DRAFT OF 12-21

UNITED STATES TAX COURT

ORGANIC CANNABIS FOUNDATION, LLC,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Docket No. 381-22L**
	:	
COMMISSIONER OF INTERNAL REVENUE,	:	
	:	
Respondent.	:	

AMICUS BRIEF OF THE CENTER FOR TAXPAYER RIGHTS IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS*[1]

The Center for Taxpayer Rights ("the Center") was established in 2019 as a § 501(c)(3)[2] non-profit organization dedicated to furthering taxpayers' awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of taxation. The Executive Director of the Center is Nina E. Olson, who, from 2001 through 2019, served as the IRS National Taxpayer Advocate.

Counsel for the Center is the Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic"), which was formed in 2015 to represent low-income taxpayers before the IRS and in tax matters before the courts. The Clinic regularly represents taxpayers in deficiency, Collection Due Process ("CDP"), and stand-alone innocent spouse cases in the Tax Court and in the courts of appeals and has also filed many *amicus* briefs on its own.

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[1] This is to affirm that no party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code.

With the consent of the parties in the Supreme Court, the Center, represented by the Clinic, filed an *amicus* brief in support of the taxpayer in *Boechler P.C. v. Commissioner*, 142 S. Ct. 1493 (2022).

ARGUMENT

In this Court's order dated November 14, 2022, the Court asked whether the 30-day the filing deadline in § 6320(a)(3)(B) is subject to equitable tolling.

For a filing deadline to be subject to equitable tolling, it must first be nonjurisdictional. Then, it must pass the presumption in favor of equitable tolling set out in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990).

Section 6320(a) states, in relevant part:

> **(2) TIME AND METHOD FOR NOTICE.--** The notice required under paragraph (1) shall be—
>
> > **(A)** given in person;
> > **(B)** left at the dwelling or usual place of business of such person; or
> > **(C)** sent by certified or registered mail to such person's last known address,
>
> not more than 5 business days after the day of the filing of the notice of lien.
>
> **(3) INFORMATION INCLUDED WITH NOTICE.--** The notice required under paragraph (1) shall include in simple and nontechnical terms—
>
> . . .

> **(B)** the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2). . . .

Section 6320(b)(1) then provides:

> **(1) IN GENERAL.--** If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Independent Office of Appeals.

As a preliminary comment, *amicus* alerts the Court (if it did not know already) that the identical issue is currently being considered by Judge Gustafson in the case of *All Is Well Homecare Services, LLC v. Commissioner*, Tax Court Docket No.21210-19L. In an order in that case issued on December 15, 2022, Judge Gustafson asked that the parties address (in filings due in January and February 2023), "(3) whether the deadline of section 6320(a)(3)(B) is subject to equitable tolling, and if so, (4) the standards IRS Appeals should use in determining whether tolling applies in a given case and the standard by which the Tax Court should review such a determination by IRS Appeals." *Amicus* recommends that the Judges coordinate any opinion-writing in these cases.

I. The 30-Day Deadline in § 6320(a)(3)(B) to File a Request for a Collection Due Process Hearing Is Not Jurisdictional Under Current Supreme Court Case Law.

On page 11 of his Response to Petitioner's Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction ("Response"),

respondent states that, although the filing deadlines in §§ 6320(a)(3)(B) and 6330(a)(3)(B) "may not be jurisdictional – neither provision speaks to a court's adjudicatory authority or plainly shows that they are imbued with jurisdictional consequences – the time limits are not malleable." (Footnote and citations omitted.) This is an apparent concession that the deadlines are not jurisdictional. However, since parties are not allowed to waive or forfeit jurisdictional requirements; *Boechler*, 142 S. Ct. 1497; *amicus* believes it best to explain why this Court must hold these deadlines nonjurisdictional.

To determine whether a statutory deadline is jurisdictional, courts examine the "text, context, and relevant historical treatment" of the provision. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).

Beginning in 2004, the Supreme Court observed that it and other courts had been too careless in using the word "jurisdictional."

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'" can be confounding. *Carlisle* [*v. United States*], 517 U.S. [416] at 434 [(1996)] (Ginsburg, J., concurring). Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

Since *Kontrick*, the Supreme Court has held that time periods in which to act are almost never jurisdictional. *United States v. Kwai Fun Wong*, 575

U.S. 402, 410 (2015). However, the Court acknowledges that time periods still can be jurisdictional if Congress makes a "clear statement" to that effect. *Id*. at 1632. In *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 515 (2006), the Court first articulated this "clear statement" exception to its holding that claim-processing rules are no longer jurisdictional. Thereafter, in *Kwai Fun Wong*, the Court stated:

> [I]n applying that clear statement rule, we have made plain that most time bars are nonjurisdictional (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as quintessential claim-processing rules, which seek to promote the orderly progress of litigation, but do not deprive a court of authority to hear a case. That is so . . . even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so however emphatically expressed those terms may be. Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

575 U.S. at 410 (citations omitted; cleaned up)

Since *Kontrick*, the Supreme Court has almost exclusively found statutory time frames to be nonjurisdictional. Three opinions held a deadline to be not jurisdictional because both (1) there was no clear statement otherwise from Congress within the statute and (2) an actual jurisdictional grant was located far away in the United States Code from the deadline. *Musacchio v. United States*, 577 U.S. 237 (2016); *Kwai Fun Wong*; *Henderson v. Shinseki*, 562 U.S. 428 (2011). But, the Supreme Court has

also repeatedly held a deadline not to be jurisdictional, even when the jurisdictional grant and the deadline are in the same sentence. *Boechler*; *Sebelius v. Auburn Regional Med. Cntr.*, 568 U.S. 145 (2013); *Weinberger v. Salfi*, 422 U. S. 749, 763–764 (1975).

After *Arbaugh*, the Supreme Court has yet to hold any statute to clearly state Congress's intent that a deadline be jurisdictional. This makes it especially difficult for lower courts to hold deadlines jurisdictional under the clear statement rule because there are no such holdings provided by the Supreme Court to consider.

Since *Kontrick*, there have been only two Supreme Court opinions holding a deadline jurisdictional. But, those holdings were predicated exclusively on *stare decisis*, since for over 100 years, the Supreme Court had held those statutory deadlines jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

The *stare decisis* exception has no application here because it only applies if a long line of Supreme Court authority has held the deadline jurisdictional, even though the deadline contains no clear statement from Congress. *See Boechler*, 142 S. Ct. at 1500; *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Hamer v. Neighborhood Housing Servs.*, 138 S.

Ct. 13, 20 n.9 (2017); *Kwai Fun Wong*, 575 U.S at 416; *Auburn*, 568 U.S. at 153-154; *Gonzalez v. Thaler*, 565 U.S. 134, 142 n.3 (2012); *Henderson*, 562 U.S. at 436 (2011); *Reed Elsevier*, 559 U.S. at 168 (2010); *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82 (2009). The articulated reason for this exception is that Congress no doubt reads Supreme Court case law and considers that case law in legislating. *John R. Sand & Gravel Co.*, 552 U.S. at 139 ("Congress has long acquiesced in the interpretation we have given.")

Even though Justice Ginsburg[3] only wrote it in a concurrence, she objected to any attempt to expand this *stare decisis* exception to include merely a long line of consistent authority in courts below the Supreme Court. *Reed Elsevier*, 559 U.S. at 173-174 (Ginsburg, J, concurring, joined by Stevens and Breyer, JJ.) ("[I]n *Bowles* and *John R. Sand & Gravel Co. . . .* we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.' *Amicus* cites well over 200 opinions that characterize [17 U.S.C.] § 411(a) as jurisdictional, but not one is from this Court. . . ."; emphasis in original; citations omitted). The Supreme Court has never said courts should presume Congress reads appellate court

[3] As noted from the quote from *Kontrick* on page 4, above, Justice Ginsburg was the Justice who was the initial and primary mover of the restriction of the use of the word "jurisdictional".

opinions and legislates in reliance on those opinions in interpreting what procedural requirements are jurisdictional. Expanding the narrow *stare decisis* exception to include a long line of lower court opinions would be to drive a truck through what the Court expected to be a very narrow exception.

Amicus does not agree with the recent holding of *Hallmark v. Commissioner*, 159 T.C. No. 6 (Nov. 29, 2022), that a long history of courts below the Supreme Court consistently holding a deadline jurisdictional is enough to invoke the Supreme Court's *stare decisis* exception. In any case, however, CDP has existed for only 24 years, and there is no long line of appellate authority holding the § 6320(a)(3)(B) filing deadline jurisdictional. Thus, whatever the scope of the *stare decisis* exception to the clear statement exception, the *stare decisis* exception has no application here.

Amicus recognizes that, for a long time, the Tax Court has held, in effect (though not in so many words), that the § 6320(a)(3)(B) filing deadline is jurisdictional and not subject to equitable tolling. For example, in *Ramey v. Commissioner*, 156 T.C. 1 (2021), this Court wrote:

> When a taxpayer fails to make a timely request for a hearing under section 6330 and IRS Appeals makes no determination pursuant to section 6330, we have no jurisdiction under section 6330(d) "[b]ecause there [i]s no Appeals determination for this Court to review." *Offiler v. Commissioner*, 114 T.C. [492] at 498 [(2000)]; *see also Moorhous v. Commissioner*, 1116 T.C. 263, 269-270 (2001); *Kennedy v. Commissioner*, 116 T.C. 255, 261-263 (2001).

Id. at 11. But, again, this should not qualify for the Supreme Court's *stare decisis* exception. The Tax Court is not the Supreme Court.

Applying the current Supreme Court "clear statement" case law, the 30-day deadline in § 6320(a)(3)(B) in which to request a CDP hearing at Appeals is not jurisdictional.

To begin with, the "jurisdictional" grant to Appeals is located in § 6320(b)(1), which does not even mention the filing deadline, but only mentions the requirement of a written request for a hearing as a predicate to Appeals' jurisdiction. This should really end the matter of whether there is a clear statement that the filing deadline is intended to be jurisdictional.

At best, § 6320(b)(1) is ambiguous as to whether compliance with the filing deadline is also a jurisdictional requirement for Appeals consideration.

Under the "clear statement" exception, if there is more than one plausible interpretation of a statute, and one interpretation does not provide for a jurisdictional deadline, the exception has not been met. It does not matter that an interpretation of the statute that makes the filing deadline jurisdictional is the better interpretation – i.e., the interpretation the court would settle on if not applying the "clear statement" rule. *See Boechler*, 142 S. Ct. at 1499 ("But in this context, better is not enough. To satisfy the clear-statement rule, the jurisdictional condition must be just that: clear.").

In *Boechler*, the Court parsed § 6330(d)(1), which, unlike § 6320(b)(1), contains a parenthetical jurisdictional grant and filing deadline in the same sentence. Because there were multiple plausible interpretations of the statute (some of which would make the filing deadline not jurisdictional), the Court held there was no clear statement of a jurisdictional deadline. Section 6330(d)(1) provides: "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)."

At issue in *Boechler* was whether the parenthetical grant of jurisdiction, "(and the Tax Court shall have jurisdiction with respect to such matter)", was tied to the filing deadline of 30 days. The parties disputed whether the phrase "such matter" ties the jurisdictional grant to the filing deadline. The taxpayer argued it does not because "such matter" refers to the immediately preceding phrase: "petition [to] the Tax Court for review of such determination." *Id*. at 1498. In contrast, the Solicitor General argued that the phrase "such matter" refers to the entire first clause, including the filing deadline, and thus links the filing deadline to the jurisdictional grant.

As the *Boechler* Court pointed out, there were further interpretations of "such matter" for which neither party argued. "Such matter" might refer

to "determination" or even the list of matters considered at the CDP hearing before the Independent Office of Appeals. *Id.* at 1498. Because there were multiple plausible interpretations, and at least one was nonjurisdictional, the Court held that Congress did not clearly state a jurisdictional deadline, even if that was the most plausible interpretation.

Here, while there is one reading of § 6320(b)(1)'s jurisdictional grant that could make the filing deadline jurisdictional, the most plausible reading of the statute is that the filing deadline is not jurisdictional.

In addition to *Boechler*, there have been two other cases in which the Supreme Court has held a filing deadline contained within the same sentence as a jurisdictional grant to be nonjurisdictional. Both of these opinions were cited with favor in *Boechler*. 142 S. Ct. at 1499.

Auburn involved the 180-day deadline under 42 U.S.C. § 1395*oo*(a)(3) for Medicare providers to file in an administrative board in order to complain of insufficient reimbursements. 42 U.S.C. § 1395*oo*(a) provides:

> **(a) ESTABLISHMENT** Any provider of services which has filed a required cost report within the time specified in regulations may obtain a hearing with respect to such cost report by a Provider Reimbursement Review Board (hereinafter referred to as the "Board") which shall be established by the Secretary in accordance with subsection (h) and (except as provided in subsection (g)(2)) any hospital which receives payments in amounts computed under subsection (b) or (d) of section 1395ww of this title and which has

> submitted such reports within such time as the Secretary may require in order to make payment under such section may obtain a hearing with respect to such payment by the Board if—
>
> **(1)** such provider—
>
> **(A)** **(i)** is dissatisfied with a final determination of the organization serving as its fiscal intermediary pursuant to section 1395h of this title as to the amount of total program reimbursement due the provider for the items and services furnished to individuals for which payment may be made under this subchapter for the period covered by such report, or
>
> **(ii)** is dissatisfied with a final determination of the Secretary as to the amount of the payment under subsection (b) or (d) of section 1395ww of this title,
>
> **(A)** has not received such final determination from such intermediary on a timely basis after filing such report, where such report complied with the rules and regulations of the Secretary relating to such report, or
>
> **(B)** has not received such final determination on a timely basis after filing a supplementary cost report, where such cost report did not so comply and such supplementary cost report did so comply,
>
> **(2)** the amount in controversy is $10,000 or more, and
>
> **(3)** such provider files a request for a hearing within 180 days after notice of the intermediary's final determination under paragraph (1)(A)(i), or with respect to appeals under paragraph (1)(A)(ii), 180 days after notice of the Secretary's final determination, or with respect to appeals pursuant to paragraph (1) (B) or (C), within 180 days after notice of such determination would have been received if such determination had been made on a timely basis.

Thus, in a single, long sentence, subsection (a) provides that those providers "may" obtain hearings before an administrative board *if* (1) the providers

were dissatisfied with certain administrative reimbursement determinations (or lack thereof), (2) the amount in controversy is $10,000 or more, and (3) the providers request a hearing within 180 days after the determination (or lack thereof).

The Supreme Court appointed an *amicus* in *Auburn* to argue the 180-day period was jurisdictional. However, the Court then rejected the *amicus*' argument, writing:

> *Amicus* urges that the three requirements in § 1395*oo*(a) are specifications that together define the limits of the PRRB's jurisdiction. Subsection (a)(1) specifies the claims providers may bring to the Board, and subsection (a)(2) sets forth an amount-in-controversy requirement. These are jurisdictional requirements, *amicus* asserts, so we should read the third specification, subsection (a)(3)'s 180-day limitation, as also setting a jurisdictional requirement.
>
> Last Term, we rejected a similar proximity-based argument.

Auburn, 568 U.S. at 155.

The Court undoubtedly knew that, like § 6320(b)(1), § 1395*oo*(a) is the only provision arguably conferring jurisdiction, even though the word "jurisdiction" does not appear in § 1395*oo*(a).

The *Auburn* Court also rejected the *amicus*'s proximity-based arguments. While the Court took no issue with the *amicus*'s argument that the initial parts of the sentence, subsections (a)(1) and (a)(2), established jurisdictional conditions, the Court rejected any conclusion that subsection

(a)(3) was necessarily jurisdictional because of the latter subsection's proximity to the former. As the Court noted, it had rejected a similar proximity-based argument the year before – in *Gonzalez v. Thaler*, *supra*. In that case, 28 U.S.C. § 2253 governed the jurisdiction of district courts in *habeas* review. Subsection (c)(3) of that statute provided that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." As in *Auburn*, the Court in *Gonzalez* refused to consider the requirement of paragraph (c)(3) jurisdictional, even though it was adjacent to the paragraph (c)(1) jurisdictional provision within the same section of the United States Code. The Court reasoned that, "Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 565 U.S. at 147.

In addition to *Auburn*, *Boechler* relied on *Weinberger v. Salfi*, 422 U. S. 749, 763-764 (1975), for the proposition that a single sentence with a jurisdictional grant and a filing deadline does not necessarily give rise to a jurisdictional filing deadline. *Boechler* at 1499.

In *Salfi*, the Court interpreted 42 U.S.C. § 405(g), the first two sentences of which provide:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of

> the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia].

The Supreme Court in *Salfi* analyzed those two sentences at pp.763-764 (the pages cited in *Boechler*):

> Section 405(g) specifies the following requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. The second and third of these requirements specify, respectively, a statute of limitations and appropriate venue. As such, they are waivable by the parties, and not having been timely raised below, see Fed. Rules Civ. Proc. 8(c), 12(h)(1), need not be considered here. We interpret the first requirement, however, to be central to the requisite grant of subject-matter jurisdiction – the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are "final" and "made after a hearing."[4]

Here again, the Court broke apart the sentence, severing the final clause containing the filing deadline and deeming that clause not jurisdictional.

[4] About a decade later, the Supreme Court held that the filing deadline in § 405(g) is subject to equitable tolling. *Bowen v. City of New York*, 476 U.S. 467 (1986).

Under *Boechler*, *Auburn*, and *Salfi*, a court is precluded from finding Congress made a clear statement that a deadline is jurisdictional *merely* because the deadline is contained in the same sentence making the jurisdictional grant.

In sum, the deadline in § 6320(a)(3)(B) is not jurisdictional.

II. The 30-Day Deadline in § 6320(a)(3)(B) to File a Request for a Collection Due Process Hearing Is Subject to Equitable Tolling.

In *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court created a rebuttable presumption that equitable tolling applies to nonjurisdictional deadlines affecting the federal government.

While in 2013, the Supreme Court noted that equitable tolling under the *Irwin* presumption has "generally involved time limits for filing suit in federal court"; *Auburn*, 568 U.S. at 158; the Court's 2015 opinion in *Kwai Fun Wong* applied equitable tolling to a filing deadline in an agency.

Kwai Fun Wong involved the Federal Tor Claims Act ("FTCA"). 28 U.S.C. § 2401(b) provides that a person seeking recovery under the FTCA must first file an administrative claim in the agency that allegedly committed the tort. Thereafter, the person may bring suit on the claim in district court. Section 2401(b) provides separate deadlines for the filing in the agency and for the filing in district court. The Supreme Court held that both filing deadlines were not jurisdictional and were subject to equitable tolling. Thus,

the Supreme Court has already held that equitable tolling applies to at least one agency filing deadline.

Respondent's Response (at pp. 11-16) makes much of *Auburn*, but fails to cite the later *Kwai Fun Wong* opinion. Further, the Response does not discuss the other features of the Medicare provider reimbursement board litigation that led the Court in *Auburn* to its conclusion that the filing deadline in that case was not subject to equitable tolling.

As to those other features, the Court in *Auburn*, the Court wrote:

> We note, furthermore, that unlike the remedial statutes at issue in many of this Court's equitable-tolling decisions, the statutory scheme before us is not designed to be unusually protective of claimants. Nor is it one "in which laymen, unassisted by trained lawyers, initiate the process." *Zipes* [*v. TWA*], 455 U.S. [385], at 397 [(1982)] (internal quotation marks omitted). The Medicare payment system in question applies to sophisticated institutional providers assisted by legal counsel, and generally capable of identifying an underpayment in their own NPR within the 180-day time period specified in 42 U.S.C. § 1395*oo*(a)(3). As repeat players who elect to participate in the Medicare system, providers can hardly claim lack of notice of the Secretary's regulations.

568 U.S. at 159-160 (cleaned up; some citations omitted).

Boechler specifically distinguished the CDP Tax Court petition filing deadline from the Medicare deadline in *Auburn* as follows:

> We see nothing to rebut the [*Irwin*] presumption here. Section 6330(d)(1) does not expressly prohibit equitable tolling, and its short, 30-day time limit is directed at the taxpayer, not the court. Cf. [*Irwin*, 498 U.S.], at 94-96 (holding that a statutory time limit with the same characteristics is subject to equitable tolling). The deadline also

> appears in a section of the Tax Code that is unusually protective of taxpayers and a scheme in which laymen, unassisted by trained lawyers, often initiate the process. *Auburn*, 568 U.S., at 160. This context does nothing to rebut the presumption that nonjurisdictional deadlines can be equitably tolled.

142 S. Ct. at 1500 (cleaned up). *Amicus* agrees with the petitioner in this case, which pointed out in its Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction (at pp. 14-15) the incongruity of holding the § 6320(a)(3)(B) filing deadline jurisdictional while the Supreme Court has held the § 6330(d)(1) filing deadline not jurisdictional. Similarly incongruous would be holding the former deadline not subject to equitable tolling while the latter deadline is subject to equitable tolling.

In arguing against equitable tolling of the § 6320(a)(3)(B) filing deadline, respondent writes, "The inflexibility of these time limits makes sense in context. '[T]axes are the life-blood of government, and their prompt and certain availability an imperious need.' *Bull v. United States*, 295 U.S. 247, 259 (1935)." Response, at 16. This argument simply flies in the face of *Boechler*, where the Court held a different CDP filing deadline involving taxes is not inflexible, but is subject to equitable tolling.

In his Response (pp. 13-16), respondent argues that the existence of equivalent hearings for those taxpayers who request late CDP hearings, but who still request hearings within one year, shows that Congress has struck a

balance, providing for a rigid 30-day request period for CDP hearings, but allowing CDP-like procedures for equivalent hearings (though ones where there is no judicial review or hold on collection during the hearings). *Amicus* simply does not understand this argument. CDP hearings are different from equivalent hearings; providing the latter does not in any way undermine the *Irwin* presumption in favor of equitable tolling to obtain the former.

Moreover, respondent's quotation (on Response, p. 12) from the Conference Committee Report from the IRS Restructuring and Reform Act of 1998 omits a key sentence that shows Congress did expected the CDP hearing request filing deadline to be subject to equitable tolling. When a notice is mailed to a last known address, case law generally holds that the failure to receive the notice is no ground for tolling the filing deadline where the deadline is jurisdictional. In *Weber v. Commissioner*, 122 T.C. 258, 261-262 (2004), the Tax Court imported from its deficiency jurisdiction precedent the rule that a "ticket" to the Tax Court (there, a CDP notice of determination), if mailed to the taxpayer's last known address, commences the filing period, even if the taxpayer does not receive that ticket during the filing period. And, in *Ramey v. Commissioner*, *supra*, the Tax Court also held that an NOIL, if mailed to the taxpayer's last known address,

commences the period to request a CDP hearing, even if the taxpayer does not receive the NOIL during the 30-day filing deadline.

In the Conference Committee Report section discussing NOILs, however, Congress states that it wants the taxpayer to receive what must be a CDP hearing when he or she did not receive the NOIL (presumably, during the filing period). Here is the full paragraph from the Report that includes, as its second and third sentences, the direction from Congress tor the IRS to provide equivalent hearings. Note the last sentence, not quoted by respondent:

> If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property 30 days after the Notice of Intent to Levy was mailed. The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice. *If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer.*

H.R. Rep. (Conf.) 105-599 at 265-266, 1998-3 C.B. at 1019-1020 (Emphasis added). Though the last sentence does not explicitly state that the hearing provided be a CDP hearing, that is its obvious import, since equivalent hearings do not provide for the suspension of collection activity. Outside the tax area, non-receipt of important governmental notices is considered a ground for equitable tolling. *See, e.g*., *Checo v. Shinseki*, 748 F.3d 1373,

1378-1379 (Fed. Cir. 2014) (en banc) (when, because of homelessness, veteran did not receive Board of Veterans Appeals ruling until the 91st day of the 120-day filing deadline to bring an appeal in the Court of Appeals for Veterans Claims ("Veterans Court"), the 120-day period could potentially be equitably tolled to make her 33-days-late appeal timely; remand to Veterans Court to apply "stop clock" equitable tolling approach to the facts of the case).

Unfortunately, the *Ramey* opinion of this Court involved a *pro se* taxpayer who no doubt was unaware of, and so failed to cite, the italicized Committee Report sentence to the Tax Court, and the Court never discussed the sentence in its opinion.[5] Indeed, as far as *amicus* is aware, no opinion of this Court discusses the italicized Committee Report sentence. Instead, opinions of this Court cite a regulation stating that the failure to receive a properly-addressed NOIL is no excuse for a late CDP hearing request.[6]

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[5] *See* Caitlin Hird and T. Keith Fogg, "*Pro Se* Precedent in the U.S. Tax Court: A Case for *Amicus* Briefs", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4020358 forthcoming in the *Houston Business and Tax Law Journal* (regarding precedential opinions in pro se cases; discussing the distinct disadvantage *pro se* petitioners have in these situations and the potential damage to precedent resulting from an argument only presented by the government).

[6] For example, *Ramey* states: "[T]he regulations explain that '[n]otification properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business is sufficient to start the 30-day period within which the taxpayer may request a CDP hearing. * * * Actual receipt

However, the Eleventh Circuit was presented with the argument that the failure to receive an NOIL during the 30-day period was, in light of the Conference Committee Report sentence, a good excuse for a taxpayer to get a CDP hearing when he submitted his request within 30 days after belatedly actually receiving the NOIL. Here's from *Berkun v. Commissioner*, 890 F.3d 1260 (11th Cir. 2018):

> Mr. Berkun also advances an argument as to § 6330 based on the legislative history of the bill which became the IRS Restructuring and Reform Act of 1998. He asserts that, according to the bill's conference report, for the purpose of CDP hearings the Conference Committee was concerned with actual receipt of notices of deficiency, rather than simply constructive receipt accomplished through mailing notice to a taxpayer's last known address. *See* H.R. Rep. No. (Conf.) 105-599 at 264-66 (1998); 105 Cong. Rec. 144-53 at S4163 (1998). Building on this reading of the legislative history, Mr. Berkun contends that the Treasury regulations on which the tax court relied in dismissing his petition do not apply if the taxpayer does not receive the NOIL during the 30-day appeal period. Alternatively, he argues that if these regulations do apply, they are unreasonable constructions of the governing statutes and should not receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or they fail as an unreasonable interpretation of the text, structure, and purpose of the statutes.

Id. at 1264. The Eleventh Circuit refused to rule on this issue or a Due Process issue that Berkun also raised because the arguments were not timely presented to the Tax Court. However, the Eleventh Circuit was clearly

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is not a prerequisite to the validity of the CDP Notice.' [Sec. 301.6330-1(a)(3),] Q&A-A9." 156 T.C. at 9.

concerned that Berkun's Due Process and legislative history arguments might be correct. So, the court concluded its opinion as follows:

> We do not reach the due process or legislative history arguments because Mr. Berkun did not properly raise them in the tax court. Given the lack of any substantive ruling on our part, this may seem like an opinion "about nothing." *Cf. Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992). And maybe it is. But we have chosen to publish it because *the issues that Mr. Berkun attempts to raise on appeal may deserve attention from the bench and bar.*

Id. at 1265 (emphasis added). It is unfortunate that the *pro se* taxpayer in *Ramey* apparently also did not bring *Berkun* to the attention of this Court. After 24 years have passed since the Report's issuance, the meaning and import of the highlighted Report sentence should receive appropriate notice.

At pp. 16-17 (including n.7 on page 17), respondent's Response points out that TIGTA reports show that between 2017 and 2021, the IRS Independent Office of Appeals closed between 26,00 and 41,000 CDP and equivalent hearings combined. In terms of the administrative impact on the IRS of equitable tolling of the §§ 6320(a)(3)(B) and 6330(a)(3)(B) deadlines, TIGTA reports show that, by far, CDP hearings exceed the number of equivalent hearings at Appeals.[7] If equitable tolling were

[7] Respondent accurately cites the total number of CDP and equivalent hearings reported by TIGTA in its reports but fails to provide context. Only the cases the IRS refers for equivalent hearings matter in trying to gauge the administrative impact of equitable tolling on this process since taxpayers receiving a CDP hearing would not seek equitable tolling. The number of

allowed, in a small number of hearings requests Appeals would need to make a decision based on equitable tolling whether an otherwise late hearing request deserved a CDP hearing. The Appeals Officers would have little additional work in applying equitable tolling in these cases where they are already inquiring into the timeliness of the hearing request. And, as will be seen below, Appeals Officers are already applying what are, in effect, some equitable tolling principles in deciding whether a hearing request was timely.

In his Response (at pp. 13-16), respondent points to the regulations that, since 2002, have provided for no equitable tolling of the CDP request filing deadlines and that have provided, instead, for equivalent hearings. Respondent there notes that Congress amended the CDP provisions 10 times since their original adoption, yet has not specifically overruled those regulations. Respondent, in effect, argues for application of the legislative reenactment doctrine – to confirm that Congress intended the result of no equitable tolling. There are several problems with this argument:

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equivalent hearing cases ranged from a high of just over 7,000 to a low of just under 4,000. Of course, not all taxpayers requesting an equivalent hearing want a CDP hearing or would argue for equitable tolling. Respondent's brief fails to properly identify the likely number of cases in which an administrative equitable tolling determination would be necessary. That number could be quite low.

First, the same could be said as to the regulations under the filing deadline for Tax Court CDP petitions; they also do not explicitly allow for equitable tolling.[8] Yet *Boechler* did not mention any such legislative reenactment doctrine deference to those regulations in its opinion. That was no accident. The Solicitor General, knowing that this argument was a non-starter, did not even make a legislative reenactment doctrine argument in his Supreme Court brief or even cite to a single CDP regulation as support for the argument that the Tax Court petition filing deadline is jurisdictional and not subject to equitable tolling.

Second, Respondent appears to be trying to rely on the outcome in *Auburn*, which, in part, applied the legislative reenactment doctrine as part of its rationale for holding the Medicare provider filing deadline therein not subject to equitable tolling. The deadline to file a dispute over Medicare reimbursement in that case was generally 180 days. By a regulation that existed nearly over 40 years and through 6 statutory amendments (ones that did not discuss the regulation), the agency had in place a rule allowing up to 3 years for filing in cases "for good cause shown", instead of the 180-day

[8] Reg. 301.6230(f)(2)(AF-1) and 301.6330(f)(2)(AF-1) both provide: "[T]he taxpayer must, within the 30-day period commencing the day after the date of the Notice of Determination, appeal the determination by Appeals to the Tax Court."

filing deadline. The Court held the regulation valid. The case had been brought by Medicare providers who discovered what they alleged was Medicare using an incorrect method of computing reimbursements of which the providers had not been aware during the 3-year period, so the providers could not rely on the regulation's good cause extension. The Court thought the regulation an adequate substitute for equitable tolling because "[t]he Secretary brought to bear practical experience in superintending the huge program generally, and the PRRB in particular, in maintaining three years as the outer limit." *Id*., 568 U.S. at 157-158. It is far from clear that the *Auburn* Court would have upheld the regulation if it had not provided for any general good cause exception. By contrast, the CDP regulations provide for no extension for any excuse.[9]

Finally, although the regulations do not provide for equitable tolling of the CDP hearing request filing deadlines, as a practical matter, the Internal Revenue Manual ("Manual") allows for what can only be fairly characterized as equitable tolling. The Response fails to mention the relevant Manual provisions.

[9] Of course, there are statutory extensions that can apply to filings with the IRS generally that would clearly also apply to the deadline to request a CDP hearing. *See*, *e.g*., §§ 7502, 7508, and 7508A. *Boechler* did not find that the existence of such general (non-CDP-related) statutory extensions precluded equitable tolling of the Tax Court CDP filing deadline.

In *Mannella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011), the Third Circuit summarized current federal case law regarding the most common grounds for equitable tolling. Congress presumably was aware of this case law (much of which derives from Supreme Court case law) when it drafted §§ 6320(a)(3)(B) and (b)(1) and 6330(a)(3)(B) and (b)(1).

> There may be equitable tolling (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Mannella v. Commissioner, 631 F.3d at 125. *Accord Irwin*, 498 U.S. at 96 ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."; footnotes omitted); *Pace v. Di Guglielmo*, 544 U.S. 408, 418 (2005) ("[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."; citation to *Irwin* omitted).

The Manual essentially applies the equitable tolling grounds of (1) timely filing in the wrong forum and (2) the defendant (here, the IRS) actively misleading the plaintiff into filing late.

NOILs and NFTLs give directions to taxpayers to file Forms 12153 requesting CDP hearings at particular addresses shown in the notices. If the taxpayer properly mails his or her Form 12153 to the address to be used for that form shown in the notice, the taxpayer is entitled to the extension under § 7502 for timely-mailing-is-timely-filing. However, notices often also show a different address for payment. Manual § 8.22.5.3.1(2) (8-31-2020) states: "If a taxpayer mistakenly sends a timely hearing request to a different address on the notice, treat the postmark or transmission date as the date to determine timeliness." Thus, the Manual provides a rule that is essentially the same as the equitable tolling ground of timely filing in the wrong forum (here, the wrong IRS office). As examples of equitable tolling opinions applying that wrong forum ground, notices of appeal received timely in certain locations other than the Court of Appeals for Veterans Claims are treated as timely filed in that court for purposes of equitable tolling. *Bailey v. Principi*, 351 F.3d 1381, 1382 (Fed. Cir. 2003) ("We hold that the filing with the regional office of a document that expresses the veteran's intention to appeal to the Veterans Court equitably tolls the

running of the 120–day notice of appeal period, and we therefore reverse and remand."); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002) ("We hold as a matter of law that a veteran who misfiles his or her notice of appeal at the same VARO from which the claim originated within the 120–day judicial appeal period of 38 U.S.C. § 7266, thereby actively pursues his or her judicial remedies, despite the defective filing, so as to toll the statute of limitations."); *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002) (same).

Section 6091(a) states: "When not otherwise provided for by this title, the Secretary shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations." Manual § 8.22.5.3.1.3(1) (3-29-2012) states:

> Treas. Regs. require timely written filing of a CDP hearing request with the office indicated on the CDP notice. However, IRC 6091 permits more flexibility with respect to hand-delivered hearing requests. If a taxpayer **hand delivers** the CDP hearing request to a local [Taxpayer Assistance Center], the request is timely if received no later than:
>
> A. 30 days from the date of the CDP levy notice, or
>
> B. The "must file by" date on Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320

(Emphasis in original.) This is another provision that essentially adopts the equitable tolling ground excusing timely filing in the wrong place as timely filing in the right place.

Manual § 8.22.5.3.1.4(9) (8-31-2020) states: "If it is determined that the taxpayer received erroneous instructions from an IRS employee resulting in the request being sent to the wrong office, use the postmark date to the incorrect office to determine timeliness." This is essentially employing the equitable tolling ground for when the defendant actively misleads the plaintiff into filing late.

So, while the regulations do not explicitly permit equitable tolling, respondent, in his Manual, is providing equitable tolling selectively and without any public notice and comment or judicial review. This Court should not allow a party to essentially waive compliance with the filing deadline and then argue that there can be no equitable tolling. That is unfair tax administration.

CONCLUSION

This Court should hold that the 30-day deadline in § 6320(a)(3)(B) to request a CDP hearing is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

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January __, 2023

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on petitioner's counsel, Christian A. Speck, Douglas L. Youmans, and Robin Lesley Klomparens, Esqs. by mailing it to them on January __, 2023, in a postage-paid wrapper addressed to them at Wagner Kirkman Blaine Klomparens & Youmans LLP, 10640 Mather Boulevard, Suite 200, Mather, CA 95655, as well as by e-mailing it to them on that date.

This is to certify that a copy of the foregoing paper was served on counsel for the respondent, Erik W. Nelson, Esq., by mailing it to him on January __, 2023, in a postage-paid wrapper addressed to him at IRS Counsel's Office, 1220 S.W. 3rd Ave. Suite G004, Mail Stop O-0700 Portland, OR 97204-2827, as well as by e-mailing it to him on that date.

_____
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Dated: January __, 2023