No. 20-1472

IN THE
Supreme Court of the United States

BOECHLER, P.C.,
Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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INTEREST OF *AMICI CURIAE*[1]

The National Taxpayers Union Foundation

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amici* represents that all parties were provided ten days' notice of *Amici's* intention to file this brief and have granted consent to the filing of the brief.

(NTUF) and National Federation of Independent Business (NFIB) Small Business Legal Center submit this brief as *amici curiae* in support of Petitioner in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

The National Federation of Independent Business (NFIB) is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

Because *Amici* have testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers, small businesses, and tax administration, *Amici* have an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

Historically, the Internal Revenue Service ("IRS") and some courts have thought of tax law as a distinct and special area of law. Perhaps that is because tax law generates the revenue that is the lifeblood of the government.

This creates a problem because "tax exceptionalism"—the idea that tax is different in kind from other law and therefore subject to special accommodation by the courts—produces a view of tax law as something opaque and knowable only to the experts. If the law is not understandable but to a privileged few, then tax enforcement will appear arbitrary. This case shows the very real fright: being just one day late with a filing has put the Petitioner on the hook for $19,250, plus interest. JA 24.

Tax law is fundamentally a statutory framework like any other and the regulation of an important government function. Thus, this Court and others have clarified recently that the IRS is no more special than any other government entity—subject to the general statutes like the Administrative Procedure Act (APA). Tax law may be complex but so too are other areas of the law such as environmental law or campaign finance regulations, and as in those areas,

one becomes more proficient by specializing in the field.

Simply put, the Tax Court is a court that should operate like any other, including allowing for equitable tolling and other doctrines to help assure citizens can have their day before an impartial tribunal. This is especially vital given that this case involves the attachment—and possible seizure—of business property to satisfy thousands of dollars in taxes. Taxpayers facing such consequences should not receive *less* due process than litigants in other areas of the law. This case therefore affords this Court the opportunity to extend a long line of cases upholding any ambiguity in the tax code in favor of the taxpayer.

Alternatively, even if this Court were to consider tax law as exceptional, it should go the other way: tax law is special *because* it touches every American citizen and resident. Tax reporting is pervasive and compels the average person to open their financial life to the government. Unlike other complex regulatory schemes, one cannot opt out of the tax system simply by avoiding a profession or activity. Because this system for reporting taxes is so universal, equitable doctrines ought to be available and considered essential to prevent manifest unfairness in enforcement of the tax code.

Taken together, this case offers the opportunity to clarify that the Tax Court can hear equitable claims to its jurisdiction and apply them using its discretion. Therefore, the decision of the Eighth Circuit upholding the Tax Court's refusal to hear the taxpayers claim should be reversed.

ARGUMENT

I. TAX EXCEPTIONALISM IS AN ANACHRONISM NOT TIED TO CONGRESSIONAL MANDATE.

The federal government has predictably argued that the sky will fall if deadlines are waived in this and future tax cases where equitable tolling might apply. Gov't Br. in Opp. at 27. The government fears "a delinquent taxpayer might be able to prolong the suspension period by filing a tardy petition in the Tax Court and then seeking to excuse that failure to file a timely petition on equitable-tolling grounds." Id. Then, that would put into doubt the legality of the levy pending resolution of the equitable tolling question. Id. And then "the IRS would be unable to know with certainty when it could safely begin to collect." Id.

What underlies this line of argument is that tax law is exceptional because it involves the very lifeblood the government needs to operate: tax revenue. Tax exceptionalism is "'the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.'" Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw*, 69 TAX LAWYER 493, 498 (2016) (quoting Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1901 (2014)).

Tax exceptionalism produces a line of thinking that justifies not adhering to notice and comment rulemaking and other APA requirements—if tax law is different, then ordinary administrative law does not apply. But this argument runs up against decisions of

this Court and other courts which have made clear that the IRS is subject to the same generally-applicable rules as any other agency.

In the same vein, the Tax Court is a court of the United States. In instances like those in Boechler, Tax Court proceedings are the first time any formal due process attaches and the taxpayer can make their arguments before a neutral arbiter. Missing the Tax Court forum means losing judicial review of IRS actions and forfeiting possible defenses. Given that revenue and property rights are at stake, this Court should clarify that equitable tolling is another in a long line of the doctrine that ambiguities in the tax law should favor the taxpayer.

A. The IRS is Not Special.

The IRS has long contended APA notice-and-comment and other procedural requirements do not apply to certain of its regulations. *See, e.g.*, Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1729 (2007) ("Treasury also contends, however, that most Treasury regulations are interpretive in character and thus exempt from the public notice and comment requirements by the APA's own terms."); Pete Sepp, "NTU Comments to the Acting IRS Commissioner on Tax Reform Implementation," National Taxpayers Union (Feb. 1, 2018) https://tinyurl.com/irs-apa-reform ("Aside from hewing more closely to APA's safeguards, the IRS can and should begin winding back the doctrines that have built a wall of exemption between the tax agency and the accountability mechanisms contained in the

Regulatory Flexibility Act, White House review pursuant to Executive Order 12866, and the Congressional Review Act."). But recent decisions of this Court and the D.C. Circuit have pushed back on the narrative that tax law is exceptional in this regard. A triumvirate of cases—*Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011), *CIC Services, LLC v. Internal Revenue Service*, 593 U.S. ___, 141 S. Ct. 1582 (2021), and *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc)—highlight how courts elucidated the principle that the IRS is an *administrative* entity that simply oversees revenue collection.

The *Mayo Foundation* case is illustrative on how unremarkable the IRS is in the administrative law context. In that case, medical schools challenged the IRS system for issuing payroll tax refunds when courts held that medical residents—part student, part employee—were exempted from payroll withholdings. *Mayo Found.*, 562 U.S. at 49. The IRS created a burdensome system for claiming the refunds. *See id.* The Chief Justice wrote for an 8 to 0 Court in applying standard review to the IRS regulation. *Id.* at 52-53 (applying *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This Court could not have been clearer: "[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action." *Id.* at 55 (internal citation omitted). While the Court in that case ruled in favor of the IRS interpretation, it did so after applying standard analysis of regulations

as would be applied to the rest of the administrative state.

That the Treasury and the IRS are treated no differently from other administrative entities was reinforced just last term, again by a unanimous Court in *CIC Services*. *See CIC Services*, 593 U.S. ___, 141 S. Ct. 1582. At issue in *CIC Services* was whether Congress' broad bar to pre-enforcement challenges, the Anti-Injunction Act (AIA) (26 U.S.C. § 7421(a)), prohibited a suit under the APA. *Id*. at 1588. In other words, did the special tax provision control, or the general administrative statute? The problem was that the AIA generally bars federal courts from enjoining the collection of federal taxes and CIC Services was challenging a regulatory provision that was backed by penalties charged as "taxes." So, "[i]f that downstream tax penalty did not exist, th[e] case would be a cinch: The Anti-Injunction Act would not apply and the suit could proceed." *Id*. This court held that because CIC Services was challenging a reporting regime, not the collection of any tax, then the AIA did not apply. *Id*. at 1594. This Court then remanded the case for further proceedings on the APA claim. *Id*.

In *Cohen v. United States*, the D.C. Circuit, *en banc*, noted that the "IRS is not special" and is subject to "suit under the APA." *Cohen*, 650 F.3d at 723 (collecting cases). That is because while the AIA is a special carveout, it "has 'almost literal effect': It prohibits only those suits seeking to restrain the assessment or collection of taxes," not administrative law challenges. *Id*. (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737 (1974)). Thus, when a "suit is an APA action" a court must recognize that "it questions the administrative procedures by which the IRS"

operates. *Id.* at 731. In so doing, the *Cohen* court rejected "revenue collection" as a reason to exempt IRS action from judicial review because "Congress has not made that call." *Id.* at 736.

If the IRS is just like any other executive agency, then that strongly implies that the Tax Court is just like any other court—which means equitable tolling and similar doctrines should be available absent clear commands from Congress to the contrary.

B. The Tax Court is Not Special and Equitable Doctrines Apply.

The "Tax Court exercises judicial, rather than executive, legislative, or administrative, power" and it therefore shares "a portion of the judicial power of the United States." *Freytag v. Comm'r*, 501 U.S. 868, 890–91 (1991). [2] The decisions of the Tax Court are reviewable by the Circuit Courts of Appeals and this Court. *See* 26 U.S.C. § 7482(a) (permitting either the IRS or the taxpayer to appeal a Tax Court decision).

The Tax Court is the first neutral arbiter and trial court taxpayers can reach before paying a disputed tax. Up until entering Tax Court, the collection process is largely informal. *See Robinette v. Comm'r of I.R.S.*, 439 F.3d 455, 461 (8th Cir. 2006) (discussing the informality of the process, and finding "where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to

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[2] For a discussion of the evolution of the Tax Court, from its 1924 creation to its 1969 transformation into an Article I court, *see* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014).

receive evidence concerning what happened during the agency proceedings"). First, when the IRS discovers a suspected deficiency, it will issue a preliminary report detailing the taxpayer's liability. *See, e.g.*, Hoffer & Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. at 236 (detailing process). Once a notice of unpaid tax is issued, the taxpayer then has thirty days to request reconsideration by the IRS Office of Appeals, which often conducts its work informally. *See* 26 U.S.C. § 6330. The IRS and the taxpayer trade documents, phone calls, and other communications to address discrepancies. There is no formal testimony given, the rules of evidence do not apply, and there are no transcripts. It is no wonder that taxpayers do not recognize this as a formal process needing legal representation.

Eventually the Office of Appeals issues a "notice of determination." 26 U.S.C. § 6330(c)(3). The date of this letter starts the clock for the taxpayer to petition the Tax Court for review. 26 U.S.C. § 6330(d)(1). It is this deadline that is the subject of this case, as Petitioner missed the deadline by a single day. Op. Br. at 9. Given that Tax Court is the first *judicial* entity to hear a tax dispute, any ambiguity in the deadline should be in favor of generally-applicable principles of equity and justice, like any other court. *See, e.g.*, Nat'l Taxpayer Advocate, "Annual Report to Congress 2017," vol. 1, 284-85 (2017) ("In general, the Tax Court is the *only* judicial forum in which a taxpayer can challenge the IRS's assertion that he or she is liable for a deficiency tax… before paying the asserted

liability in full.") (emphasis added).[3] Indeed, the Tax Court's decision on the merits becomes *res judicata* for the same claim and same tax year. *Id*. at 285 (quoting and discussing *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948)). Therefore, the National Taxpayer Advocate highlighted the need for applying equitable tolling and other doctrines to assure that cases are heard: "the *right to a fair and just tax system* requires that these doctrines be available to taxpayers in the rare cases they would apply." *Id*. at 291 (emphasis in original).

This Court should use general statutory construction and equitable principles to Section 6330(d)(1)'s deadline, and conclude that they apply to the Tax Court. Since Tax Court is the only forum in which taxpayers can challenge a powerful agency, the need is all the greater for equitable doctrines to apply.

C. The Deadline Here Is Written in A Similar Manner As Other Courts' Deadlines.

The government argues that this deadline is jurisdictional because it "involves 'tax collection.'" Gov't Br. in Opp. at 27. They want this Court to think that the sky will fall on all-important tax collection if deadlines are ever waived, and because Congress could not have meant for the sky to fall, therefore this Court must rule that the deadline is mandatory even

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[3] At the petition stage, the government made a great deal about how taxpayers once had two fora options: Tax Court or District Court. Gov't Br. in Opp. at 28-29. But as the Petitioner notes, this is no longer true for collection due process determinations since a 2006 enactment. Op. Br. at. 6-7. Getting into Tax Court, therefore, is all the more important to protect a taxpayer's due process rights.

if it was not stated explicitly. Equitable tolling, however, is generally available in a variety of contexts. *Young v. United States*, 535 U.S. 43, 49 (2002) (collecting cases).

The government chiefly relies on *United States* v. *Brockamp*, 519 U.S. 347, 349-354 (1997), to defend this sweeping claim. Gov't Br. in Opp. at 26-27. But that case is highly distinguishable from the case at bar. Unlike the case at bar, *Brockamp* was not about being a day late to get into court to protect the taxpayer's property, but years late to ask the government for millions of refunds. *Brockamp* concerned the tax refund program—something that can implicate millions of tax returns. *See id.* at 348; *id.* at 352 (noting 90 million tax returns at that time). And the *Brockamp* plaintiffs sought equitable tolling of "*several years* after the relevant statutory time period for doing so had ended" under claims of mental disabilities. *Id.* at 348 (emphasis added). More importantly, the *Brockamp* Court took pains to highlight how careful Congress was in describing the refund deadline. The refund provision, 26 U.S.C. § 6511 "sets forth its time limitations in unusually emphatic form." *Id.* at 350. The *Brockcamp* Court compared § 6511 with other limitations statutes that "use fairly simple language, which one can often plausibly read as containing an implied equitable tolling exception. *Id.* (quotation marks removed).

The deadline at issue in this case, Section 6330(d)(1), is in a single paragraph with a single clock (30 days). The *Brockamp* deadline, Section 6511(a), gives two clocks: "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if

no return was filed by the taxpayer, within 2 years from the time the tax was paid." The next subsection closes any further opportunity: "No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund." 26 U.S.C. § 6511(b)(1). Further, the amount that can be refunded is calculated based on the timelines in subjection (a). *See* 26 U.S.C. §§ 6511(b)(2)(A) and (B). *Brockamp* recognized these detailed rules. 519 U.S. at 350-52. There are also special rules for when the government seeks extension of time, 26 U.S.C. § 6511(c), and when dealing with income taxes, 26 U.S.C. § 6511(d) (with eight different subsections).

But for this case, Section 6330(d)(1)'s deadline is fairly plain: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d)(1). The question becomes whether the parenthetical on jurisdiction attaches also to the 30-day deadline to form a *clear* indication that the deadline has jurisdictional consequences. *Amici* agree with the Petitioner's statutory interpretation of Section 6330(d)(1)'s deadline. Op. Br. 14-25. Section 6330(d)(1) is not a comprehensive instruction book for how to calculate deadlines in different situations. Instead, it is a plain 30-day clock with no other ornamentation that would clearly indicate that Congress wished to close the courthouse door even when the equities suggested tolling. In other words, it looks and acts like an ordinary filing deadline.

II. EVEN IF TAX LAW IS SPECIAL, THAT SHOULD RESULT IN GREATER TAXPAYER PROTECTIONS SUCH AS EQUITABLE DOCTRINES IN TAX COURT.

"It is hornbook law that limitations periods are customarily subject to equitable tolling . . .unless tolling would be inconsistent with the text of the relevant statute." *Young*, 535 U.S. at 49 (collecting cases). Applying *Young* and recognizing that "Tax Court petitioners are typically pro se, individual taxpayers who have never petitioned the Tax Court before," the D.C. Circuit readily found equitable tolling available in the context of applying for whistleblower payments under 26 U.S.C. § 7623(b)(4). *Myers v. Comm'r of Internal Revenue Serv.*, 928 F.3d 1025, 1036-37 (D.C. Cir. 2019). For its part, the Ninth Circuit sees the Tax Court as having the "authority to apply the full range of equitable principles generally granted to courts that possess judicial powers." *Est. of Branson v. Comm'r*, 264 F.3d 904, 908 (9th Cir. 2001). This idea follows from the fact that the Tax Court is a court of the United States and, for the deadline at issue here, the statute is written in a similar manner as other courts' filing deadlines.

This case is about getting into Tax Court when the IRS wants to take property to satisfy what it believes to be due. This Court has long "held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (collecting cases). Due process reflects the "fundamental and deeply held values central to the framers' concept of government." Richard B. Saphire, *Specifying Due Process Values:*

Toward A More Responsive Approach to Procedural Protection, 127 U. PA. L. REV. 111 (1978). In the situation of tax discrepancies, Congress provided for (largely informal) procedure at the Independent Office of Appeals within the IRS, and then full hearing in Tax Court as a neutral arbiter. The Tax Courthouse doors should remain open when equities apply.

This case, therefore, can be another in a long line of decisions upholding tax law ambiguity in favor of the taxpayer. *See, e.g.*, JOSEPH HENCHMAN, HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES (2013), https://tinyurl.com/taxesandfees at 10 ("All states except one (Oregon) interpret ambiguity in tax statutes in favor of the taxpayer."); *id.* at 16-97 (listing cases). This Court has the opportunity to make sure our tax court system gives every due process right possible before taking property.

Taxes are intimidating to the average person. Tax law is complex and its impact is in nearly every area of a person's public life. Worse, the taxpayer must present their entire financial life to the IRS in the hope they either owe little to the government or might actually get a refund. But if the ordinary person or business miscalculates, tax enforcement is too often calamitous.

All must pay taxes. Unlike a Federal Energy Regulatory Commission regulation for building a power plant, an initial public offering under the Securities and Exchange Acts, or filing an Environmental Protection Agency Environmental Impact Statement to build a road, the Byzantine tax

rules apply to *everyone*, and *anyone* can be hauled before the Service to explain their financial lives.

April 15 is a secular national ritual of offering up one's personal and/or business records for approval of the tax agency. Businesses send employees W-2 forms and send the government W-3 forms on withholdings (the very forms at issue in this case). JA 24-25, Op. Br. 8. Banks track how much interest income an account generates and sends form 1099-INT. Independent contractors get Form 1099. Charities and churches send out donation reports. Paper flies around the country as everyone prepares to file their taxes. Tax preparation is itself a $10.8 billion industry in the United States in 2021. IBISWorld, *Tax Preparation Services in the US - Market Size 2003–2027* (Aug. 19, 2021), https://tinyurl.com/yeymd8yx. Ninety percent of businesses and ninety-five percent of individual taxpayers use a paid preparer or tax software to complete their tax return. *See* Demian Brady, *Tax Complexity 2021: Compliance Burdens Ease for Third Year Since Tax Reform*, NATIONAL TAXPAYERS UNION FOUNDATION at 13 (Apr. 15, 2021), https://tinyurl.com/47zmm25y. Overall, NTUF estimates the net compliance burden on preparing and filing individual income taxes to be around $110.24 billion nationwide in 2020. *Id.* at 8, Table 3. The business tax compliance burden was $83.59 billion in 2020. *Id.* at 11, Table 7. People and businesses spend significant money and time each year trying to get the tax math right.

And getting the arithmetic wrong can be dire. The IRS has at its disposal a variety of options to compel payment. "Given the IRS's extraordinary power to garnish wages, levy on bank accounts, and file liens

against homes, taxpayers who can afford to pay generally don't risk losing their assets by getting cross-wise with the IRS.[…] (Unlike other creditors, in almost all instances, the IRS can take these actions administratively, without seeking approval from a court.)" Nat'l Taxpayer Advocate, "The National Taxpayer Advocate Responds to Private Debt Collectors' Contentions," Jul. 18, 2018, https://www.taxpayeradvocate.irs.gov/news/ntablog-the-national-taxpayer-advocate-responds-to-private-debt-collectors-contentions/. In addition to garnishing wages and seizing assets, the IRS can seek criminal convictions and a wide array of civil penalties. *See, e.g.*, 26 U.S.C. § 7345 (authorizing the IRS to request that the State Department revoke passports of persons with $54,000 or more in tax debt).[4]

The specter of tax enforcement, combined with tax law's complexity, garners a visceral reaction in ordinary citizens and business. This counsels the need for greater due process protections to assure their claims and defenses are heard in Tax Court. This is classic grounds for equitable tolling, at least in some cases, and unless Congress speaks clearly otherwise, courts should have that option available when the facts warrant. The door should not be closed on courts' discretion when statutes do not prohibit it.

[4] By 2018, 436,400 taxpayers qualified for passport revocation under IRC § 7345. *See* Nat'l Taxpayer Advocate, "Objectives Report to Congress, FY 2019," vol. 1 at 80.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that the decision of the court below be reversed.

Respectfully submitted,

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