No. 19-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BOECHLER, P.C.,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF DISMISSAL OF THE UNITED STATES TAX COURT

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING EN BANC

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GLOSSARY

Amicus	Federal Tax Clinic of the Legal Services Center of Harvard Law School
Appellant-taxpayer	Boechler, P.C., Petitioner-Appellant
CDP	Collection-due-process
Code or I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
Commissioner	Commissioner of Internal Revenue, Respondent-Appellee
IRS	Internal Revenue Service

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STATEMENT

In a recent published opinion, a panel of this Court affirmed the Tax Court order dismissing appellant's petition, filed on the 31st day after the IRS mailed a notice of collection-due-process determination, for lack of jurisdiction under Section 6330(d)(1) of the Internal Revenue Code of 1986 ("I.R.C."). The panel correctly applied the Supreme Court's "clear statement rule" in *United States v. Wong*, 575 U.S. 402, 410 (2015), to hold that "[t]he statutory text of § 6330(d)(1) is a rare

instance where Congress clearly expressed its intent to make the filing deadline jurisdictional." (Op. 4.)

The panel properly determined that in § 6330(d)(1) "[t]he parenthetical '(and the Tax Court shall have jurisdiction with respect to such matter)' is clearly jurisdictional and renders the remainder of the sentence jurisdictional." (Op. 6, citing *Fort Bend Cty. v. Davis*, 139 S. Ct 1843, 1849 (2019).) The panel also correctly determined that "[t]he use of 'such matter' 'plainly show[s] that Congress imbued a procedural bar with jurisdictional consequences.' " (Op. at 6, citing *Wong*, 575 U.S. at 410.) In so holding, the panel correctly determined that "[u]nlike other statutory provisions that have been found to be non-jurisdictional by the Supreme Court, § 6330(d)(1) speaks 'in jurisdictional terms.' " (Op. at 6, citing *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016).) In sum, the panel correctly stated that Congress "has spoken clearly enough to establish that § 6330(d)(1)'s 30-day filing deadline is jurisdictional." (Op. 7.)

The petition for rehearing *en banc* should be denied because appellant has not shown that the panel "overlooked" or "misapprehended" points of law or fact. *See* Fed. R. App. P. 40(a)(2).

Full Court review also is not warranted because the panel's opinion is correct and does not conflict with any decision of this Court, the Supreme Court, or any other court of appeals, although, as explained below, the decision is in tension with *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019), which interpreted a different statute with similar language.[1] *See* Fed. R. App. P. 35(b)(1). And, notwithstanding appellant's claim (Pet. 12-15), this case does not present any issue of exceptional importance warranting *en banc* review. *See* Fed. R. App. P. 35(b)(2). Thus, there is no basis for rehearing.

DISCUSSION

A. The panel's holding does not conflict with Supreme Court precedent

I.R.C. § 7442 provides that "[t]he Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title." The Tax Court, as an Article I court, is a court of limited jurisdiction and may exercise jurisdiction only to the extent authorized by Congress. *Freytag v. Commissioner*, 501 U.S. 868, 870-71 (1991); *United States v. Giaimo*, 854 F.3d 483, 486 (8th Cir. 2017).

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[1] As discussed *infra*, pp. 14-15, *Myers* was incorrectly decided.

Section 6330(d)(1) confers jurisdiction on the Tax Court to review administrative determinations of the Office of Appeals in collection-due-process (CDP) proceedings as follows:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

While the Supreme Court has stated that "filing deadlines ordinarily are not jurisdictional," *Sebelius v. Auburn Reg. Med. Ctr.*, 568 U.S. 145, 154 (2013), it has repeatedly held that Congress may make a time limit jurisdictional by providing a "clear indication" of the limit's jurisdictional status. *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011); *see also, e.g., Musacchio*, 136 S. Ct. at 717.

To determine whether such a clear indication exists, courts "examine the 'text, context, and relevant historical treatment' of the provision at issue." *Musacchio*, 136 S. Ct. at 717 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)). In other words, a statutory time limit is jurisdictional if "traditional tools of statutory construction . . . plainly show that Congress imbued [the limit] with jurisdictional consequences." *Wong*, 575 U.S. at 410; *see also Nat'l*

Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012) ("the best evidence of Congress's intent is the statutory text").

Statutory text provides a clear indication that a time limit is jurisdictional if it "expressly refer[s] to subject-matter jurisdiction or speak[s] in jurisdictional terms." *Musacchio*, 136 S. Ct. at 717. This does not mean that Congress must use the term "jurisdiction" (*see, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012)) or any other "magic words" (*Wong*, 575 U.S. at 410 (internal quotation marks omitted)). Rather, it simply means that "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional." *Id.*; *see Duggan v. Commissioner*, 879 F.3d 1029, 1032 (9th Cir. 2018).

Appellant argues that the panel's holding that the filing deadline in § 6330(d)(1) is jurisdictional "conflicts with the Supreme Court precedent." (Pet. 2-6.) Appellant is mistaken that the panel's decision is at odds with the Supreme Court's rejection of "proximity-based argument[s]" in *Auburn* and *Gonzalez*. In *Auburn*, the Supreme Court held that the time limit in subpart (3) of the 344-word Medicare statute, 42 U.S.C. § 1395*oo*, which "would otherwise be classif[ied] as

nonjurisdictional . . . does not become jurisdictional" due to its proximity to subparts (1) and (2). 568 U.S. at 155. In *Gonzalez*, the conditions for seeking habeas review, contained in 28 U.S.C. § 2253(c)(2) and (c)(3), were held to be nonjurisdictional because they were in different subsections and "distinct paragraphs" from § 2253(c)(1), which contained "the only 'clear' jurisdictional language in § 2253(c)." 565 U.S. at 142.

In § 6330(d)(1), by contrast, the 30-day filing deadline and the clear jurisdictional language occupy the same subsection and a 33-word sentence, not neighboring provisions as in *Auburn*, or "distinct paragraphs" as in *Gonzalez*. Thus, the panel's decision does not conflict with those cases.[2] *See Duggan*, 879 F.3d at 1034 ("Although '[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle,' [*Gonzalez*], § 6330(d)(1) makes timely filing of the petition a condition of the Tax Court's jurisdiction.")

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[2] *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) (Pet. 5), in which the Supreme Court held that jurisdiction was lacking under the Social Security Act, 42 U.S.C. § 405(g), because the class-members' complaint failed to allege that the Secretary had made a "final decision" is not on point.

Appellant challenges the panel's holding (Op. 6) that "§ 6330(d)(1) is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional." (Pet. 4.) Appellant, however, concedes that in § 6330(d)(1) there is both a "jurisdictional grant" and "the time bar" and that "there is no dispute that *something* in Section 6330(d)(1) has jurisdictional significance," but just not the filing deadline. (Pet. 4-5.)

Appellant's assertion is based on its erroneous grammatical argument that the phrase "such matter" in § 6330(d)(1)'s parenthetical, "(and the Tax Court shall have jurisdiction with respect to such matter)," means the same thing as those "Matters considered at [CDP] hearing," which is the "title" of § 6330(c). (Pet. 5.) The "[m]atters" considered by the Office of Appeals at the hearing include the IRS's compliance with applicable law and administrative procedure (§ 6330(c)(1)), a taxpayer's relevant issues regarding collection, including collection alternatives (§ 6330(c)(2)(A), (B)), and the IRS's need for efficient tax collection (§ 6330(c)(3)). *See Gillum v. Commissioner*, 676 F.3d 633, 644 (8th Cir. 2012). Thus, the "[m]atters"

considered at the CDP hearing for purposes of § 6330(c) have no bearing on the meaning of "such matter" in § 6330(d)(1).

To the contrary, by including the term "such matter" in § 6330(d)(1)'s grant of jurisdiction, Congress clearly referred to its antecedents as the "*something*" that is jurisdictional: first, there must be "a determination under this section," and, second, there must be a petition to the Tax Court that was filed "within 30 days of that determination." *See Duggan*, 879 F.3d at 1034 (§ 6330(d)(1) is " 'unambiguous' that in order for the Tax Court to have jurisdiction, a petition for review must be filed 'within 30 days of a determination.' ") (citation omitted); § 6330(e)(1) ("Tax Court shall have no jurisdiction under this paragraph . . . unless a timely appeal has been filed under subsection (d)(1) . . ."); *see also Webster's Third New International Dictionary* 2283 (2002) ("such" refers to things "previously characterized or specified"); Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 849 (2d ed. 1995) ("*Such* is properly used as an adjective when reference has previously been made to a category of persons or things"). Accordingly, the panel correctly determined that "[t]he use of 'such matter' 'plainly show[s] that Congress imbues a procedural bar with

jurisdictional consequences.' " (Op. 6, citing *Wong*, 575 U.S. at 410.) *See Duggan*, 879 F.3d at 1034-35; *see also Myers*, 928 F.3d at 1039 (dissent) (" 'such matter' in [identical parenthetical in § 7623(b)(4)]," provides " 'words linking the time period for filing to the grant of jurisdiction.' ")

Contrary to appellant's assertion (Pet. 5-6), it matters not that "the jurisdictional grant and the time limit appear in distinct clauses" joined by "and." By placing the deadline for filing a Tax Court petition seeking review of the CDP determination in the same sentence and subsection as the jurisdictional language, the link between timeliness and jurisdiction in § 6330(d)(1) is proximate and explicit. *See Fort Bend Cty.*, 139 S. Ct. at 1849; *Duggan*, 879 F.3d at 1034 (filing period "is given in the same breath as the grant of jurisdiction"). This link, the panel correctly determined, is absent in the statutes that the Supreme Court found to be non-jurisdictional in *Henderson*, *Gonzalez*, and *Auburn*. (Op. 6-7.)

Appellant's attempt (Pet. 6) to show that the panel erred in holding that the time limit in § 6330(d)(1) is jurisdictional by "contrast[ing]" it with the wording of § 6015(e)(1)(A), which three

circuits have held to be jurisdictional, is meritless. *See Nauflett v. Commissioner*, 892 F.3d 649, 652-53 (4th Cir. 2018); *Rubel v. Commissioner*, 856 F.3d 301, 304-05 (3d Cir. 2017); *Matuszak v. Commissioner*, 862 F.3d 192, 196 (2d Cir. 2017). "[T]he test is whether Congress made a clear statement, not whether it made the clearest statement possible." *Duggan*, 879 F.3d at 1034.

There is no one formula to make a clear statement. *See Auburn*, 568 U.S. at 153 (Congress need not "incant magic words in order to speak clearly"); *see also Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1092-94 (9th Cir. 2020) (rejecting arguments made here and holding that I.R.C. § 6213(a) contained clear statement that filing deadline is jurisdictional); *Tilden v. Commissioner*, 846 F.3d 882, 886 (7th Cir. 2017) (same); *Maassen v. Commissioner*, 671 F. App'x 402, 403 (8th Cir. 2016) (holding time limit in § 6213(a) is jurisdictional). The panel correctly determined that "[w]hile there might be alternative ways that Congress could have stated the jurisdictional nature of the statute more plainly, it has spoken clearly enough to establish that § 6330(d)(1)'s 30-day filing deadline is jurisdictional." (Op. 7.)

Finally, appellant's speculation of Congress's intent (Pet. 7) is irrelevant. As the Supreme Court in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) stated, where Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue" (footnote omitted). *See U.S. v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997).

In sum, the panel's holding that "§ 6330(d)(1) is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional" (Op. 6) does not conflict with any Supreme Court decision.

B. The panel's decision is consistent with this Court's decisions

Appellant errs in arguing (Pet. 11) that there is "some intra-circuit division" warranting this Court's review. *Hauptman v. Commissioner*, 831 F.3d 950 (8th Cir. 2016), on which appellant relies (Pet. 1, 11), is consistent with the panel's decision. In *Hauptman*, the taxpayer argued that "the tax court lacked jurisdiction to consider [his] petitions challenging the supplemental notices of determination." *Id.* at 952-53. The Court identified "two prerequisites" to the Tax Court's jurisdiction

under § 6330(d)(1): (1) a notice of determination, and (2) a petition filed within 30-days after the determination is issued. *Id.* "Hauptman d[id] not contest that both of these conditions were satisfied. . . . Rather, he argue[d] that the tax court's jurisdiction over the original notices of determination d[id] not extend to the supplemental notices of determination." *Id.* Because "the same jurisdictional prerequisites apply" to a supplemental determination, the Court "reject[ed] Hauptman's challenge to the tax court's jurisdiction." *Id.*

The panel's holding in this case that "§ 6330(d)(1)'s 30-day filing deadline is jurisdictional" (Op. 7) is consistent with *Hauptman*. Whether the jurisdictional test in *Hauptman* was *obiter dicta*, as the panel majority believed (Op. 4), or "was necessary to [this Court's] decision" in *Hauptman,* as concurring Judge Kelly believed (Op. 10), is purely academic and does not furnish grounds for obtaining the extraordinary remedy of *en banc* rehearing. *See* Fed. R. App. P. 35(b)(1)(A) (petition for *en banc* rehearing must begin with statement that "the panel decision *conflicts* with a decision of the United States Supreme Court or of the court to which the petition is addressed . . .") (emphasis added).

C. The decision is consistent with the decisions in other circuits

The Ninth Circuit in *Duggan* rejected the arguments pressed by appellant and the amicus here, stating that § 6330(d)(1) "expressly contemplates the Tax Court's jurisdiction" since "the filing deadline is given in the same breath as the grant of jurisdiction." 879 F.3d at 1034. Thus, the Ninth Circuit held that the " 'unambiguous' " and "plain language of 6[3]30(d)(1)" "conditions the Tax Court's jurisdiction on the timely filing of a petition for review, the thirty-day deadline in § 6330(d)(1) is jurisdictional." *Id.* at 1034-35.

As appellant admits (Pet. 13), the Ninth Circuit, however, is not alone. Every court of appeals, along with the Tax Court, to consider whether the time limit in § 6330(d)(1) is jurisdictional has agreed that it is. *Kaplan v. Commissioner*, 552 F. App'x 77, 78 (2d Cir. 2014); *Gray v. Commissioner*, 723 F.3d 790, 793 (7th Cir. 2013); *Boyd v. Commissioner,* 451 F.3d 8, 10 (1st Cir. 2006); *Guralnik v. Commissioner*, 146 T.C. 230, 235 & n.6 (2016); *see also Hauptman*, 831 F.3d at 953 (dicta); *Tschida v. Commissioner*, 57 F. App'x 715, 715 (8th Cir. 2003) (same); *Springer v. Commissioner*, 416 F. App'x 681, 682-83 & n.1 (10th Cir. 2011) (same); *Tuka v. Commissioner*, 348 F. App'x 819, 820 (3d Cir. 2009) (same).

To be sure, the panel's decision is in tension with *Myers*, where a divided panel of the D.C. Circuit held that a Tax Court filing deadline in the whistleblower-award statute, I.R.C. § 7623(b)(4), which contains the identically worded parenthetical as § 6330(d)(1), was not jurisdictional. The majority in *Myers* acknowledged that its decision was "in some tension" with *Duggan*, but it did not attempt to reconcile the two. 928 F.3d at 1036.

The *Myers* majority decision is incorrect because it did not correctly apply the Supreme Court's clear statement rule. As the *Myers* dissent correctly determined, "There is no doubt that the parenthetical clause – '(and the Tax Court shall have jurisdiction with respect to such matter)' is jurisdictional because it expressly 'speak[s] in jurisdictional terms.' " *Id*. at 1039 (citation omitted). In addition, as the dissent aptly noted, the majority's determination that the phrase "such matter" only refers to one antecedent, *i.e.*, any determination made by the IRS Whistleblower Office, and not the other antecedent, *i.e.*, an appeal filed "within 30 days of such determination" is not plausible. *Id*. The dissent also correctly determined that, contrary to the majority's opinion, the words "such matter" are " 'words linking the time period for filing to the

grant of jurisdiction.' " *Id*. Finally, as the *Myers* dissent observed, the majority mistakenly applied the proximity rule in *Auburn* and *Gonzalez* because the filing period and the jurisdictional grant are both in the same 33-word sentence. *Id*. at 1040.

D. There is no other basis warranting *en banc* review

Appellant asserts that although the Tax Court has been "treating this deadline [in § 6330(d)(1)] as jurisdictional for decades" (Pet. 13), "[f]urther review is warranted" because the decision "impacts many low-income and *pro se* taxpayers" (Pet. 13, 15). This is also the amicus's primary argument.[3] (Br. 1-8.) The argument is based on the fact that nonjurisdictional deadlines, unlike jurisdictional deadlines, are subject to equitable tolling (*see Auburn Regional Med. Ctr.*, 568 U.S. at 152-54) and on the assertion that low-income and pro-se taxpayers often miss a filing deadline for various reasons and that equitable tolling should, therefore, be available. (Br. 7-10.)

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[3] Appellant is neither low-income nor *pro se*. It is a law firm that improperly reported its employees' wages in 2012 and was assessed an intentional disregard penalty under § 6721(e)(2)(A).

It is, however, a non sequitur to treat a filing deadline as nonjurisdictional based on the alleged needs of low-income and pro se taxpayers. If a filing deadline is nonjurisdictional simply because low-income and pro se taxpayers utilize it, then many statutes would be nonjurisdictional. But that is clearly not the case. The Supreme Court has held that the period to file a notice of appeal and the period to file a claim for a tax refund are jurisdictional,[4] as is the time to commence an action in the Court of Federal Claims. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008); *Bowles v. Russell*, 551 U.S. 205, 209 (2007); *United States v. Dalm*, 494 U.S. 596, 601 (1990). That low-income and pro se taxpayers file notices of appeal and claims for refund and commence actions in the Court of Federal Claims did not preclude the Supreme Court from so holding. Nor should the commencement of CDP actions by low-income and pro-se taxpayers cause the time limit in § 6330(d)(1) to be nonjurisdictional.

The amicus's claim that the panel's ruling is "bad" for low-income *pro se* taxpayers is principally based on its "study" that "indicated that

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[4] The filing of an administrative claim for refund is a prerequisite to a tax refund suit. I.R.C. § 7422(a).

8% of CDP petitions (13 of 154) filed in the first six weeks of 2008 were dismissed for lack of jurisdiction." (Br. 3-4.) Its limited study, however, did not indicate how many of those 13 petitions were filed by low-income *pro se* taxpayers. Contrary to appellant's assertion (Pet. 14), the National Taxpayer Advocate 2018 Annual Report does not support its (and Judge Kelley's) position that the panel's holding will " 'fall disproportionately on low-income taxpayers.' " According to this report, notices of determination following a CDP hearing with the IRS Office of Appeals were mailed to 22,377 taxpayers in 2017, of which 3,259 taxpayers, or only 15% of the total, were purportedly "[i]n poverty." (Report at 216.) According to the report, however, the actual number who were in poverty may have been much lower; about one-third of the taxpayers "were categorized into the 'in poverty' group because for tax year 2017 they did not file a return and there were no third-party reports of income for them. It is possible that some of these taxpayers may have had unreported income." (*Id.*) Thus, the percentage of taxpayers who were in poverty and who were eligible to seek Tax Court review of an adverse IRS notice of determination may have been much

lower than 15%. Thus, there is little evidence that the panel's ruling will disproportionately affect low-income and pro se taxpayers.[5]

The amicus's additional assertion that the IRS "unintentionally, actively misleads taxpayers into filing late" in CDP cases (Br. 5) lacks merit. Indeed, the Fourth Circuit in *Cunningham v. Commissioner*, 716 F. App'x 182, 184 (2018), squarely rejected the amicus's argument that the language in the notice of determination was "misleading and tricked her and other taxpayers into filing late." The Court "s[aw] nothing misleading about the IRS's notice, and certainly nothing to suggest the IRS acted with negligence (or worse). Instead, the error in this case came from Cunningham's own mistake. . . ." *Id.* at 185.

Likewise, amicus' reliance on *Weiss v. Commissioner*, 2018 WL 2759389 (D.C. Cir. 2018), does not support its claim that the "IRS also has a history of sending CDP notices with misleading language or wrong dates." (Br. 8.) Weiss was an attorney who argued that the IRS

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[5] To be sure, 59% of the Tax Court petitions filed in CDP cases were filed by pro se taxpayers. (Report at 216.) The IRS is unaware of any data on the number of *pro se* CDP petitions dismissed as untimely based on income levels. "Courts should be reluctant to decide cases that require them to speculate on the basis of hypothetical facts." *Cass County v. United States*, 570 F.2d 737, 741 (8th Cir. 1978).

was time-barred from collecting his significant tax liability, which turned on whether Weiss's request for an administrative CDP hearing was timely filed within 30 days. A hearing request suspends the limitations period on collection (§ 6330(e)), so Weiss argued that his request was *un*timely and thus did not stop the clock. The D.C. Circuit agreed with the Commissioner that the "plain" text of the statute provides that the 30-day period ran from the date of mailing, not the date on the levy notice, so Weiss's request was *timely* (as the Commissioner maintained) and suspended the limitations period on collection. (*Id*. at *2.) The D.C. Circuit refused to side with Weiss who attempted to "manipulate the Code" to avoid paying his taxes. (*Id*. at *3.)

Finally, appellant asserts that a CDP proceeding "is the taxpayer's only opportunity to challenge the deficiency [sic] notice before collection" (Pet. 7), but this ignores the fact that in most CDP cases, taxpayers already have had the opportunity to contest their tax liability before the Tax Court in a deficiency proceeding. *See* I.R.C. § 6213(a). Moreover, appellant (a law firm) is not without recourse; it still has the option of paying the penalty at issue, filing an

administrative refund claim and, if the claim is denied, filing a refund suit in the district court. *See* I.R.C. §§ 6511, 7422.

In sum, the occasional filing of CDP petitions by low-income and *pro se* taxpayers does not make this case one of "exceptional importance" warranting *en banc* review. *See* Fed. R. App. P. 35(b)(1)(B).

CONCLUSION

Appellant's petition for rehearing *en banc* should be denied.

Respectfully submitted,

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(s) /s/ JANET A. BRADLEY

Attorney for Commissioner of Internal Revenue

Dated: October 16, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2020, I electronically filed a PDF version of the foregoing response in opposition to appellant's petition for rehearing *en banc* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ JANET A. BRADLEY
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Attorney