxpayers wrote off in 2007, and on which they base their net operating loss, included some projects that allegedly expired in 2005 or 2006. As to these projects, taxpayers contended that they were negotiating an extension of the legal rights into 2007, but that, sometime in 2007, they abandoned those efforts.[6] (*See, e.g.*, Doc. 59 at 8; ER 25.)

In support of their claimed abandonment of these projects, they relied exclusively on their own declarations. For example, Karen's declaration testimony was that "[w]e continued to negotiate to renew these legal rights into 2007, without success" and that "[i]n 2007, we decided to no longer pursue the renewal of these legal rights and these projects were discontinued." (ER 33.) Howard testified by declaration that he "authorized these write-offs because the legal rights to the projects had all expired without a successful extension of these rights in 2007, and Baldwin Entertainment Group Ltd. had discontinued these projects."[7] (ER 26-27.) But taxpayers' decision to cease attempting to

[6] Although taxpayers asserted in pretrial filings that they were seeking, in 2007, to renew the rights for movie projects that had previously expired, Howard admitted at trial that he no longer had an interest in the "Phantom" movie project, the legal rights to which expired in 2006. He stated that the Phantom project was not still alive after the legal rights expired in 2006 and that, as to that project, "in 2006 everything was off." (ER 152.) This testimony was inconsistent with his pre-trial declaration that an extension of rights on the Phantom project "was still being negotiated in 2007." (ER 25.)

[7] At trial, Howard testified that in 2007, "we just weren't able to sustain the company" financially because lending had dropped for independent movies. (ER 140.) Thus, in 2007, taxpayers "took a

renew the option contracts is not an identifiable event, observable to outsiders, that constitutes "some step which irrevocably cuts ties to the assets." *Corra Resources*, 945 F.2d at 227.

Had taxpayers sent letters to the parties owning the movie rights in which they stated that they abandoned any attempt to renew the expired rights, the letters likely would have constituted an identifiable event observable to outsiders. *See Corra Resources*, 945 F.2d at 227. *See also A.J. Indus.*, 503 F.2d at 674 (abandonment of taxpayer's gold mining venture occurred in 1957, when taxpayer executed a contract for salvage, which was a closed and completed transaction). The record, however, contains no correspondence evidencing taxpayers' alleged attempts to renew previously-expired movie rights, let alone correspondence from taxpayers discontinuing any such attempts. As the Seventh Circuit has stated, "Intra-corporate affairs (what Eatman said to Corra, what Corra said to Eatman, what either or both intended) do not generate signs visible to outside observers and therefore do not mark the crossing of the Rubicon." *Corra Resources*, 945 F.2d at 226.

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sabbatical" from the movie business and "headed back East and kind of put [their] old hockey hats on." (ER 142.)

Thus, because there was no evidence of an identifiable event in 2007 observable to outsiders demonstrating cessation of taxpayers' supposed efforts to renew previously-expired movie projects, the district court erred as a matter of law in upholding the net operating loss deduction.[8]

B. Taxpayers' argument that the movie rights were worthless merely rehashes their argument that the rights were abandoned

An I.R.C. § 165 deduction can sometimes be appropriate because assets have become worthless even if the asset is still in the possession of the taxpayer and therefore has not been abandoned. *See Echols v. Commissioner*, 950 F.2d 209, 211 (5th Cir. 1991) (denying petition for rehearing). But taxpayers' worthlessness theory is not distinct from

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[8] Taxpayers' net operating loss deduction is limited to $2,569,969, which is their adjusted basis in Baldwin Entertainment Group Ltd. stock during 2007. (ER 29.) While the reported losses based on movie projects that allegedly expired in 2007 exceeds that amount, the reported losses on movie projects that allegedly expired in 2005 and 2006 falls short of it. (*See* ER 236-37.) Thus, if this Court agrees with the United States that the district court's reliance on secondary evidence that certain movie rights expired in 2007 violated the best evidence rule, but also holds (contrary to our argument) that there was sufficient evidence of abandonment in 2007 of movie projects that were allegedly abandoned in 2005 and 2006, then this Court should remand for a recalculation (*i.e.*, reduction) of the net operating loss deduction.

their abandonment theory. It is based on the contention that movie projects became worthless to them in 2007 either because the legal rights expired in 2007 or because they gave up their efforts to renew previously-expired movie projects in 2007. In other words, taxpayers, to the extent that they attempt to rely on worthlessness as a distinct theory, claim that the movie projects are worthless because they cut ties with those projects, *i.e.*, because they abandoned the projects.

Whenever a taxpayer abandons an asset, the asset, once abandoned, also becomes worthless to the taxpayer. This truism does not make worthlessness a distinct theory in cases in which a taxpayer has cut ties with an asset. Thus, a taxpayer who argues that an I.R.C. § 165 deduction is appropriate because assets were abandoned cannot do an end run around the observable act requirement by arguing that the same assets, once abandoned, were also worthless. Indeed, even in cases (unlike this one) in which worthlessness is actually a distinct theory, courts require an observable event evidencing taxpayers determination that an asset has become worthless. *See Echols*, 950 F.2d at 213 (making clear that worthlessness must be supported by "by identifiable events or closed transactions").

III

The district court erred in awarding litigation costs to taxpayers under I.R.C. § 7430

Section 7430(a)(2) provides, in relevant part, that the prevailing party in a court proceeding "brought by or against the United States in connection with the determination, collection, or refund of any tax . . . may be awarded . . . reasonable litigation costs incurred in connection with such court proceeding." "The term 'prevailing party' means any party . . . which (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented." I.R.C. § 7430(c)(4)(A)(i). But "[a] party shall not be treated as the prevailing party . . . if the United States establishes that the position of the United States in the proceeding was substantially justified." *Id.* § 7430(c)(4)(B)(i).

The United States argued below that, though taxpayers prevailed before the district court, its position was substantially justified and thus an award of litigation costs was inappropriate. The district court agreed that the Government's litigating position was substantially justified "up until the point that the Court ruled on summary judgment against the Government's original theory of the case," *i.e.*, the Government's theory that Treas. Reg. § 301.7502-1(e) is valid and that, under that regulation, the district court lacked jurisdiction over this case. But the district court determined that, after that original theory had been rejected, the Government's litigating position became unreasonable, and it awarded fees and costs from that point forward. (ER 14.)

The United States does not seek to challenge in this appeal the district court's substantial justification determination, which this Court would review only for abuse of discretion. *See Huffman v. Commissioner*, 978 F.2d 1139, 1147 (9th Cir. 1992). However, in the event that this Court reverses on either of the grounds the United States has argued above, it must also reverse the fee award because the United States would then be the prevailing party. *California Medical Ass'n v. Shalala*, 207 F.3d 575, 577-78 (9th Cir. 2000) ("Since the fee award is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award."); *see also, e.g., Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986) ("[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it.”); *RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1075 (10th Cir. 2009) (same).

CONCLUSION

This Court should reverse the judgment of the district court and its award of litigation costs.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that the following pending case is related to the instant appeal: *Steven Waltner, et al. v. Commissioner*, No. 16-72754. This case raises the same issue (the validity of Treas. Reg. § 301.7502-1(e)) as the instant appeal.

ADDENDUM

I.R.C. § 165. Losses (excerpts)

(a) General rule.-- There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

. . . .

I.R.C. § 172. Net operating loss deduction (excerpts)

(a) Deduction allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) Net operating loss carrybacks and carryovers.--

(1) Years to which loss may be carried.--

(A) General rule.--Except as otherwise provided in this paragraph, a net operating loss for any taxable year--

(i) shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and

(ii) shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.

. . . .

I.R.C. § 6511. Limitations on credit or refund (excerpts)

. . . .

(d) Special rules applicable to income taxes.--

. . . .

(2) Special period of limitation with respect to net operating loss or capital loss carrybacks.--

(A) Period of limitation.--If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback.

. . . .

I.R.C. § 7430. Awarding of costs and certain fees (excerpts)

(a) In general.--In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for--

. . . .

(2) reasonable litigation costs incurred in connection with such court proceeding.

. . . .

(c) Definitions.--For purposes of this section--

. . . .

(A) In general.--The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)--

(i) which--

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Exception if United States establishes that its position was substantially justified.--

(i) General rule.--A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

. . . .

I.R.C. § 7502 – Timely mailing treated as timely filing and paying (excerpts)

(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.

. . . .

(c) Registered and certified mailing; electronic filing.--

(1) Registered mail.--For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail--

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail; electronic filing.--The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

. . . .

(f) Treatment of private delivery services.--

(1) In general.--Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a

reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

(2) Designated delivery service.--For purposes of this subsection, the term "designated delivery service" means any delivery service provided by a trade or business if such service is designated by the Secretary for purposes of this section. The Secretary may designate a delivery service under the preceding sentence only if the Secretary determines that such service--

(A) is available to the general public,

(B) is at least as timely and reliable on a regular basis as the United States mail,

(C) records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery, and

(D) meets such other criteria as the Secretary may prescribe.

(3) Equivalents of registered and certified mail.--The Secretary may provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail.

Treas. Reg. § 301.7502–1 Timely mailing of documents and payments treated as timely filing and paying. (excerpts)

(c) Mailing requirements—(1) In general. Section 7502 does not apply unless the document or payment is mailed in accordance with the following requirements:

. . . .

(iii) Postmark—(A) U.S. Postal Service postmark. If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. See, however, paragraph (c)(2) of this section with respect to the use of registered mail or certified mail to avoid this risk. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made. Furthermore, if the envelope that contains a document or payment has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

. . . .

(2) Registered or certified mail. If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

. . . .

(e) Delivery—(1) General rule. Except as provided in section 7502(f) and paragraphs (c)(3) and (d) of this section, section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made.

> (2) Exceptions to actual delivery—(i) Registered and certified mail. In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

. . . .

(g) Effective date—(1) In general. Except as provided in paragraphs (g)(2) and (3) of this section, the rules of this section apply to any payment or document mailed and delivered in accordance with the requirements of this section in an envelope bearing a postmark dated after January 11, 2001.

. . . .

> (4) Registered or certified mail as the means to prove delivery of a document. Section 301.7502–1(e)(2) will apply to all documents mailed after September 21, 2004.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55115 & 17-5

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant	s/ Nathaniel S. Pollock	Date	10/10/2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2017. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nathaniel S. Pollock
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