No. ________

In the Supreme Court of the United States

HOWARD L. BALDWIN AND
KAREN E. BALDWIN,
A MARRIED COUPLE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

National Cable & Telecommunications Association v. Brand X Internet Services held that an agency's "*permissible* reading" of a statute trumps circuit-court precedent if the prior court had interpreted a statute that was silent or ambiguous with respect to the specific issue. 545 U.S. 967, 984 (2005) (emphasis in original). In all other situations, *stare decisis* dictates that opinions issued by federal appellate panels can be overruled only by *en banc* courts of appeals, by this Court, or by a properly enacted statute.

The Ninth Circuit in this case, acting under the *Brand X* doctrine, deferred to the Internal Revenue Service's interpretation of 26 U.S.C. § 7502 and held that the Ninth Circuit's prior construction of the statute did not bar IRS's subsequent contrary construction of that section because the statute was "silent" as to the specific legal issue. App.11a. The Ninth Circuit's precedent, established in 1992, had upheld the common-law mailbox rule. Nearly 20 years later in August 2011, IRS issued its contrary interpretation, which not only overruled court precedent but also abrogated a common-law rule that has prevailed for hundreds of years.

Absent *Brand X*, Ninth Circuit precedent based on ordinary tools of statutory construction would have controlled. Consequently, Howard and Karen Baldwin, who prevailed in district court, would have obtained a tax refund of about $168,000, plus statutory interest and attorneys' fees. Accordingly, the Baldwins present the following questions:

(1) Should *Brand X* be overruled?

(2) What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation, such as the common-law presumption canon?

DETAILS REQUIRED BY RULE 14.1(b)

Parties

All parties are listed on the cover page.

Petitioners are Howard Baldwin and Karen Baldwin, a married couple, who were plaintiffs in the district court and appellees in the court of appeals.

Respondent (defendant-appellant in the court of appeals) is the United States of America.

Rule 29.6 Statement

None of the parties are corporations.

Related Proceedings

Proceedings directly related to the case are as follows:

- *Baldwin v. United States*, No. 2:15-CV-06004-RGK-AGR, U.S. District Court for the Central District of California. Judgment after bench trial entered December 2, 2016, and Order awarding attorney's fees entered January 24, 2017.

- *Baldwin v. United States*, Nos. 17-55115, 17-55354 (consolidated, respectively, appeal from the December 2 Judgment, and appeal from the January 24 Order), U.S. Court of Appeals for the Ninth Circuit. Panel decision issued April 16, 2019, and Order denying rehearing issued June 25, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Howard and Karen Baldwin, who produced the critically acclaimed movie *Ray* (2004) based on Ray Charles' life, had filed a claim for the refund of their 2005 income tax. Four months before the deadline to claim a refund, they mailed a refund claim to the Internal Revenue Service (IRS) to recover $167,663 in overpaid taxes by regular United States mail.

IRS claimed it never received their refund claim and refused to pay them. The Baldwins sued IRS to get their money back. There was an easy way to prove—and they did so at trial—that they had in fact mailed the claim on June 21, 2011, four months before the October 15 refund-filing deadline.

The relevant statute (26 U.S.C. § 7502), Ninth Circuit precedent, and the centuries-old common-law mailbox rule were all on the Baldwins' side. That precedent clearly allowed the Baldwins to prove the postmark date, which is deemed the date of delivery, by using extrinsic evidence such as witness testimony.

After trial, the district court entered judgment against IRS. On appeal, however, the Ninth Circuit concluded that IRS's later-in-time interpretation (issued in August 2011) trumps the centuries-old common-law mailbox rule, the Ninth Circuit's longstanding precedent, and the plain text of Section 7502, all under the *Brand X* doctrine. IRS's new interpretation did not allow use of extrinsic evidence to prove the postmark date of a tax document sent by regular U.S. mail.

Thanks to *Brand X*, the court below reversed the favorable outcome the Baldwins had obtained after full trial. Absent *Brand X*, the Ninth Circuit would have simply followed its *Anderson* (1992) decision. *Brand X*, therefore, was outcome-determinative here. The Court

should grant certiorari to revisit *Brand X*, or in the alternative, to determine whether *Brand X* permits an agency to uproot the common law and plug the hole with its own rule.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 921 F.3d 836. App.1a–15a. The district court opinion is not reported but reproduced at App.16a–31a.

JURISDICTION

The Baldwins invoked the district court's jurisdiction under 28 U.S.C. § 1346(a)(1). The Ninth Circuit issued its opinion on April 16, 2019. App.1a. It denied a timely-filed petition for rehearing *en banc* on June 25, 2019. App.42a. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1254(1). This petition is filed within 90 days of the Ninth Circuit's denial of the petition for rehearing per Rule 13.3.

RELEVANT STATUTES AND REGULATIONS

The relevant provisions are reproduced at App.44a–77a, namely: 26 U.S.C. §§ 6511, 7422, 7502; 28 U.S.C. § 1346; 26 C.F.R. § 301.7502-1 (old and new versions).

STATEMENT OF THE CASE

A. The Baldwins Mailed the Tax-Refund Claim Four Months Before the Filing Deadline

Howard and Karen Baldwin overpaid their 2005 income taxes. As a result, they were entitled to a tax refund of $167,663. App.18a.

To obtain the refund, the Baldwins had until October 15, 2011 to file their amended 2005 tax return pursuant to the limitations period given in 26 U.S.C. §§ 6511(a), (b)(1), (d)(2)(A). App.4a. IRS agrees that was their deadline. The Baldwins mailed the relevant tax documents by regular U.S. mail to IRS on June 21, 2011—*i.e.*, about four months before the statute of limitations ran. App.10a.

1. Claiming the Filing Was "Untimely," IRS Sought Dismissal of the Baldwins' Suit

IRS claimed it never received the return. It denied the Baldwins' refund claim as "untimely." 26 U.S.C. § 7422(a); App.4a. The Baldwins then filed suit under 28 U.S.C. § 1346(a)(1).

In the district court, IRS filed a motion for summary judgment claiming the case should be dismissed for lack of jurisdiction. App.33a. In the motion, IRS argued that because the Baldwins' filing was untimely, the agency was immune from suit. To understand that argument, one needs to look at the statutory scheme.

There are several logical steps linking untimeliness with sovereign immunity in IRS's argument. It argued as follows:

- To maintain a civil action in federal court under 28 U.S.C. § 1346(a)(1) "for the recovery of" overpaid taxes—and to overcome sovereign immunity—the taxpayer must meet three requirements: (1) the taxpayer must fully pay the tax for the year in question. *Flora v. United States*, 362 U.S. 145, 176 (1960); (2) the refund claim must be "duly filed" with IRS under Internal Revenue Code (IRC) § 7422(a), 26 U.S.C. § 7422(a)[1]—*i.e.*, filed within the limitations period of Section 6511[2]; and (3) the tax-refund suit must be filed within the period given in IRC § 6532(a)(1).

- If there is a dispute as to the precise filing date, IRC § 7502 resolves such a dispute. Section 7502 provides that for tax-refund claims sent to IRS "by United States mail," the "postmark" date "shall be deemed to be the date of delivery" of the tax-refund claim. 26 U.S.C. § 7502(a)(1).

- Thus, a refund claim is "duly filed" within the meaning of Section 7422(a) if the "postmark" date falls, as relevant here, within the limitations period of IRC §§ 6511(a), (b)(1), (d)(2)(A).

- As a result, if the postmark date cannot be proved or if it falls beyond the statute of limitations, then

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[1] Unless otherwise noted, all statutory references are to Title 26 of the United States Code.

[2] Sections 6511(a), (b)(1), (d)(2)(A), as relevant here, establish a six-year limitations period to seek a tax refund. That is, Section 6511(d)(2)(A) adds three additional years to the three-year statute of limitations given in Sections 6511(a), (b)(1) for the specific type of refund claimed by the Baldwins.

federal courts do not have jurisdiction to entertain a taxpayer's tax-refund suit.

2. The Only Dispositive Issue Pertained to Section 7502

In its summary-judgment motion, based on this extended syllogism, IRS claimed it was immune from suit and had not waived sovereign immunity. App.35a. The Court held that the Baldwins plainly met the first and third requirements: they had fully paid (in fact, overpaid) the tax liability for tax-year 2005 and filed the suit within the prescribed time. App.36a.

The only question, therefore, was whether the Baldwins had met the second of these three requirements—timely filing of the refund claim. IRS maintained it never received the refund claim. App.37a.

Thus, the case depended on whether the refund claim was timely filed under Section 7502. That is, if the Baldwins could prove the postmark date of June 21, 2011, the refund claim would be deemed filed on that date, well before the October 15 deadline. Consequently, they would satisfy all three requirements for maintaining the tax-refund suit, establish the district court's jurisdiction, and receive their refund, plus statutory interest and attorneys' fees.

B. The District Court Ordered Trial to Prove—and the Baldwins Proved—Timely Mailing Under Section 7502

1. The Common-Law Mailbox Rule Under *Anderson* Applies Here

As relevant here, Section 7502 provides for two ways to prove the postmark date for tax documents sent by "United States mail": (1) presenting proof of registered or certified mail conclusively proves delivery, and (2) for other types of United States mail, such as regular or first-class mail, proving the postmark date by introducing extrinsic or circumstantial evidence establishes a presumption of receipt by IRS. Compare IRC § 7502(a)(1) (providing for "deliver[y] by United States mail," which includes, *inter alia*, priority mail, first-class mail, registered mail, certified mail), with IRC § 7502(c) (providing special rules for registered mail, certified mail, and electronic filing).

Following enactment of Section 7502 in 1954, a circuit split developed. On one side[3] were circuits holding that Section 7502 is "exclusive" and that it "displac[es] the common-law mailbox rule altogether." App.8a. In these circuits, Section 7502 does not "tolerat[e] testimonial and circumstantial evidence to prove when a document was mailed (and thus presumptively delivered)." App.8a. The Baldwins' claim would be considered untimely filed in these circuits because the only evidence they had establishing the June 21 postmark date was

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[3] *Maine Medical Center v. United States*, 675 F.3d 110 (1st Cir. 2012); *Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986); *Surowka v. United States*, 909 F.2d 148 (6th Cir. 1990); *Carroll v. Commissioner*, 71 F.3d 1228 (6th Cir. 1995).

"[o]ral testimony and documentary exhibits," which these circuits do not allow. App.17a.

On the other side[4] of the split were circuits concluding that Section 7502 "is best read as providing a safe harbor" for taxpayers. App.8a. These circuits relied on the principle that "statutes should not be read as displacing the common law unless Congress clearly so intended." *Id.* Section 7502 in these circuits did not "displace the common-law mailbox rule." At common law, "proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." App.5a. The Baldwins' refund claim would have been duly filed in these circuits based on oral testimony and documentary exhibits that proved the refund claim was postmarked June 21, 2011.

The Ninth Circuit, in *Anderson v. United States*, adopted the latter reasoning. 966 F.2d 487 (9th Cir. 1992). *Anderson* was a refund-recovery suit like the Baldwins'. The sole question, as here, was whether the plaintiff "had filed a timely claim for refund." 966 F.2d at 488. Acknowledging the circuit split, *Anderson* held that "[n]either the language of the statute nor Ninth Circuit precedent bars admission of extrinsic evidence to prove

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[4] *Philadelphia Marine Trade Ass'n–Int'l Longshoremen's Ass'n Pension Fund v. Commissioner*, 523 F.3d 140, 147 (3d Cir. 2008); *Estate of Wood v. Commissioner*, 909 F.2d 1155, 1161 (8th Cir. 1990) (affirming U.S. Tax Court's *en banc* decision in *Estate of Wood v. Commissioner*, 92 T.C. 793 (1989)); *Sorrentino v. IRS*, 383 F.3d 1187 (10th Cir. 2004).

The Fourth and Federal Circuits have declined to take sides on this question. *Spencer Medical Associates v. Commissioner*, 155 F.3d 268, 272 (4th Cir. 1998); *Martinez v. United States*, 101 Fed. Cl. 688, 693 (2012) (citing *Davis v. United States*, 230 F.3d 1383 (Fed. Cir. 2000)).

timely delivery," and that "enactment of Section 7502 did not displace the common law presumption of delivery" because the "statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule." *Id.* at 491.

The common-law rule has an ancient pedigree. As far back as 1884, this Court concluded that the common-law mailbox rule is "well settled" for letters sent by United States mail, *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884):

> The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

In the Baldwins' case, the Central District of California said that the Ninth Circuit's *Anderson* decision, which in turn relied on *Rosenthal*, controlled. The court explained that "the common law provides that proof of timely mailing of the return raises a rebuttable presumption that it was timely received." App.37a (quoting *Anderson* at 491). Under Section 7502, a taxpayer can introduce extrinsic and circumstantial evidence of mailing to establish "a presumption of receipt." App.37a (citing *Anderson*).

2. IRS Overruled the *Anderson* Decision by Amending Its Regulation

In 2011, however, IRS amended 26 C.F.R. § 301.7502-1 ("Regulation"), and made "registered or

certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received." App.37a–38a (emphasis in original) (citing 26 C.F.R. § 301.7502-1(e)). Consequently, the question the district court had to address was whether IRS's interpretation of Section 7502 controls or whether *Anderson* does.

3. The District Court Concluded that *Anderson* Controls

The district court concluded that the "regulation is in direct conflict with Ninth Circuit precedent"—*Anderson*—"which allows credible extrinsic evidence of mailing to create a presumption of receipt." App.38a.

However, IRS argued that because "any prior judicial constructions of [§ 7502] are superseded by reasonable agency interpretations of ambiguous statutes" under the *Brand X* doctrine, the agency's regulation should get "*Chevron* deference." App.38a.

The district court saw "no statutory ambiguity" in Section 7502 and held that IRS's 2011 Regulation "materially alters an otherwise clear statute." App.39a. Because the court found "that § 7502 is not ambiguous," it granted "no deference … to the Treasury Department's interpretation of the statute." App.40a.

Anderson therefore controlled, the court explained. App.40a. The court permitted the Baldwins to present extrinsic evidence proving the date when the tax-refund claim was postmarked. Since the "credibility of each party's evidence is for a jury to weigh, and is not a determination made at summary judgment," the court denied IRS's motion for summary judgment and ordered the parties to proceed to trial "with respect to the timely filing of their refund claim." App.41a.

4. The Baldwins Proved Their Claim Was Postmarked June 21, 2011

The court conducted a bench trial. App.3a. At trial, the Baldwins proved that their assistant had mailed the refund claim to IRS "via regular mail at the … post office," and that it "would have arrived at the IRS service center in the ordinary course well before the October 15, 2011 deadline." App.18a. IRS "offer[ed] no affirmative evidence calling into question that the [Baldwins] mailed [the refund claim] … on June 21, 2011." App.18a.

Thus, the court found "*credible*" the Baldwins' evidence that the refund claim "was indeed mailed on" June 21, 2011, and that IRS "failed to rebut the presumption of delivery." App.19a–20a (emphasis added); see *Anderson*, 966 F.2d at 492 ("The district court's conclusion that the government failed to rebut the presumption of delivery was, in essence, a credibility determination.").

The court reiterated that the common-law mailbox rule applied because Section 7502 "did not displace the common law presumption of delivery" dictated by the rule. App.19a (quoting *Anderson*, 966 F.2d at 491). The common-law rule, the court explained, states that "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." App.20a (citing *Rosenthal*, 111 U.S. at 193–94).

Therefore, the Baldwins had "met the requirements of 28 U.S.C. § 1346, and ha[d] further demonstrated that they are entitled to a tax refund of $167,663." App.22a. The court also awarded attorneys' fees and costs to the Baldwins as the prevailing parties. App.24a–31a.

IRS appealed from the district court's judgment and its order awarding fees and costs to the Baldwins—two cases that the Ninth Circuit consolidated.

C. The Ninth Circuit Concluded that *Brand X* Required It to Give *Chevron* Deference to IRS's Amended Regulation

In the Ninth Circuit, IRS argued that the district court erroneously rejected the government's deference argument—that its Regulation barred application of *Anderson*'s common-law mailbox rule. App.10a. It claimed that the district court erred in viewing Section 7502 "as unambiguously supplementing, rather than supplanting, the common-law mailbox rule, thus leaving no room for the agency to adopt the construction of the statute reflected in [the Regulation]." App.10a.

The Baldwins argued that because Section 7502 is unambiguous, *Brand X* does not switch on *Chevron* deference for IRS's Regulation. App.10a. They also argued that if the court applies *Brand X* and affords *Chevron* deference, IRS still cannot repeal common law unless the statutory language the agency is construing clearly and explicitly repeals the common-law rule. The common-law presumption canon, which is a traditional tool of statutory construction applied at *Chevron* Step One, dictates this result. App.12a. Finally, they argued that IRS should not be permitted to simply override the Ninth Circuit's *Anderson* decision under the *Brand X* doctrine. App.13a.[5]

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[5] The Baldwins also argued, using traditional tools of interpretation, that the default common-law mailbox rule applies because Section 7502 applies when a tax document is sent before, but received after, the applicable due date. They argued, because the statute does not address a situation where, as here, IRS claims it never received the document, the default common-law mailbox rule should apply. See *Storelli v. Commissioner*, 86 T.C. 443, 447 (1986) ("The provisions of section 7502(a) are applicable, however, only if

The Ninth Circuit concluded that "IRC § 7502 is *silent* as to whether the statute displaces the common-law mailbox rule," App.11a (emphasis added), and it further concluded that statutory silence triggers the *Brand X* doctrine under which courts "employ the familiar two-step analysis under *Chevron*[.]" App.10a.

In a single paragraph, without employing any traditional tools of statutory construction, the court decided at *Chevron* Step One that Section 7502 is "silent." App.11a. Then proceeding immediately to *Chevron* Step Two, again in a single paragraph, the court held that IRS's "construction of the statute is reasonable." App.12a.

In sum, the Ninth Circuit held that IRS's Regulation "is valid and applicable" under *Brand X*. Thus, the "exclusive" way left for the Baldwins to prove that the refund was postmarked June 21, 2011 was to produce a registered-mail or certified-mail receipt. 26 C.F.R. § 301.7502-1(e)(2). In other words, because they had mailed their refund by regular mail, the Regulation gave them no way to prove the postmark date. Therefore, the Baldwins' tax-refund claim was deemed not "timely filed" under the Regulation. Consequently, they could not maintain the tax-refund suit, having failed to overcome sovereign immunity. App.15a. No longer being

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the petition is delivered."). The Ninth Circuit rejected that argument. App.13a–14a.

They had also argued that the Regulation, which was promulgated in August 2011—two months after they mailed their refund claim—does not apply for that reason. The 2011 Regulation provides that it "will apply to all documents mailed after September 21, 2004." App.14a (quoting 26 C.F.R. § 301.7502-1(g)(4)). The court rejected the Baldwins' argument, concluding that the retroactivity provision of the Regulation complies with IRC § 7805(b), "which authorizes the Treasury Secretary to make regulations retroactively applicable as far back as the date of their proposal." App.14a–15a.

"prevailing parties," the court also reversed the Baldwins' attorneys'-fees award. App.15a.

The Ninth Circuit's decision thus depended on the *Brand X* doctrine, and on the question of what, if any, deference a federal agency's statutory construction should receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation like the common-law presumption canon. The Baldwins present precisely those questions here.

REASONS FOR GRANTING THE PETITION

I. RECONSIDERATION OF *BRAND X* IS LONG OVERDUE

Lower-court judges have urged this Court to revisit *Brand X*. The Court should grant certiorari and overrule *Brand X* because it erodes *stare decisis*, it is unworkable, and it was wrongly decided. Further, reconsidering *Brand X* need not have any effect on the applicability or validity of *Chevron* or *Kisor*. As the district court explained, without *Brand X*, the Baldwins clearly get their money back.

A. *Brand X* Subverts *Stare Decisis*

Brand X enables agencies to circumvent *stare decisis*. It empowers agencies to take out precedents they do not like via regulation—even ones like *Anderson* (1992), *Rosenthal* (1884), and the centuries-old common-law mailbox rule. The agencies may then replace unfavorable precedents by providing only cursory justification—not "special justification"—for the changes. Adherence to and judicial respect for *stare decisis*, therefore, should actually compel discarding *Brand X*.

Brand X allows agencies to undercut predictability, stability, fair notice to parties like the Baldwins, reasonable reliance, and settled expectations—values that *stare decisis* and the Due Process Clause protect. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Any departure from *stare decisis* "demands special justification—something more than an argument that the precedent was wrongly decided." *Id.* (cleaned up).

The Baldwins' case illustrates the fair notice problem especially well. In light of longstanding common law, a decades-old statute, and the then two-decade-old *Anderson* decision, the Baldwins had every reason to expect that they would be able to rely on extrinsic evidence (should it become necessary) to prove they mailed their return on time. Instead, thanks to the workings of *Brand X*, the Ninth Circuit allowed IRS in one swoop to erase the common law, the statute, and the court precedent simply by passing a new regulation—*after* the Baldwins had already filed their return. Such palpable unfairness is diametrically opposite to *stare decisis* values like fair notice and reasonable reliance.

Even if that were not so, *stare decisis* should not be a bar to overruling *Brand X*. "The ultimate touchstone of constitutionality is the Constitution itself and not what [this Court has] said about it." *Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring). *Stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

Further, *Brand X* itself did not address the constitutional objections that the Baldwins raise here. It cannot, therefore, be said that this Court has rejected these constitutional arguments by adhering to *Brand X* for 14 years. Cases such as *Brand X* "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality). In fact, *Brand X* has "no precedential effect" on whether the doctrine it established is constitutional. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Because the constitutional arguments were "not … raised in briefs or argument nor discussed in the opinion of the Court … [it] is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Although Justice Scalia flagged the *Brand X* decision as "probably unconstitutional," none of the parties presented the constitutional arguments the Baldwins raise here. 545 U.S. at 1017. Nor did the *Brand X* majority discuss these constitutional concerns. Therefore, *stare decisis* cannot excuse this Court from considering the constitutionality of *Brand X* deference now.

Moreover, *Brand X*'s constitutionality is not susceptible to percolation or burgeoning circuit splits. "It is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The lower courts simply must follow the mandates emanating from this Court. Therefore, it is particularly telling that a growing number of court of appeals judges—and Members of this Court—have nonetheless called upon the Court to reconsider *Brand X*.

There is no reason to "perpetuate[]" a faulty "practice" just because it has been around for 14 years; in fact that experience shows that such decisions "should be terminated, not perpetuated." *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 231 (N.J. 1952).

In sum, *Brand X* supplies a mechanism for subverting *stare decisis* to federal agencies. The Court should grant certiorari to reconsider *Brand X* because the "special justification" needed to overturn this precedent is that *Brand X* itself does enormous damage to *stare decisis*. The "special care" this Court—and the courts of appeals—take to preserve their precedents dictates that *Brand X* should not be kept on the books. *Kisor* at 2418.

B. *Brand X* Is Unworkable

Brand X is unworkable in practice. Before *Brand X*, courts seldom explicitly stated whether a statute is silent, truly ambiguous, or unambiguous. Such missing assessments makes *Brand X* unworkable. Judges had no inkling that they must utter the "magic words"—"ambiguous" or "unambiguous"—"in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia sharply criticized the workability of *Brand X* in his *Home Concrete* concurrence. Before *Brand X*—and even "pre-*Chevron*"—no one was aware of the "utility (much less the necessity) of making the ambiguous/nonambiguous determination" during the "judicial-review analysis." *Home Concrete*, 566 U.S. at 493. Even assuming that an ambiguous statute impliedly "delegate[s] gap-filling authority to an agency," that hardly resolves situations where a pre-*Brand X* decision did not even make the "ambiguous/nonambiguous determination." *Id.* at 488.

What's more, the delegation of gap-filling authority is absent when a statute is *silent*—as much as, if not more

than, when the statute is unambiguous. If the rule were to the contrary, every instance of Congressional silence would turn into an open-ended delegation of gap-filling authority to agencies with no limiting principle. Such statutory "silence" cannot be an "invitation to regulate." *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit). Thus, *Brand X* transgressed the Constitution when it concluded that statutory "silence suggests … that the [agency] has the discretion to fill the consequent statutory gap." 545 U.S. at 997. The court below took it a step further and said that because *Anderson* was silent as to whether Section 7502 is silent, ambiguous, or unambiguous, the agency's permissible reading trumps court precedent under *Brand X*. App.13a.

However, even assuming Section 7502 is silent as to whether it was intended to displace the common-law mailbox rule, such silence should also compel the conclusion that the common law still applies. See *Arangure v. Whitaker*, 911 F.3d 333, 337 n.2, 339 (6th Cir. 2018). Silence in this context does not create a gap for the administrative agency to fill. It forms the basis for a statutory rule of construction—the common-law presumption canon—which, as explained below, makes Section 7502 clear. That is precisely what the Ninth Circuit had previously determined in *Anderson*. 966 F.2d at 491.

Anderson (1992), which predated *Brand X* (2005), did not use the magic words "ambiguous," "unambiguous," or "silent." Instead, it simply ruled, based on a straightforward reading of the text of Section 7502 that the "postmark" date of a tax document sent by "United States mail" can be proved by presenting credible extrinsic evidence. But the court below concluded—based on an extremely sparse statutory-construction analysis—that Section 7502 is "silent" as to whether it supplements or

supplants the common-law mailbox rule. App.11a.[6] Because *Anderson* did not expressly "hold … that our interpretation of the statute was the *only* reasonable interpretation," the court below deferred to IRS's 2011 amended Regulation. App.13a (emphasis in original). But the court also acknowledged that *Anderson* "made clear that our decision … filled a statutory gap" with the common-law mailbox rule. App.13a.

Brand X presumably applies only to a "reasonable reading of an ambiguous statute" but not when the statute is unambiguous. *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). Except by the court below, App.11a, *Brand X* has not been applied in statutory-silence situations, and if this Court's statement in *Eurodif* is any indication, it should probably not apply in statutory-silence situations because there is "no statutory uncertainty to be resolved." 555 U.S. at 315.

More importantly, *Brand X* is unworkable because it provides no assurance that following the rule of law and conforming one's conduct accordingly will lead to predictable consequences. Litigants like the Baldwins are doomed if they comply with court precedent, common law, or the statute. The Baldwins did not know, at the time they made the fateful decision to mail their refund claim by regular U.S. mail, that they needed to predict whether IRS might change its interpretation of Section 7502. Tasking the Baldwins to be omniscient is the antithesis of a workable rule of law.

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[6] Every court, in addition to the court below, that has expressly evaluated whether Section 7502 is silent, ambiguous, or unambiguous has said that the statute is "silent" as to how a taxpayer may prove the postmark date. *Sorrentino*, 383 F.3d at 1193; *Carroll*, 71 F.3d at 1231; *Lewis v. United States*, 942 F. Supp. 1290, 1293 (E.D. Cal. 1996).

At the time the Baldwins mailed their refund claim in June 2011, IRS's now-current rule—allowing only registered or certified mail receipts to prove the postmark date—was not the law of the land. The law, as it stood in June 2011 was the Ninth Circuit's *Anderson* decision. Deferring to IRS under *Brand X* in such situations would mean that the Baldwins erred in complying with established circuit precedent and erred in not complying with IRS's *proposed rule* when they mailed their refund claim by regular U.S. mail.

Brand X thus demotes federal-court opinions into mere advisory opinions and promotes even federal-agency *proposed* rules into governing law. See *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 531 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone") (Under *Brand X*, court rulings are "necessarily provisional and subject to correction when the agency chooses to adopt its own interpretation of the statute" and when "[a]gencies alone can speak … as to what the law means."). Such a rule is in direct tension with the most basic high-school-level understanding of rule-of-law precepts: "fair notice, reasonable reliance, and settled expectations." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

The Court should grant certiorari to reconsider *Brand X* and provide a workable—and Constitutional—standard for litigants and lower courts to follow.

C. *Brand X* Was Wrongly Decided

The Court should grant certiorari in this case to revisit *Brand X* because it violates due process, Article III judicial independence, separation of powers guarantees of the Constitution, and it undermines the judiciary's role to say what the law is.

1. *Brand X* Denies Due Process and Impairs Judicial Independence Under Article III

Deferring to the agency's interpretation of a statute when such construction overrides prior court precedent violates the Due Process Clause by commanding judges to exhibit bias toward government litigants. *Brand X* deference "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of power leads to "more than a few due process … problems." *Id.* at 1155.

Brand X removes the judicial blindfold. It requires judges to display systematic bias favoring agency litigants—and against counterparties like the Baldwins. *Brand X* deference thus "embed[s] perverse incentives in the operations of government" and requires courts to "bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Authority*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). The "risk of arbitrary conduct is high" and *Brand X* puts "individual liberty … in jeopardy" because "an agency can change its statutory interpretation with minimal justification and still be entitled to full deference." *Id.* at 280. It is a denial of due process when judges "engage in systematic bias in favor of the government … and against other parties." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016).

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Brand X* institutionalizes a regime of

systematic judicial bias by requiring courts to "defer" to agency litigants especially where the agency litigant, as here, openly ignores or disregards prior court precedent. *Brand X* thus forces judges to abandon their own judgment about what the law is and instead consciously substitute the legal judgment of one of the litigants before them.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [them]." 28 U.S.C. § 453. And federal judges are ordinarily very scrupulous about living up to these commitments. Nonetheless, under *Brand X*, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold and precommit to favoring the government agency's position.

Whenever *Brand X* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's last-in-time interpretation of the law. Indeed, judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729, 1734 (2018) (Kagan., J., concurring).

Judges also abandon their duty of independent judgment when they "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but *first*." *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (emphasis added). Under *Brand X*, "the agency is free to expand or change the obligations upon our citizenry without any change in the statute's text." *Id.* That truth is especially obvious here because Section 7502(a) has *not* changed in relevant part since 1954. And

the common-law mailbox rule was considered "settled" well before 1884. *Rosenthal*, 111 U.S. at 193.

Other judges have also properly refused to abdicate their judicial duty. In *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812, 823 (8th Cir. 2017) (*en banc*), criticizing *Brand X*, the majority explained that applying *Brand X* "would leave the Board free to disregard any prior Supreme Court or court of appeals interpretation of the NLRA." Thus, refusing to abandon judicial independence, the *MikLin* majority withheld *Brand X* deference from the NLRB's new interpretation that had effectively "overruled" this Court's and the Eighth Circuit's decisions. *Id.* at 821.

Brand X mandates that the government litigant win as long as its preferred interpretation of the regulation seems "permissible," even if it is wrong. Here, IRS's interpretation is the exact *opposite* of long-standing, well-reasoned decisions of several federal appellate courts. It casually discards a centuries-old common-law mailbox rule. It is also contrary to the plain meaning of an Act of Congress that echoed settled common law. Worse still, IRS demanded—and received—*Brand X* deference to its Notice of *Proposed* Rulemaking issued in 2004, 69 Fed. Reg. 56377-01 (Sep. 21, 2004). App.14a. The Regulation, 26 C.F.R. § 301.7502-1 (pre- and post-2011 versions reproduced at App.52a–77a), was not amended until the Notice of Final Rulemaking was issued in August 2011—two months *after* the Baldwins had already mailed their refund claim. 76 Fed. Reg. 52561-01 (Aug. 23, 2011). The Baldwins were unable to order their actions in advance to conform with the law. That violates fundamental rule-of-law precepts.

In addition to the abundant criticism already noted, several jurists have explicitly urged this Court to revisit *Brand X*. See *Gutierrez-Brizuela* at 1150–51 (2015)

(Gorsuch, J., concurring) ("semi-tam[ing]" "some of *Brand X*'s more exuberant consequences"); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Garfias-Rodriguez*, 702 F.3d 504 (*en banc*) (Kozinski, J., "disagreeing with everyone" & Reinhardt, J., dissenting); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (per Berzon, J., dissenting, joined by Pregerson, Fisher, Paez, JJ.). "[E]xecutive agencies" should not be "permitted to … reverse court decisions like some sort of super court of appeals." *Gutierrez-Brizuela* at 1150. The Court should therefore grant certiorari to revisit *Brand X* and restore due process and judicial independence.

2. *Brand X* Violates the Constitution's Separation of Powers

In *Kisor v. Wilkie*, Justice Gorsuch, joined by Justices Thomas, Alito, and Kavanaugh, criticized *Brand X*: "if an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really determines what the regulation means?" 139 S. Ct. at 2433 (Gorsuch, J., concurring in the judgment) (cleaned up). Justice Thomas, who authored *Brand X*, criticized it later and explained that it "raises serious separation-of-powers questions," "is in tension with Article III's Vesting Clause," and "Article I's [Vesting Clause]." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Such concerns are especially valid in this case where an Article II agency amended its regulation to overrule Article III court decisions, settled common law, and the plain text of an Article I act of Congress.

The Constitution provides foundational rules for the operation of our government. Congress writes the laws. The Executive Branch enforces them. The Judiciary

independently interprets them. But *Brand X* threatens to consolidate all three functions in a single administrative agency—here, IRS—and to contravene both the laws written by Congress and prior judicial interpretations of those laws.

The Constitution establishes a system of separated powers: "[T]o avoid the possibility of allowing politicized decisionmakers to decide cases and controversies about the meaning of existing laws, the framers sought to ensure that judicial judgments 'may not lawfully be revised, overturned or refused faith and credit by' the elected branches of government." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Neither an Executive Department official "nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." *Hayburn's Case*, 2 U.S. 409, 410 n.* (1792). Hence, when the Treasury Secretary nullifies *Anderson*, that action is every bit as unconstitutional as was the War Secretary's action revising the decision of a federal court in *Hayburn's Case. Id.*

"Yet this deliberate design, this separation of functions aimed to ensure a neutral decisionmaker for the people's disputes, faces more than a little pressure from *Brand X*." *Gutierrez-Brizuela* at 1150; see also *De Niz Robles* at 1171 & n.5 (collecting pertinent authority). *Brand X* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution." *Gutierrez-Brizuela* at 1149.

Justice Scalia, joined by Justices Souter and Ginsburg in part, dissented in *Brand X*. Justice Scalia called the majority's decision "not only bizarre" but "probably

unconstitutional." 545 U.S. at 1017. Indeed, "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *Id.* But that is precisely what *Brand X* endorses. The agency that "is party to the case in which the Court construes a statute … [is] able to disregard that construction and seek"—and obtain—"*Chevron* deference for its contrary construction the next time around." *Id.*

Brand X "emphatically" undermines "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court should grant certiorari to resolve this "serious separation-of-powers" problem with *Brand X*. *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring).

D. Overruling *Brand X* Need Not Affect the Applicability or Constitutionality of *Kisor* or *Chevron*

Brand X is somewhat unique among government-litigant-bias doctrines. While *Chevron* and *Kisor* are triggered where a court construes a statute or regulation issued sometime in the past, *Brand X* deals with the order of events reversed. The clear difference is this: *Brand X* requires not merely judicial deference to agency interpretation, but also judicial acquiescence in agency non-deference to judicial interpretation. It is thus a direct assault on judicial authority. If agency action abrogates an earlier-in-time *court decision*, *Brand X* switches on *Chevron* deference in favor of the government litigant. *Brand X* being such a "bizarre" beast, 545 U.S. at 1017, it can be overruled without necessarily affecting the applicability or validity of *Chevron* or *Kisor*.

II. Alternatively, the Court Should Grant Certiorari to Clarify Whether the *Brand X* Doctrine Permits an Agency to Disregard Traditional Statutory-Construction Tools

Even if this Court is reluctant to repudiate *Brand X*, it still should at least clarify when the case applies.

A. The Court Should Clarify that the First Analytical Step Before Applying *Brand X* Should Be Rigorously Applying Traditional Tools of Statutory Construction to a Statute's Text

The "cursory" statutory-construction analysis employed by the court below is a classic example of "reflexive deference" that this Court should grant certiorari to reject. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The lower court's scant statutory-interpretation analysis ignored the traditional, "ordinary tools of statutory construction," *id.*, the effect of which was to endorse IRS's interpretation that ignored, among other canons of construction, the common-law presumption canon, and the *contra proferentem* canon that applies to tax laws. *Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537, 547 (1956) ("[A] question as to the meaning of a taxing act [is] to be read in favor of the taxpayer."). Even if legislative history were to play a role in this step-one textual analysis (*Anderson* had evaluated Section 7502 using traditional tools in detail, and also using legislative history), that history also points to the speciousness of IRS's argument.[7]

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[7] Congress enacted Section 7502 "to mitigate the harsh inequities of a literal adherence to the filing requirements … . Under that section a [tax document] is 'deemed' filed as of the date of the U.S. postmark stamped on the envelope in which it is mailed."

This Court has not crafted "explici[t]" instructions about statutory-construction analysis under *Brand X*, which has left lower courts in a state of confusion. *Arangure*, 911 F.3d at 339–40. Granting certiorari in this case will enable the Court to alleviate that confusion.

Consider, for instance, the common-law presumption canon. Where, as here, there is "statutory silence in the face of existing common law," "courts presume that general statutory language incorporates established common-law principles … unless a statutory purpose to the contrary is evident." *Id.* at 337 n.2, 339. So, "silence" cannot be automatically equated with "ambiguity." *Id.* at

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Wells Marine, Inc. v. Renegotiation Bd., 54 T.C. 1189, 1192–93 (1970). The Tax Court has long followed the common-law mailbox rule: "To establish that a return has been timely filed, we require reliable testimony or other corroborating evidence of the circumstances surrounding the return's preparation and mailing." *Hyler v. Commissioner*, 84 T.C.M. 717, 2002 WL 31890047 at *11 (2002). In 2010, a year before IRS amended the Regulation, the Tax Court had once again held that "extrinsic evidence is admissible" under 26 C.F.R. § 301.7502-1(c)(1). *Van Brunt v. Commissioner*, T.C. Memo. 2010–220, 100 T.C.M. (CCH) 322 (2010). Repeatedly failing to obtain favorable decisions from the courts, IRS instead promulgated the Regulation and got rid of the court decisions it did not like on this topic.

Section 7502, however, is

> Totally devoid of any language to indicate that Congress intended a registered or certified mailing to be the exclusive means of proving a postmark. Indeed, the House and Senate Reports specifically state with respect to an amendment to IRC § 7502 that 'the taxpayer, of course, could also establish the date of mailing by other competent evidence (besides registered or certified mail receipts).'

Kenneth H. Ryesky, *Tax Simplification: So Necessary and So Elusive*, 2 Pierce L. Rev. 93, 121 & n.192 (2004) (quoting S. Rep. No. 90-1014, at 19 (1968); H.R. Rep. No. 90-1104, at 14 (1968)).

338. "[N]or does it automatically mean that a court can proceed to *Chevron* step two," as the lower court did here. *Id.*

The common-law presumption canon is "not based on a normative judgment that the common law is better as a policy"; "[r]ather, it is based on a descriptive judgment: Congress legislates against a common-law backdrop and presumably does not intend to reject that backdrop with general statutory language." *Id.* at 343.[8] It would indeed be hard to come by "an interpretive tool more traditional than the centuries-old common-law presumption." *Id.* (cleaned up). This Court expressed the same principle over two centuries ago: "The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 623 (1812); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. Rev. 109 (2010) (discussing the common-law presumption canon); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2120 (1990) ("When the relevant interpretive norm is part of an effort to discern legislative instructions, *Chevron* is uncontroversially subordinate to that norm"). Although this Court has "a canons first

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[8] Here, for example, Congress knew how to override the common-law mailbox rule (or restrict mailing methods to registered or certified mail) in Section 7502—but it did neither. See, *e.g.*, 10 U.S.C. § 1566(g)(2) (requiring actual delivery); 52 U.S.C. §§ 30104(a)(2)(A)(i), (a)(4)(A)(ii), (a)(5) (abrogating the common-law mailbox rule, restricting mailing methods); 42 U.S.C. §§ 1395w-112(b)(4)(A)(iii), (b)(4)(D)(iv) (preserving the common-law mailbox rule for payments, but not for claims). See also 39 U.S.C. § 404 (the postal service follows the common-law mailbox rule); Supreme Court Rule 29; Fed. R. App. P. 25; Fed. R. Bankr. P. 8011; 38 U.S.C. § 7266 (following the common-law mailbox rule).

rule, … it has not said so *explicitly*." *Arangure*, 911 F.3d at 339–40 (collecting cases; cleaned up; emphasis added).

Due to lack of explicit instructions from this Court, lower courts inconsistently apply *Brand X*. For example, some courts have concluded that the "common-law presumption canon qualifies as a 'traditional tool' of statutory interpretation." *Arangure* at 342. The Sixth Circuit, *Arangure* shows, gives no deference to agency interpretations in derogation of the common law. Nor do the Second, Fifth, Ninth, Eleventh, and D.C. Circuits.[9]

The court below, departing from these courts, and previous panels of the Ninth Circuit, upheld IRS's interpretation in derogation of the common law. The court declared the common-law presumption canon merely a "dueling principle[] of statutory interpretation," on par with IRS's "equally permissible construction of the statute." App.12a. In effect, the court below performed *no*

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[9] See, *e.g.*, *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018) (8 U.S.C. § 1401 incorporates the common law presumption of legitimacy); *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 369–70 (5th Cir. 2018) ("absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses"); *United States v. Garcia-Santana*, 774 F.3d 528 (9th Cir. 2014) (courts use common law at *Chevron* Step One); *Lagandoan v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004) (Congress can override the common-law presumption with express language; without express language, Congress is presumed to legislate against the background of the common law); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1292 (11th Cir. 2016) ("*Chevron* step one" "analysis ends" "[b]ecause Congress indicated by its silence that … the common law governed"); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017) (whether a "worker" is an "employee" or "independent contractor" is a question "of pure common-law agency principles involving no special agency expertise that a court does not possess"; "this particular question under the [NLRA] is not one to which we grant the Board *Chevron* deference or to which the *Brand X* framework applies").

traditional-tool analysis to determine whether Section 7502 is ambiguous, unambiguous, or silent, and instead jumped straight to *Chevron* Step Two and concluded that IRS's interpretation was "permissible." *Id.* That shortcut approach collapses the whole *Brand X–Chevron* inquiry into a single step: *Chevron* Step Two.

But *Brand X* did not endorse this game of hopscotch that skips the traditional-tool analysis. The Court should grant certiorari to clarify that courts must conduct a thorough analysis of the statutory text using traditional tools of statutory construction to determine whether the statute is truly ambiguous, unambiguous, or silent.

B. The Court Should Specify that *Brand X* Is Not a Magic-Words Review of the First-in-Time Court's Decision

The Court should also grant certiorari to indicate that the *Brand X* analysis does not turn on whether the first-in-time court characterized the statute as silent, ambiguous, or unambiguous. That is because pre-*Brand X* courts seldom if ever expressly categorized statutes as silent or (un)ambiguous. Instead, the *Brand X* Step One analysis should look at whether the first-in-time court performed a traditional-tool analysis regardless of whether it expressly placed the statute in one of these three silos. If the first-in-time court did resort to such analysis, then that first-in-time decision, and not the later-in-time agency interpretation, should control. In other words, federal agencies should not be able to trump judicial decisions that have scrupulously applied traditional tools of statutory construction.

The court below, instead, performed a cursory magic-words review. It said, because *Anderson* was silent as to whether Section 7502 is silent, ambiguous, or

unambiguous, the court will defer under *Brand X* to the agency's permissible or reasonable reading of the statute. App.13a.

Home Concrete indicates why this clarification is sorely needed. There, the Court had to evaluate whether a Treasury Regulation interpreting a statute trumped a prior Supreme Court decision—*Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958)—interpreting the tax statute. In *Colony* the Court had written that "it cannot be said that the language is unambiguous." 357 U.S. at 33. The *Home Concrete* majority relied on this standard to conclude that the statute is "now unambiguous," 566 U.S. at 489 (cleaned up), and declined to defer under *Brand X* to IRS's regulation. In other words, the outcome turned on how the first-in-time court chose to characterize the statute on the silent–ambiguous–unambiguous continuum.

However, the "now unambiguous" formulation in Justice Breyer's majority opinion also seems to suggest that a court confronted with the question of whether *Brand X* applies should look to *how* the first-in-time court (*Colony*) analyzed the text of the statute, not the *label* the court used. *Home Concrete* concluded that when a prior decision "makes clear" that it is filling a statutory gap, the statute then becomes "unambiguous" and there is "no gap to fill," and consequently the courts should not defer to the agency's later-in-time interpretations attempting to re-fill that already-filled gap. 566 U.S. at 489–90.

Furthermore, any permissibility or reasonableness of agency interpretation is at its lowest ebb when the agency does not invoke or depend on the agency's "substantive expertise." *Kisor*, 139 S. Ct. at 2417. IRS has no "substantive" or "special" "expertise" in the common law. *FedEx*, 849 F.3d at 1128; see also *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 761 (8th Cir. 1982) (NLRB

has no "special expertise" in "common law agency principles"); *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–93 (10th Cir. 1978) (the "basis for deference ebbs" when the "interpretive issu[e] … fall[s] more naturally into a judge's bailiwick," such as "elucidat[ing] … a simple common-law property term").

This Court has confirmed that "[s]tatutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). It simply cannot be that Congress abrogated common law in Section 7502 (its plain words reveal the opposite), and it cannot be that Congress, through ambiguity or silence, authorized IRS to abrogate the longstanding common-law mailbox rule. Cf. *Rios v. Nicholson*, 490 F.3d 928, 931–32 (Fed. Cir. 2007) ("Congress did not intend to abrogate the common-law mailbox rule" by enacting 38 U.S.C. §§ 7266(c)(2), (d)); *Savitz v. Peake*, 519 F.3d 1312, 1315 (Fed. Cir. 2008) (concluding that 38 U.S.C. § 7105(b)(1) did not supplant or "abrogate" the common-law mailbox rule).[10] Thus, if *Brand X* survives, it should apply at most in rare instances where the meaning of the statute truly cannot be ascertained using ordinary statutory-construction methods.

If this Court is unwilling to overrule *Brand X*, it could at least follow the approach the Court took in *Kisor*. A rigorous analysis employing ordinary statutory-interpretation tools should resolve this case and many other *Brand X* cases. The only "reflexive" portion of a court's analysis should be to turn to statutory construction at the first step. The Court should grant certiorari to make it clear once and for all that courts' first resort is

[10] The Third, Eighth, Ninth (under *Anderson*), and Tenth Circuits have concluded that Section 7502 supplements and does not supplant the common-law mailbox rule. See *supra* n.4.

analyzing the applicable statute using ordinary tools of statutory construction, including canons of construction.

III. THIS CASE IS AN ATTRACTIVE VEHICLE TO RESOLVE THE CRITICALLY IMPORTANT QUESTION OF WHETHER *BRAND X* SHOULD BE OVERRULED OR CABINED

This case is an ideal vehicle to answer the questions presented. The district court applied *Anderson* instead of the later-in-time Regulation. The Ninth Circuit, per *Brand X*, deferred to the later-in-time Regulation and discarded *Anderson*. If the district court is right, the Baldwins win; if the Ninth Circuit is right, the Baldwins lose. The questions, therefore, are cleanly presented and outcome-determinative.

Further, this case has well-developed facts entered into the record after a full-fledged bench trial, which makes it an ideal vehicle. No further facts need to be developed; no procedural-posture problems exist like the ones which crop up in cases coming up to this Court upon grants of motions to dismiss.

The *Brand X* questions are front and center, and when answered, would resolve the case. They are also critically important questions that affect *every single* tax document filed with IRS—that's at least as many tax documents as there are taxpayers in the Nation. It is thanks to Section 7502 that the date "April 15" has obtained such cultural significance, and perhaps notoriety too, as "Tax Day." IRS's website, for example, says: "File on: April 15th," When to File, IRS (May 1, 2019), https://bit.ly/2kl0LrM, and clarifies further, "Your return is considered filed on time if the envelope is properly addressed, postmarked, and deposited in the mail by the due date." *Id.* IRS's argument against the Baldwins

based on its amended Regulation that registered or certified mail receipts are "the exclusive means to establish … evidence of delivery" suggests otherwise. 26 C.F.R. § 301.7502-1(e)(2)(i), App.74a.

Justice Story once refused to defer to a Treasury Department interpretation of an Act of Congress when Treasury had argued that its construction is "entitled to great respect." Justice Story said, "the judicial department has … the solemn duty to interpret the laws; and … in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *United States v. Dickson*, 40 U.S. 141, 161–62 (1841). Justice Story had it right, and the *Brand X* doctrine has it wrong. The Baldwins' case is an optimal vehicle to discard the *Brand X* doctrine—or at least narrow it considerably.

CONCLUSION

The writ should issue.

Respectfully submitted, on September 23, 2019.

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No. ________

In the Supreme Court of the United States

HOWARD L. BALDWIN AND
KAREN E. BALDWIN,
A MARRIED COUPLE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOWARD L. BALDWIN; KAREN BALDWIN, *Plaintiffs-Appellees*, v. UNITED STATES OF AMERICA, *Defendant-Appellant.*	Nos. 17-55115 17-55354 D.C. No. 2:15-cv-06004-RGK-AGR OPINION

Appeals from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted January 8, 2019
Pasadena, California

Filed April 16, 2019

Before: Susan P. Graber and Paul J. Watford, Circuit Judges, and Jack Zouhary,* District Judge.

Opinion by Judge Watford

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

SUMMARY[**]

Tax

The panel reversed the district court's judgment, after a bench trial, in favor of taxpayers in their tax refund action, and remanded with instructions to dismiss because taxpayers had not filed a timely claim for a refund with the Internal Revenue Service (IRS).

As a prerequisite to bringing their refund action, taxpayers first had to file a timely amended return, claiming the refund, with the IRS. In this case, the IRS did not timely receive such a return. The district court credited the testimony of two employees of taxpayers to find that, under the common-law mailbox rule, the amended return had been timely filed.

The common-law mailbox rule provides that proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive. In contrast, Internal Revenue Code § 7502 allows documents to be deemed timely filed only if they are actually delivered to the IRS and postmarked on or before the deadline. For documents sent by registered mail, § 7502 provides a presumption that the document was delivered even if the IRS claims not to have received it, so long as the taxpayer produces the registration as proof. Under Treasury Regulation § 301.7502-1(e)(2), IRC § 7502 provides the

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

exclusive means to prove delivery, rendering the common-law mailbox rule unavailable.

The panel accorded *Chevron* deference to Treasury Regulation § 301.7502-1(e)(2) as a permissible construction of IRC § 7502. Because that regulation applies to this case, the panel reversed the district court's judgment and remanded with instructions to dismiss, and reversed the award of litigation costs to taxpayers because they were no longer the prevailing party.

COUNSEL

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Robert Wayne Keaster (argued), Chamberlin & Keaster LLP, Encino, California, for Plaintiffs-Appellees.

OPINION

WATFORD, Circuit Judge:

Howard and Karen Baldwin filed this action to obtain a refund of taxes they paid for the 2005 tax year. After a bench trial, the district court entered judgment in their favor, awarding them a refund of roughly $167,000 plus litigation costs of $25,000. We conclude that the district court lacked the authority to hear this suit. As a prerequisite to bringing this action, the Baldwins first had to file a timely claim for a

refund with the Internal Revenue Service (IRS). They filed their claim too late. As a result, we must reverse the district court's judgment and remand with instructions to dismiss the case.

I

Because the merits of the underlying tax dispute are irrelevant to our disposition, we provide only a brief summary of the facts. The Baldwins' 2007 tax return reported a net operating loss of approximately $2.5 million from their movie production business. They wanted to carry that loss back to the 2005 tax year in order to offset their 2005 tax liability. Based on that carryback, the Baldwins prepared an amended 2005 tax return claiming entitlement to a refund of approximately $167,000.

To obtain a refund, the Baldwins were required to file their amended 2005 tax return by October 15, 2011—three years from the extended due date for their 2007 tax return. *See* 26 U.S.C. § 6511(b)(1), (d)(2)(A). The Baldwins assert that they sent their amended 2005 tax return to the IRS by U.S. mail in June 2011, well before the October 15th deadline. But the IRS never received that return, or any other return postmarked by the October 15, 2011, deadline. The IRS did eventually receive an amended 2005 return from the Baldwins in July 2013, but it was postmarked after the statutory deadline had passed. The IRS accordingly denied the Baldwins' refund claim as untimely.

The Baldwins then brought this action against the United States in the district court. Although the doctrine of sovereign immunity would ordinarily bar such a suit, the United States has waived its immunity from suit by allowing a taxpayer to file a civil action to recover "any internal-revenue tax alleged to have been erroneously or illegally

assessed or collected." 28 U.S.C. § 1346(a)(1). Under the Internal Revenue Code (IRC), though, no such action may be maintained in any court "until a claim for refund or credit has been duly filed" with the IRS, in accordance with IRS regulations. 26 U.S.C. § 7422(a); *see United States v. Dalm*, 494 U.S. 596, 609 (1990). To be "duly filed," a claim for refund must be filed within the time limit set by law. *Yuen v. United States*, 825 F.2d 244, 245 (9th Cir. 1987) (per curiam). Here, as noted above, the Baldwins had to file their refund claim (*i.e.*, their amended 2005 tax return) by October 15, 2011.

At this point, before proceeding further, a detour is necessary to explain when a document, such as a tax return, is deemed "filed" with the IRS.

Before 1954, the law treated tax documents as timely filed only if they were physically delivered to the IRS by the applicable deadline. *Anderson v. United States*, 966 F.2d 487, 490 (9th Cir. 1992); *see United States v. Lombardo*, 241 U.S. 73, 76 (1916). This physical-delivery rule left taxpayers who mailed their documents vulnerable to the vagaries of the postal service; documents could be delayed or not delivered at all through no fault of the taxpayer. To mitigate the harshness of the physical-delivery rule, some courts responded by applying the common-law mailbox rule. *See, e.g.*, *Detroit Automotive Products Corp. v. Commissioner of Internal Revenue*, 203 F.2d 785, 785–86 (6th Cir. 1953) (per curiam); *Arkansas Motor Coaches, Ltd. v. Commissioner of Internal Revenue*, 198 F.2d 189, 191 (8th Cir. 1952). Under the common-law mailbox rule, proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive.

Philadelphia Marine Trade Association v. Commissioner of Internal Revenue, 523 F.3d 140, 147 (3d Cir. 2008); *Anderson*, 966 F.2d at 491.

In 1954, Congress addressed some of the problems caused by the physical-delivery rule by enacting IRC § 7502. Section 7502(a)(1) carves out an exception to the physical-delivery rule for tax documents sent and delivered by U.S. mail. It provides that if a document is received by the IRS after the applicable deadline, it will nonetheless be deemed to have been delivered on the date that the document is postmarked:

> If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

26 U.S.C. § 7502(a)(1). This exception means that a document will be deemed timely filed so long as two things are true: (1) the document is *actually delivered* to the IRS, even if after the deadline; and (2) the document is postmarked on or before the deadline. If the document is

never delivered at all—say, because it gets lost in the mail—the exception by its terms does not apply. *Miller v. United States*, 784 F.2d 728, 730 (6th Cir. 1986) (per curiam).

To protect against a failure of delivery, some taxpayers choose to send documents by registered mail. Section 7502(c)(1) provides an exception to the physical-delivery rule applicable to documents sent in that manner. It provides that when a document is sent by registered mail, the registration will serve as prima facie evidence that the document was delivered, and the date of registration will be treated as the postmark date:

> For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail—
>
> > **(A)** such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and
> >
> > **(B)** the date of registration shall be deemed the postmark date.

26 U.S.C. § 7502(c)(1). Subsection (B) provides, in effect, that the same exception to the physical-delivery rule afforded under § 7502(a)(1) for documents sent by regular mail extends to documents sent by registered mail, with the registration serving the same function as the postmark. Subsection (A), however, goes further. It provides a presumption that a document sent by registered mail was

delivered even if the IRS claims not to have received it, so long as the taxpayer produces the registration as proof.[1]

In the decades following the enactment of IRC § 7502, the courts of appeals reached conflicting decisions as to what effect, if any, the statute had on application of the common-law mailbox rule. On one side of the split, some courts held that § 7502 supplies the exclusive exceptions to the physical-delivery rule, thereby displacing the common-law mailbox rule altogether. *See Miller*, 784 F.2d at 730–31; *Deutsch v. Commissioner of Internal Revenue*, 599 F.2d 44, 46 (2d Cir. 1979). These courts noted that § 7502 evinces a preference "for an easily applied, objective standard"—a preference incompatible with the common-law mailbox rule, which tolerates testimonial and circumstantial evidence to prove when a document was mailed (and thus presumptively delivered). *Deutsch*, 599 F.2d at 46.

On the other side of the split, some courts reasoned that because § 7502 was meant to mitigate the harshness of the physical-delivery rule, it is best read as providing a safe harbor, not as limiting resort to alternative exceptions to the physical-delivery rule. *See Sorrentino v. IRS*, 383 F.3d 1187, 1193 (10th Cir. 2004); *Estate of Wood v. Commissioner of Internal Revenue*, 909 F.2d 1155, 1161 (8th Cir. 1990). Courts on this side of the split relied on the principle that statutes should not be read as displacing the common law unless Congress clearly so intended, while noting that Congress did not clearly state in § 7502 that it

[1] Although not at issue here, IRC § 7502(c)(2) and (f)(3) authorize the Treasury Secretary to establish, by regulation, equivalent exceptions to the physical-delivery rule for documents sent by certified mail, electronic filing, and private delivery services. 26 U.S.C. § 7502(c)(2), (f)(3).

intended to displace the common-law mailbox rule. *See Estate of Wood*, 909 F.2d at 1160. Our circuit adopted this latter line of reasoning. In *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992), we "decline[d] to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule." *Id.* at 491.

This circuit split left the law in an undesirable state, as it allowed similarly situated taxpayers to be treated differently depending on where they lived. In August 2011, the Treasury Department sought to resolve the split by promulgating an amended version of Treasury Regulation § 301.7502-1(e). The amended regulation interprets § 7502 as creating the exclusive exceptions to the physical-delivery rule:

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

26 C.F.R. § 301.7502-1(e)(2)(i) (emphasis added). The regulation makes clear that, unless a taxpayer has direct proof that a document was actually delivered to the IRS, IRC § 7502 provides the exclusive means to prove delivery. In other words, recourse to the common-law mailbox rule is no longer available.

With that background in mind, we can now return to the facts of this case. In the district court, the Baldwins did not dispute that the amended 2005 tax return they claim to have mailed in June 2011 was never received by the IRS. The Baldwins therefore sought to rely on the common-law mailbox rule to establish that the document was presumptively delivered to the IRS in June 2011, shortly after they mailed it. They offered the testimony of two of their employees, who had been tasked with mailing the document on the Baldwins' behalf. The employees explained that they deposited the amended 2005 return in the mail at the post office in Hartford, Connecticut, on June 21, 2011. Under the common-law mailbox rule, that testimony, if credited by the court, would give rise to a rebuttable presumption that the amended return was delivered to the IRS well before the October 15, 2011, deadline.

The district court credited the testimony of the Baldwins' employees and found, on the basis of the common-law mailbox rule, that the Baldwins' claim for a refund had been timely filed. The court rejected the government's argument that Treasury Regulation § 301.7502-1(e)(2) barred application of the common-law mailbox rule. The court viewed IRC § 7502 as unambiguously supplementing, rather than supplanting, the common-law mailbox rule, thus leaving no room for the agency to adopt the construction of the statute reflected in Treasury Regulation § 301.7502-1(e)(2). Whether the district court correctly declared that portion of the Treasury Regulation invalid is the principal focus of the government's appeal.

II

In deciding whether Treasury Regulation § 301.7502-1(e)(2) is valid, we employ the familiar two-step analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984). We ask first whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, Congress' resolution of the issue controls and the agency is not free to adopt an interpretation at odds with the plain language of the statute. But if the statute is silent or ambiguous on the question at hand, we then ask whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

At step one of the analysis, we conclude that IRC § 7502 is silent as to whether the statute displaces the common-law mailbox rule. In particular, with respect to the question relevant here, the statute does not address whether a taxpayer who sends a document by regular mail can rely on the common-law mailbox rule to establish a presumption of delivery when the IRS claims not to have received the document. The statute does afford a presumption of delivery when a taxpayer sends a document by *registered* mail, 26 U.S.C. § 7502(c)(1)(A), and it authorizes the creation of similar rules for certified mail, electronic filing, and private delivery services. § 7502(c)(2), (f)(3). But as to documents sent by regular mail, the statute is conspicuously silent.[2]

At step two of the *Chevron* analysis, the remaining question is whether Treasury Regulation § 301.7502-1(e)(2) is based on a permissible construction of the statute. We conclude that it is. As reflected by the circuit split that developed on this issue, Congress' enactment of IRC § 7502 could reasonably be construed in one of two ways: as intended merely to supplement the common-law mailbox

[2] The statute is also silent as to whether any evidence other than the objective evidence described in the statute—the registration for registered mail, and equivalents for certified mail, electronic filing, and private delivery service—may raise a presumption of delivery.

rule, or to supplant it altogether. The Treasury Department chose the latter construction by interpreting IRC § 7502 to provide the sole means by which taxpayers may prove timely delivery in the absence of direct proof of actual delivery. That construction of the statute is reasonable in light of the principle that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (alteration omitted); *see also Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017). Given that the purpose of enacting IRC § 7502 was to provide exceptions to the physical-delivery rule, it is reasonable to conclude that "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

In arguing that the Treasury Department unreasonably construed IRC § 7502 as having displaced the common-law mailbox rule, the Baldwins invoke a different principle of statutory interpretation, which provides that "the common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35 (1983) (alteration and internal quotation marks omitted). But the mere fact that dueling principles of statutory interpretation support opposing constructions of a statute does not prove, without more, that the agency's interpretation is unreasonable. The question remains whether the agency has adopted a permissible construction of the statute, taking into account all of the interpretive tools available. As is true in this case, an agency's construction can be reasonable even if another, equally permissible construction of the statute could also be upheld.

Finally, our prior interpretation of IRC § 7502 in *Anderson* does not bar our decision to defer to the agency's conflicting, but nonetheless reasonable, construction of the statute. As noted above, before the relevant amendment of Treasury Regulation § 301.7502-1(e), we "decline[d] to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule." *Anderson*, 966 F.2d at 491. But "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). We did not hold in *Anderson* that our interpretation of the statute was the *only* reasonable interpretation. In fact, our analysis made clear that our decision filled a statutory gap. Under *Brand X*, the Treasury Department was free to fill that gap by adopting its own reasonable interpretation of the governing statute.

III

The Baldwins contend that even if Treasury Regulation § 301.7502-1(e)(2) is valid, it does not apply in this case. They offer two arguments to that end, both of which we reject.

First, the Baldwins argue that IRC § 7502 and Treasury Regulation § 301.7502-1(e)(2) apply only when a tax document was sent before, but received after, the applicable due date. In their view, these provisions do not apply when, as here, a tax document was never received at all. The Baldwins thus contend that even if Treasury Regulation § 301.7502-1(e)(2) prohibits recourse to the common-law mailbox rule, that prohibition does not apply to them because they used the mailbox rule not to prove that a late-received

document was mailed in time, but instead to prove that a document that the IRS apparently never received was in fact delivered.

The Baldwins are mistaken. To be sure, § 7502 addresses situations in which tax documents are mailed before, but not received until after, the due date. Subsection (a)(1) provides that in such instances the document will be deemed timely filed so long as it was postmarked before the due date. 26 U.S.C. § 7502(a)(1). But § 7502 also addresses situations in which the IRS claims not to have received a tax document at all. Subsection (c)(1)(A) provides that, for documents sent by registered mail, the registration will be treated as "prima facie evidence that the [document] was delivered." § 7502(c)(1)(A). That provision can apply only when the IRS claims not to have received a document. The Baldwins are therefore wrong in contending that IRC § 7502 and Treasury Regulation § 301.7502-1(e)(2)—which interprets the statute to prohibit recourse to the common-law mailbox rule—do not apply to situations like theirs in which a document was never delivered to the IRS.

Second, the Baldwins argue that Treasury Regulation § 301.7502-1(e)(2) does not apply in this case because it was promulgated in August 2011, two months after they allegedly mailed their amended 2005 return in June 2011. This argument also fails. *See Maine Medical Center v. United States*, 675 F.3d 110, 118 n.14 (1st Cir. 2012) (rejecting identical argument). The regulation expressly provides that "Section 301.7502-1(e)(2) will apply to all documents mailed after September 21, 2004," the date that the current text of the regulation was proposed. 26 C.F.R. § 301.7502-1(g)(4); Timely Mailed Treated as Timely Filed, 69 Fed. Reg. 56,377-01 (Sept. 21, 2004). That retroactivity provision complies with IRC § 7805(b), which authorizes

the Treasury Secretary to make regulations retroactively applicable as far back as the date of their proposal. 26 U.S.C. § 7805(b)(1)(B); *see Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Our prior decision in *Anderson* is irrelevant to the issue of retroactivity, as § 7805(b) does not contain an exception barring the retroactive application of a valid regulation in judicial circuits where the regulation contravenes a prior circuit decision.

* * *

Because Treasury Regulation § 301.7502-1(e)(2) is valid and applicable in this case, and because timely filing is a mandatory requirement for maintaining tax refund suits, *see* 26 U.S.C. § 7422(a), we reverse the judgment below and remand with instructions to dismiss this case. As the Baldwins are no longer prevailing parties, we also reverse the award of litigation costs.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **2:15-CV-06004-RGK-AGR**

Date December 2, 2016

Title ***Howard L. Baldwin and Karen Baldwin v. United States***

Present:

The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams , Deputy Clerk

Not Reported, Court Reporter / Recorder

N/A, Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Opinion & Order re Bench Trial

I. INTRODUCTION

On August 7, 2015, Howard and Karen Baldwin ("Plaintiffs") filed an action against the United States of America ("the Government" or "Defend-

ant”). The Complaint seeks the refund of income taxes wrongfully denied to Plaintiffs by the Internal Revenue Service (“IRS”).

This case was tried to the Court without a jury on November 11, 2016. Oral testimony and documentary exhibits were introduced, and after arguments the Court took the case under submission. For the following reasons **the Court enters judgment in favor of Plaintiffs**.

II. JUDICIAL STANDARD

“In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.” Fed. R. Civ. P. 52.

“In tax-refund suits generally, the taxpayer bears the burden of establishing the right to a refund.” *Heger v. United States*, 103 Fed. Cl. 261, 265 (2012) (internal quotation marks omitted). “Th[e] burden is a burden of persuasion; it requires [Plaintiff] to show the merits of his claim by at least a preponderance of the evidence.” *Rockwell v. C. I. R.*, 512 F.2d 882, 885 (9th Cir. 1975).

III. FINDINGS OF FACT

The Court finds the following facts were proven at trial by a preponderance of the evidence:

On October 24, 2006, the IRS received Plaintiffs’ individual income tax return form and payment of the full $170,951 in liability for the tax year 2005 (“2005 Return”). For tax year 2007, Plaintiffs requested and were granted an extension of time to file their return until October 15, 2008. On

November 1, 2010, the IRS received Plaintiffs' individual income tax return form for tax year 2007 ("2007 Return"), indicating a net operating loss for that year. Plaintiffs then prepared an amended individual income tax return ("Amended Return") on a Form 1040X, claiming the 2007 net operating loss ("NOL") as a carry back deduction for the tax year 2005 and a refund in the amount of $167,663.

Plaintiffs had sufficient losses from Baldwin Entertainment Group LTD included on their 2007 Return to entitle them to a refund in the amount of $167,663 when carried back to tax year 2005. Plaintiffs also had sufficient tax basis in Baldwin Entertainment Group LTD to deduct losses on their 2007 Return that would allow for a refund in the amount of $167,663 when carried back to tax year 2005.

On June 21, 2011, Plaintiffs' assistant, Ryan Wuerfel, mailed the Amended Return to the IRS via regular mail at the Hartford post office. The Amended Return was mailed in a green and white envelope, which was addressed to the IRS service center in Andover, MA. The Amended Return would have arrived at the IRS service center in the ordinary course well before the October 15, 2011 deadline. While the IRS Form 1040X instructions indicated that the Amended Return should have been sent to the service center in Kansas City, MO, the Andover service center would have forwarded the Amended Return to Kansas City in the ordinary course of operations. IRS records do not reflect that the Amended Return was ever received by either service center, but the IRS offers no affirmative evidence calling into question that the Amended Return was mailed by Plaintiffs on June 21, 2011. Plaintiffs' evidence that the

Amended Return was indeed mailed on that date was credible.

When Plaintiffs later inquired about the status of their refund claim, the IRS looked into the matter. The IRS never asked Plaintiffs for documentation to support their claim for refund during the administrative consideration of their claim, and at no time during the process did the IRS challenge the validity of the claim for refund. The IRS ultimately denied Plaintiffs' refund claim on August 12, 2013, however, because they contended that the claim had not been timely filed.

IV. CONCLUSIONS OF LAW

Based on the findings of fact above, the Court makes the following conclusions of law:

A. Subject Matter Jurisdiction

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1346(a)(1) because, as discussed below, Plaintiffs (a) fully paid the tax before filing suit for refund, (b) timely filed an administrative claim for refund with the IRS, and (c) filed this suit for refund less than two years from the date the IRS denied their administrative claim.

B. The Mailbox Rule Applies and Plaintiffs Are Entitled To a Presumption of Delivery

The Ninth Circuit has held that Congress' enactment of a statutory mailbox rule in the tax context at 26 U.S.C. § 7502(c) "did not displace the common law presumption of delivery" associated

with the common law mailbox rule. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992). When Congress enacted § 7502(c), it intended to alleviate the hardship of postal service malfunctions by giving taxpayers a means to *conclusively* establish the IRS' receipt of a return with proof of certified or registered mail. While the statute made the proof of certified or registered mail sufficient evidence to *conclusively* establish receipt of the return, there is no indication that it intended to foreclose other evidentiary means that might assist in establishing a presumption of delivery. Therefore, the Court concludes that the common law mailbox rule is still operative in this context.

The common law mailbox rule states that "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Id.* citing *Rosenthal v. Walker*, 111 U.S. 185, 193–94 (1884).

The Ninth Circuit in *Anderson* held that an individual was entitled to a presumption of delivery when "she actually saw the postal clerk stamp her document." The Court finds that Plaintiffs are similarly entitled to a presumption of delivery because Plaintiffs' assistant Ryan Wuerfel mailed the Amended Return at the Hartford post office on June 21, 2011. The Government failed to rebut this presumption, and the Court finds Plaintiffs' evidence that the Amended Return was mailed to be credible. *See Anderson*, 966 F.2d at 491 ("The district court's conclusion that the government failed to rebut the presumption of delivery was, in essence, a credibility determination.").

C. That The Amended Return Was Initially Mailed To The Andover, MA Service Center Is Not Fatal To Plaintiffs' Claims

The Internal Revenue Code "provides that no suit for a refund may be maintained in any court until a claim for a refund has been filed with the Secretary of the Treasury in accordance with Treasury Regulations. *Quarty v. United States*, 170 F.3d 961, 972 (9th Cir. 1999). Treasury Regulation § 301.6402-2(a)(2) currently provides that a claim for refund must be made in accordance with IRS Form 1040X's instructions. Between 2005 and 2010, however, Form 1040X's instructions changed regarding where an amended return should be mailed. The 2010 version of the 1040X—in effect at the time Plaintiffs mailed their amended return—instructed Plaintiffs to "mail Form 1040X and attachments to" the IRS service center in Kansas City, MO. As the Court noted above, however, Plaintiffs mailed their Form 1040X to the service center in Andover, MA, where they had filed their original 2005 and 2007 returns.

The Government contends that this technical defect is fatal to their claim for refund. The Court concludes, however, that Form 1040X's instructions regarding where to mail refund requests were not written as strict requirements. The 1040X instructions do not use "must" or "shall" when indicating the service center where the refund claim should be mailed. Rather, the instructions simply indicate the service center where such claims will be processed. The fact that the IRS routinely forwards incorrectly addressed refund claims as a matter of course also

suggests that the IRS does not consider an address problem to be fatal to a refund claim.

Further, Treasury regulations in effect at the time Plaintiffs filed their Amended Return conflicted with the operative 1040X instructions regarding where to send refund claims. At the time, Treasury Regulation § 301.6402-2(a)(2) indicated that "a claim for credit or refund must be filed with the service center serving the internal revenue district in which the tax was paid." (Background to T.D. 9727, 26 C.F.R. Part 301, Pl.'s Request for Judicial Notice, Ex. A.) In Plaintiffs' case, that would have been the service center in Andover, MA.

The Court concludes that by mailing their Amended Return to the service center in Andover, MA, where it would have been forwarded as a matter of course to the service center in Kansas City, MO, Plaintiffs properly made a claim for refund in accordance with the operative Treasury regulations and Form 1040X's instructions. The Court holds that the 2010 Form 1040X instructions, coupled with the Treasury regulations then in effect, simply required that a taxpayer mail his amended return in such a way that it would, as a matter of course, be delivered to the proper service center to handle the claim within the statutory period.

The Court therefore finds that Plaintiffs have met the requirements of 28 U.S.C. § 1346, and have further demonstrated that they are entitled to a tax refund of $167,663.

V. EVIDENTIARY OBJECTIONS

To the extent the parties object to any evidence upon which the Court relied, the Court overrules those objections.

VI. CONCLUSION

In light of the foregoing, the Court finds that **Howard and Karen Baldwin are the prevailing parties** in this action.

The Court **ORDERS** Plaintiffs to submit to the Court a proposed judgment consistent with this Order within 2 days of the filing of this Order.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **2:15-CV-6004-RGK-AGR**

Date January 24, 2017

Title ***Howard L. Baldwin et al v. United States***

Present:

The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Charles A. Rojas, Deputy Clerk

Not Reported, Court Reporter / Recorder

N/A, Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order re: Motion for Attorney's Fees (DE 79)

I. INTRODUCTION

On December 2, 2016, following a bench trial, the Court issued its Opinion declaring Howard and Karen Baldwin ("Plaintiffs") to be the prevailing parties. The Court entered judgment in the Baldwin's

favor, and against United States of America ("Defendant"), in the amount of $167,663.00.

Present before the Court is Plaintiffs' Motion for Attorney's Fees and Costs. For the following reasons, the Court **GRANTS** Plaintiffs' Motion.

II. STATEMENT OF FACTS

The Court found the following facts were proven at trial by a preponderance of the evidence:

On October 24, 2006, the IRS received Plaintiffs' individual income tax return form, and payment of the full $170,951 in tax liability for 2005 ("2005 Return"). For tax year 2007, Plaintiffs requested and were granted an extension of time to file their return. On November 1, 2010, the IRS received Plaintiffs' income tax return form for 2007 ("2007 Return"), showing a net operating loss.

Plaintiffs later prepared an amended individual income tax return ("Amended Return") on a Form 1040X, claiming the 2007 net operating loss ("NOL") as a carry back deduction for the tax year 2005, and calculated that they are owed a refund in the amount of $167,663.

Plaintiffs had sufficient losses from Baldwin Entertainment Group LTD included on their 2007 Return to entitle them to a refund in the amount of $167,663 when carried back to tax year 2005. Plaintiffs also had sufficient tax basis in Baldwin Entertainment Group LTD to deduct losses on their 2007 Return that would allow for a refund in that amount.

On June 21, 2011, Plaintiffs' assistant, Ryan Wuerfel, mailed the Amended Return to the IRS via regular mail at the Hartford post office. The Amended Return was mailed in a green and white envelope,

which was addressed to the IRS service center in Andover, MA. The Amended Return would have arrived at the IRS service center in the ordinary course well before the October 15, 2011 deadline. While the IRS Form 1040X instructions indicated that the Amended Return should have been sent to the service center in Kansas City, MO, the Andover service center would have forwarded the Amended Return to Kansas City in the ordinary course of operations. IRS records do not reflect that the Amended Return was ever received by either service center, but the IRS offered no affirmative evidence calling into question that Plaintiffs mailed the Amended Return on June 21, 2011. Plaintiffs' evidence that the Amended Return was indeed mailed on that date was credible.

When Plaintiffs later inquired about the status of their refund claim, the IRS looked into the matter. The IRS never asked Plaintiffs for documentation to support their claim for refund during the administrative consideration of their claim, and at no time during the process did the IRS challenge the validity of the claim for refund. The IRS ultimately denied Plaintiffs' refund claim on August 12, 2013, however, because they contended that the claim had not been timely filed.

The Baldwins ultimately prevailed at trial, and were awarded a $167,663 refund.

III. JUDICIAL STANDARD

Under 28 U.S.C. § 7430, a plaintiff may seek attorney's fees in a tax refund suit against the United States when: (1) plaintiff was the substantially prevailing party, (2) plaintiff exhausted his administrative remedies prior to bringing the lawsuit, (3) plain-

tiff did not unreasonably protract the litigation, (4) plaintiff's net worth did not exceed two million dollars at the time the action was filed, and (5) the United States cannot prove that its position was substantially justified. The United States bears the burden of proving that its position was substantially justified. 28 U.S.C. § 7430(c)(4)(B)(i).

IV. DISCUSSION

A. Elements 1–4: Prevailing Party, Exhaustion, Protraction, and Net Worth

The Court finds (and Government does not challenge) that Plaintiffs meet the first four elements of § 7430's test. Plaintiffs prevailed at trial, exhausted their administrative remedies with the IRS before filing suit, litigated the case with reasonable efficiency, and did not exceed the net-worth cap.

B. Element 5: Substantial Justification

The Government argues, however, that its litigation position was substantially justified, and that therefore Plaintiffs are not entitled to an award of attorney's fees and costs.

The Government bears the burden of proving that its position was substantially justified, and the test for determining substantial justification is "whether a reasonable person would think the government's position was reasonable." *Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir. 1998).

The Government argues that it was reasonable for it to have taken the position that 26 U.S.C. § 7502, and the corresponding section of the Internal

Revenue Code, preclude a taxpayer from relying on the common law mailbox rule to prove the IRS's receipt of a tax return. The Government cites regulatory language and several cases from different circuits to show that this was a reasonable position. *See, e.g.*, *Maine Medical Center v. United States*, 675 F.3d 110, 118 (1st Cir. 2012).

As the Court noted in its denial of summary judgment, however, the Ninth Circuit has held that Congress did not intend to displace the common law mailbox rule when it enacted § 7502. *See Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992). While the Government notes correctly that there has been an intervening change in IRS regulations since *Anderson*, agencies like the IRS are powerless to modify Congressional intent. At least under the Ninth Circuit's reasoning, no amount of new IRS rulemaking could transform § 7502 into a statute that displaces the common law mailbox rule.

Since reasonable judges outside the Ninth Circuit disagree on § 7502's effect on the common law mailbox rule, however, and because of the intervening regulatory changes, the Court concludes that the Government's position was reasonable, at least at the outset of this litigation. Once the Court denied the Government's Motion for Summary Judgment on this issue, however, and clarified the state of the law in the Ninth Circuit, this position became unreasonable.

The Government nevertheless moved forward to trial with a new legal theory: that the Baldwins had failed to substantiate their deduction, a position that the IRS had never taken before (not even during the prior administrative proceedings). The Government further decided to contest whether Plaintiffs had ev-

er mailed their refund, despite presenting no affirmative evidence reasonably disputing this fact. The Government further argued over technicalities regarding the proper place to mail a return, despite the IRS's own regulations at the time offering conflicting instructions on this issue, and the fact that the IRS regularly forwards misdirected returns to the proper processing center.

The Court finds that the Government's position in the present litigation was substantially justified up until the point that the Court ruled on summary judgment against the Government's original theory of the case. After that point, the Government's litigation position became unreasonable. Therefore, following the unsuccessful settlement conference held just after the Court denied summary judgment, the Government's position moving forward was no longer substantially justified.

The Court thus concludes that Plaintiffs are entitled to recover their attorney's fees and costs incurred after the settlement conference held on September 13, 2016.

C. Attorney's Fees Rate

The statutory rate for attorneys' fees incurred in 2015 and 2016 was $200 per hour. *See* Rev. Proc. 2015-53, 2015-44, I.R.B. 615; Rev Proc. 2014-61, 2014-47 I.R.B. 860. Plaintiffs argue, however, that they are entitled to a special adjustment, which would increase the statutory fees to $350 per hour.

Plaintiffs argue that a special adjustment is warranted whenever an attorney has distinctive knowledge or specialized skill necessary to the litigation, citing *Pierce v. Underwood*, 487 U.S. 552

(1988). Plaintiffs argue that because their attorneys were tax specialists, and this special skill was certainly needed in the present case, they are entitled to the higher attorney's fee rate.

Plaintiffs are mistaken, however, about *Pierce*'s applicability. *Pierce* dealt with attorney's fees under the Equal Access to Justice Act, *not* fees in tax cases under § 7430. It is a near certainty that an attorney trying a tax case will have expertise in tax law. This fact cannot, therefore, serve as a "special factor" warranting a fee adjustment. Holding otherwise would render the statutory cap meaningless in tax cases, and take away the "specialness" of the "special factor" adjustment.

Accordingly, the Court finds that the statutory rate of $200 per hour is appropriate.

D. Attorney's Fees and Cost Calculations

The Court has reviewed Plaintiffs' attorneys' billing statements, and determined the amount of hours spent and costs incurred after the September 13, 2016 settlement conference. The Court's totals are summarized below:

Steven J. Lynch, Esq.:
Fees: 64 hours @ $200/hour $ 12,800.00
Costs: $ 2,590.93

Chamberlin & Keaster LLP:
Fees: 49 hours @ $200/hour $ 9,800.00
Costs: + $ 324.07
=========
TOTAL: $ 25,515.00

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion for Attorney's Fees and Costs. The Court thereby **ORDERS** Defendant United States of America to pay for Plaintiffs' reasonable attorney's fees and costs in the amount of **$25,515.00**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **2:15-CV-06004-RGK (AGR)**

Date July 27, 2016

Title ***Howard L. Baldwin et al v. United States***

Present:

The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams (not present), Deputy Clerk

Not Reported, Court Reporter / Recorder

N/A, Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order re: Defendant's Motion for Summary Judgment

I. INTRODUCTION

On August 7, 2015, Howard and Karen Baldwin ("Plaintiffs") filed an action against the United States of America ("Defendant"). The Complaint

seeks the refund of income taxes wrongfully denied to Plaintiffs by the Internal Revenue Service ("IRS").

On June 16, 2016, Defendant filed this Motion for Summary Judgment arguing that because Plaintiffs cannot meet their burden to show a waiver of sovereign immunity, the Court must dismiss the case for lack of personal jurisdiction.

For the following reasons the Court **DENIES** Defendant's Motion for Summary Judgment.

II. STATEMENT OF FACTS

The following facts are undisputed:

On October 24, 2006, the IRS received Plaintiffs' individual income tax return form and payment of the full $170,951 in liability for the tax year 2005 ("2005 Return"). (Greene Decl. Exs. D and F, ECF No. 27-3.) For tax year 2007, Plaintiffs requested and were granted an extension of time to file their return until October 15, 2008. *Id*. On November 1, 2010, the IRS received Plaintiffs' individual income tax return form for tax year 2007 ("2007 Return"), indicating a net operating loss for that year. *Id*. Plaintiffs then prepared an amended individual income tax return ("Amended Return"), claiming the 2007 net operating loss ("NOL") as a carry back deduction for the tax year 2005 and a refund in the amount of $170,951. *Id*. On June 21, 2011, Plaintiffs' assistant sent the Amended Return to the IRS via regular mail. *Id*. The IRS records do not reflect that the Amended Return was ever received, nor that any return claiming a refund for tax year 2005 was postmarked, delivered, or filed by October 15, 2011. *Id*. The IRS denied Plaintiffs' refund claim on Au-

gust 12, 2013, and Plaintiffs brought this suit against the IRS on August 7, 2015. *Id*.

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *Id*.

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party need only show that there is an absence of evidence to support the non-moving party's case. *See id*.

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id*. at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex* 477 U.S. at 324.

VI. DISCUSSION

At the nexus of Defendant's motion is the contention that because Plaintiffs failed to prove a waiver of sovereign immunity, the Court lacks personal jurisdiction.

As a sovereign, the United States may not be sued without its consent, and that consent defines the court's jurisdiction. *United States v. Dalm*, 494 U.S. 596, 608 (1990). A waiver of sovereign immunity must be "unequivocally expressed" through a Congressional statute, *United States v. Testan*, 424 U.S. 392, 399 (1976), and that statute must be strictly construed against the surrender of sovereign immunity. *Safeway Portland Emp. Federal Credit Union v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1216 (9th Cir. 1974).

Congress has granted this Court jurisdiction over claims against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected. 28 U.S.C. § 1346(a)(1). "Despite its spacious terms, § 1436(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *Dalm*, 494 U.S. at 601. The Internal Revenue Code ("IRC") lays out three requirements, all of which must be met, for a proper waiver of sovereign immunity with regard to suits for the recovery of refunds. First, the IRC bars a suit for the recovery of a refund until the taxpayer has fully paid his tax for the year in question. *Flora v. United States*, 362 U.S. 145, 176 (1960). Second, no suit for recovery of a refund may be initiated unless a claim for a refund was timely filed. 26 U.S.C. § 7422(a).

Third, a suit proceeding under § 7422 may not be filed within 6 months from the date of filing the refund claim, or more than two years from the date the IRS denied the claim. 26 U.S.C. § 6532(a)(1).

Here, Plaintiffs fully paid the tax liability of $170,951 for tax year 2005. (Greene Decl. Exs. D and F, ECF 27-3.) Furthermore, the IRS denied Plaintiffs' refund claim on August 12, 2013, and Plaintiffs filed their refund suit less than two years later, on August 7, 2015. (*Id.*) In light of these facts, the Court finds that Plaintiffs have fulfilled the first and third requirements for a waiver of sovereign immunity.

With respect to the second requirement, however, Defendant contends that Plaintiffs did not timely file their claim for a refund and thus failed to prove a waiver of sovereign immunity. The Court disagrees and finds that Plaintiffs provide sufficient evidence to show a triable issue of material fact with respect to the timely filing of their refund claim.

Timely Filing of Refund Claims

To claim a refund arising from an overpayment attributable to a net operating loss ("NOL"), a taxpayer must file a claim for a refund within "3 years after the time prescribed by law for the filing of the return (including extensions thereof) for the taxable year of the NOL." 26 U.S.C. § 6511(d)(2)(A).

Here, Plaintiffs contend they mailed the Amended Return on June 21, 2011, thereby timely filing their claim for the 2007 NOL as a carryback deduction and a refund in the amount of $170,951. (Greene Decl. Exs. D and F, ECF No. 27-3.) In support, Plaintiffs testify that they mailed the Amended Return on June 21, 2011, and provide a declaration

from a former assistant who claims to have applied the appropriate postage and deposited the Amended Return at the post office on the date in question. (Lynch Decl. Ex. B, ECF No. 30.) Defendant responds that Plaintiffs' evidence is inadmissible. Defendant argues therefore, that because the IRS never received the Amended Return, Plaintiffs cannot raise a triable issue as to its filing.

Accordingly, the Court addresses the admissibility of Plaintiffs' evidence, and the sufficiency of that evidence.

1. *Admissibility of Extrinsic Evidence*

In the event the IRS does not receive a return, the common law provides that proof of timely mailing of the return raises a rebuttable presumption that it was timely received. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193-94 (1884)); *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). Like any rebuttable presumption, it is chiefly a "tool for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished." *Id*. Under IRC § 7502, however, a taxpayer may *conclusively* establish receipt of a return by presenting proof of registered or certified mail as evidence. 26 U.S.C. § 7502(c). In the Ninth Circuit, when no such evidence exists, a taxpayer may introduce extrinsic and circumstantial evidence of mailing for the purposes of establishing a presumption of receipt. *Anderson*, 966 F.2d at 491.

In 2011, the Treasury Department amended its regulations related to § 7502(c), making registered or

certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received. 26 CFR 301.7502-1(e). This regulation is in direct conflict with Ninth Circuit precedent, which allows credible extrinsic evidence of mailing to create a presumption of receipt under § 7502(c). Defendant contends that under the *Chevron* deference test, the Court must defer to the agency's regulation.

In *Chevron, U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court laid out a two-step analysis to determine whether a court should defer to an agency's statutory interpretation.
First, the court must determine if Congress has clearly and unambiguously expressed its intent through the statute. *Id.* If the statute is unambiguous, the court need not give any deference to the agency regulation. *Id.* If the statute is ambiguous, however, the court must defer to all reasonable agency interpretations of that statute. *Id.* at 843. Furthermore, any prior judicial constructions of that statute are superseded by reasonable agency interpretations of ambiguous statutes. *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

A statute is ambiguous if Congress either explicitly or implicitly left room for agency interpretation. *Chevron* 467 U.S. at 843-44. An example of an explicit authorization is found in § 7502 itself. The statute explicitly authorizes the Treasury Secretary to create regulations to determine whether postmarks made by delivery services other than the United States Postal Service qualify as postmarks for the purposes of the statute. 26 U.S.C. § 7502(b). Implicit authorization is present where Congress remains si-

lent as to the definition of a statutory term. *Chevron* 467 U.S. at 844. For example, in *Chevron*, the EPA interpreted the definition of the statutory term "stationary source," 467 U.S. at 839; and, in *Brand X*, the Federal Communications Commission interpreted the statutory term "telecommunications service." 545 U.S. at 974. In both instances, however, the statutory terms were considered ambiguous, thus leaving room for varying interpretations of their meaning or application.

Here, the Court finds no statutory ambiguity. Congress did not explicitly authorize the Treasury to interpret what constitutes evidence. As evidenced by other sections of the statute, it is clear that Congress knows how to explicitly authorize agency interpretations when it intends to do so. *See generally* 26 U.S.C. § 7502(b) (statute explicitly authorizes the Treasury Secretary to create regulations to determine whether postmarks made by delivery services other than the United States Postal Service qualify as postmarks for the purpose of § 7502). Accordingly, the Court finds its silence instructive. Nor has Congress implicitly left room for agency interpretation, as there is no ambiguous statutory term that has been left undefined.

Based on the foregoing, the Court finds that the Treasury Department's 2011 amendment materially alters an otherwise clear statute. When Congress enacted § 7502(c), it intended to alleviate the hardship of postal service malfunctions by giving taxpayers a means to *conclusively* establish the IRS' receipt of a return with proof of certified or registered mail. While the statute made the proof of certified or registered mail sufficient evidence to *conclusively* establish a receipt of the return, there is no indication

that it intended to foreclose other evidentiary means that might assist in establishing a presumption of delivery.

The Court finds that § 7502 is not ambiguous, and therefore the Court need not proceed to the second step of the *Chevron* analysis. Accordingly, no deference shall be granted to the Treasury Department's interpretation of the statute. The Court next considers Plaintiffs' testimony and the declaration of their former assistant in determining the sufficiency of Plaintiffs' evidence.

2. *The Sufficiency of Plaintiffs' Evidence*

If a taxpayer furnishes credible evidence of the date on which her return was postmarked and mailed to the IRS, that date controls. *Lewis v. United States*, 144 F.3d 1220, 1223 (9th Cir. 1998). In the Ninth Circuit's seminal case on the admissibility of extrinsic evidence for purposes of § 7502, a taxpayer's testimony, in addition to a corroborating affidavit, was sufficient to prove that a tax return was postmarked and mailed on the alleged date. *Anderson* 966 F.2d at 491.[1] Furthermore, in *Lewis*, a taxpayer provided credible evidence that the return was mailed on the date alleged when he produced not only its own sworn testimony, but also three signed and dated checks received by the IRS and bearing the postmark date. 144 F.3d at 1223.

Here, Plaintiffs provide not only their own sworn testimony that the Amended Return was mailed on

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[1] The affidavit declared that she went to the post office with the taxpayer and waited for her in the car. *Id.* at 489. The taxpayer returned to the car without the envelope containing the tax return. *Id.*

June 21, 2011, but also a sworn affidavit from their former assistant. This affidavit details how the assistant placed the Amended Return in an envelope addressed to the IRS, placed the appropriate postage on the envelope, and deposited it in the mail. (Lynch Decl. Ex. B, ECF No. 30.) To rebut this presumption, the government offers IRS records that reflect that the Amended Return was never received. (Greene Decl. Exs. D and F, ECF No. 27-3.) The credibility of each party's evidence is for a jury to weigh, and is not a determination made at summary judgment. The Court does find, however, that Plaintiffs have shown a triable issue of material fact as to the timely mailing of the Amended Return.

V. CONCLUSION

Plaintiffs have provided sufficient evidence to show a triable issue of material fact with respect to the timely filing of their refund claim. Therefore, a triable issue exists as to Defendant's waiver of sovereign immunity in this case.

For these reasons, the Court **DENIES** Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED JUN 25 2019
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 17-55115; 17-55354

D.C. No. 2:15-cv-06004-RGK-AGR
Central District of California, Los Angeles

HOWARD L. BALDWIN; KAREN BALDWIN, Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.

ORDER

Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Graber and Watford vote to deny the petition for rehearing en banc, and Judge Zouhary so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed May 29, 2019, is DENIED.

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:15-cv-06004 RGK (AGRx)

HOWARD L. BALDWIN AND KAREN BALDWIN,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This action came under consideration before the Court as a bench trial on November 22, 2016. The Court after having considered all relevant evidence and argument of counsel issued its Opinion and Order re Bench Trial on December 2, 2016, finding that Plaintiffs Howard and Karen Baldwin are the prevailing parties in this action.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of Plaintiffs Howard and Karen Baldwin and against Defendant United States of America in the amount of $167,663 as a refund of taxes paid for the federal income tax period ending December 31, 2005, plus statutory interest accruing on this amount pursuant to 26 U.S.C. §§ 6611, 6621 and 6622.

Date: December 7, 2016

/s/ R. Gary Klausner
United States District Judge

Internal Revenue Code § 6511, 26 U.S.C. § 6511

Limitations on credit or refund

(a) **Period of limitation on filing claim**.—
Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer 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. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) **Limitation on allowance of credits and refunds**.—

(1) **Filing of claim within prescribed period**.—
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, unless a claim for credit or refund is filed by the taxpayer within such period.

* * *

(d) **Special rules applicable to income taxes**.—

* * *

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

(A) **Period of limitation**.—If the claim for credit or refund relates to an overpayment attributable

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

* * *

Internal Revenue Code § 7422, 26 U.S.C. § 7422

Civil actions for refund

(a) **No suit prior to filing claim for refund**.—
No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * *

Internal Revenue Code § 7502, 26 U.S.C. § 7502

Timely mailing treated as timely filing and paying

(a) **General rule**.—

(1) **Date of delivery**.—

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) **Mailing requirements**.—This subsection shall apply only if—

(A) the postmark date falls within the prescribed period or on or before the prescribed date—

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return,

claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) **Postmarks**.—
This section shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

(c) **Registered and certified mailing; electronic filing**.—
(1) **Registered mail**.—For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail—
(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and
(B) the date of registration shall be deemed the postmark date.
(2) **Certified mail; electronic filing**.—The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

(d) **Exceptions**.—
This section shall not apply with respect to—
(1) the filing of a document in, or the making of a payment to, any court other than the Tax Court,
(2) currency or other medium of payment unless actually received and accounted for, or
(3) returns, claims, statements, or other documents, or payments, which are required under any provision

of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing.

(e) **Mailing of deposits**.—

(1) **Date of deposit**.—If any deposit required to be made (pursuant to regulations prescribed by the Secretary under section 6302(c)) on or before a prescribed date is, after such date, delivered by the United States mail to the bank, trust company, domestic building and loan association, or credit union authorized to receive such deposit, such deposit shall be deemed received by such bank, trust company, domestic building and loan association, or credit union on the date the deposit was mailed.

(2) **Mailing requirements**.—Paragraph (1) shall apply only if the person required to make the deposit establishes that—

(A) the date of mailing falls on or before the second day before the prescribed date for making the deposit (including any extension of time granted for making such deposit), and

(B) the deposit was, on or before such second day, mailed in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the bank, trust company, domestic building and loan association, or credit union authorized to receive such deposit.

In applying subsection (c) for purposes of this subsection, the term "payment" includes "deposit", and the reference to the postmark date refers to the date of mailing.

(3) **No application to certain deposits**.—Paragraph (1) shall not apply with respect to any deposit of $20,000 or more by any person who is required to deposit any tax more than once a month.

(f) **Treatment of private delivery services**.—

(1) **In general**.—

Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

(2) **Designated delivery service**.—

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

(A) is available to the general public,

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

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

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

(3) **Equivalents of registered and certified mail**.—

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

28 U.S.C. § 1346

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]

* * *

26 C.F.R. § 301.7502-1
[Old Version applicable during June 2011, 66 Fed. Reg. 2257-01 (Jan. 11, 2001)]

Timely mailing of documents and payments treated as timely filing and paying.

(a) **General rule**.
Section 7502 provides that, if the requirements of that section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope or other appropriate wrapper (envelope) in which the document or payment was mailed. Thus, if the envelope that contains the document or payment has a timely postmark, the document or payment is considered timely filed or paid even if it is received after the last date, or the last day of the period, prescribed for filing the document or making the payment. Section 7502 does not apply in determining whether a failure to file a return or pay a tax has continued for an additional month or fraction thereof for purposes of computing the penalties and additions to tax imposed by section 6651. Except as provided in section 7502(e) and § 301.7502–2, relating to the timely mailing of deposits, and paragraph (d) of this section, relating to electronically filed documents, section 7502 is applicable only to those documents or payments as defined in paragraph (b) of this section and only if the document or payment is mailed in accordance with paragraph (c) of this section and is delivered in accordance with paragraph (e) of this section.

(b) **Definitions—**

(1) **Document defined**.

(i) The term document, as used in this section, means any return, claim, statement, or other document required to be filed within a prescribed

period or on or before a prescribed date under authority of any provision of the internal revenue laws, except as provided in paragraph (b)(1)(ii), (iii), or (iv) of this section.

(ii) The term does not include returns, claims, statements, or other documents that are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing.

(iii) The term does not include any document filed in any court other than the Tax Court, but the term does include any document filed with the Tax Court, including a petition and a notice of appeal of a decision of the Tax Court.

(iv) The term does not include any document that is mailed to an authorized financial institution under section 6302. However, see § 301.7502–2 for special rules relating to the timeliness of deposits and documents required to be filed with deposits.

(2) **Claims for refund**. In the case of certain taxes, a return may constitute a claim for credit or refund. In such a case, section 7502 is applicable to the claim for credit or refund if the conditions of such section are met, irrespective of whether the claim is also a return. For rules regarding claims for refund on late filed tax returns, see paragraph (f) of this section.

(3) **Payment defined**.

(i) The term payment, as used in this section, means any payment required to be made within a prescribed period or on or before a prescribed date under the authority of any provision of the internal revenue laws, except as provided in paragraph (b)(3)(ii), (iii), (iv), or (v) of this section.

(ii) The term does not include any payment that is required under any provision of the internal

revenue laws or the regulations thereunder to be delivered by any method other than mailing. See, for example, section 6302(h) and the regulations thereunder regarding electronic funds transfer.

(iii) The term does not include any payment, whether it is made in the form of currency or other medium of payment, unless it is actually received and accounted for. For example, if a check is used as the form of payment, this section does not apply unless the check is honored upon presentation.

(iv) The term does not include any payment to any court other than the Tax Court.

(v) The term does not include any deposit that is required to be made with an authorized financial institution under section 6302. However, see § 301.7502–2 for rules relating to the timeliness of deposits.

(4) **Last date or last day prescribed**. As used in this section, the term the last date, or the last day of the period, prescribed for filing the document or making the payment includes any extension of time granted for that action. When the last date, or the last day of the period, prescribed for filing the document or making the payment falls on a Saturday, Sunday or legal holiday, section 7503 applies. Therefore, in applying the rules of this paragraph (b)(4), the next succeeding day that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment. Also, when the last date, or the last day of the period, prescribed for filing the document or making the payment falls within a period disregarded under section 7508 or section 7508A, the next succeeding day after the expiration of the section 7508 period or section 7508A period that is not a

Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment.

(c) **Mailing requirements**—

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

(i) **Envelope and address**. The document or payment must be contained in an envelope, properly addressed to the agency, officer, or office with which the document is required to be filed or to which the payment is required to be made.

(ii) **Timely deposited in U.S. mail**. The document or payment must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual as incorporated by reference in the postal regulations, includes mail transmitted within, among, and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Section 7502 does not apply to any document or payment that is deposited with the mail service of any other country.

(iii) **Postmark**—

(A) *U.S. Postal Service postmark*. If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date

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

(B) *Postmark made by other than U.S. Postal Service*—

(1) In general. If the postmark on the envelope is made other than by the U.S. Postal Service—

(i) The postmark so made must bear a legible date on or before the last date,

or the last day of the period, prescribed for filing the document or making the payment; and

(ii) The document or payment must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

(2) Document or payment received late. If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes—

(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

(ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(iii) The cause of the delay.

(3) U.S. and non-U.S. postmarks. If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

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

(d) **Electronically filed documents—**

(1) **In general**. A document filed electronically with an electronic return transmitter (as defined in paragraph (d)(3)(i) of this section and authorized pursuant to paragraph (d)(2) of this section) in the manner and time prescribed by the Commissioner is deemed to be filed on the date of the electronic postmark (as

defined in paragraph (d)(3)(ii) of this section) given by the authorized electronic return transmitter. Thus, if the electronic postmark is timely, the document is considered filed timely although it is received by the agency, officer, or office after the last date, or the last day of the period, prescribed for filing such document.

(2) **Authorized electronic return transmitters**. The Commissioner may enter into an agreement with an electronic return transmitter or prescribe in forms, instructions, or other appropriate guidance the procedures under which the electronic return transmitter is authorized to provide taxpayers with an electronic postmark to acknowledge the date and time that the electronic return transmitter received the electronically filed document.

(3) **Definitions—**

(i) **Electronic return transmitter**. For purposes of this paragraph (d), the term electronic return transmitter has the same meaning as contained in section 3.01(4) of Rev. Proc. 2000–31 (2000–31 I.R.B. 146 (July 31, 2000)) (see § 601.601(d)(2) of this chapter) or in procedures prescribed by the Commissioner.

(ii) **Electronic postmark**. For purposes of this paragraph (d), the term electronic postmark means a record of the date and time (in a particular time zone) that an authorized electronic return transmitter receives the transmission of a taxpayer's electronically filed document on its host system. However, if the taxpayer and the electronic return transmitter are located in different time zones, it is the taxpayer's time zone that controls the timeliness of the electronically filed document.

(e) **Delivery—**

(1) Except as provided in section 7502(f) and paragraph (d) of this section, section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made. However, in the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office.

(2) Section 7502 is applicable to the determination of whether a claim for credit or refund is timely filed for purposes of section 6511(a), assuming all the requirements of section 7502 are satisfied. Section 7502 is also applicable when a claim for credit or refund is delivered after the last day of the period specified in section 6511(b)(2)(A) or in any other corresponding provision of law relating to the limit on the amount of credit or refund that is allowable.

(3) **Example**. The rules of paragraph (e)(2) of this section are illustrated by the following example:

Example.

(i) Taxpayer A, an individual, mailed his 1998 Form 1040, "U.S. Individual Income Tax Return," on May 10, 1999, but no tax was paid at that time because the tax liability disclosed by the return had been completely satisfied by the income tax that had been withheld on A's wages. On April 15, 2002, A mails in accordance with the requirements of this section, a Form 1040X, "U.S. Amended Individual Income

Tax Return," claiming a refund of a portion of the tax that had been paid through withholding during 1998. The date of the postmark on the envelope containing the claim for refund is April 15, 2002. The claim is received by the Internal Revenue Service (IRS) on April 18, 2002.

(ii) Under section 6511(a), A's claim for refund is timely if filed within three years from May 10, 1999, the date on which A's 1998 return was filed. However, as a result of the limitations of section 6511(b)(2)(A), if his claim is not filed within three years after April 15, 1999, the date on which he is deemed under section 6513 to have paid his 1998 tax, he is not entitled to any refund. Thus, because A's claim for refund is postmarked and mailed in accordance with the requirements of this section and is delivered after the last day of the period specified in section 6511(b)(2)(A), section 7502 is applicable and the claim is deemed to have been filed on April 15, 2002.

(f) **Claim for credit or refund on late filed tax return—**

(1) **In general**. Generally, an original income tax return may constitute a claim for credit or refund of income tax. See § 301.6402–3(a)(5). Other original tax returns can also be considered claims for credit or refund if the liability disclosed on the return is less than the amount of tax that has been paid. If section 7502 would not apply to a return (but for the operation of paragraph (f)(2) of this section) that is also considered a claim for credit or refund because the envelope that contains the return does not have a postmark dated

on or before the due date of the return, section 7502 will apply separately to the claim for credit or refund if—

(i) The date of the postmark on the envelope is within the period that is three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid (see section 6513), and the claim for credit or refund is delivered after this three-year period; and

(ii) The conditions of section 7502 are otherwise met.

(2) **Filing date of late filed return**. If the conditions of paragraph (f)(1) of this section are met, the late filed return will be deemed filed on the postmark date.

(3) **Example**. The rules of this paragraph (f) are illustrated by the following example:

Example.

(i) Taxpayer A, an individual, mailed his 2001 Form 1040, "U.S. Individual Income Tax Return," on April 15, 2005, claiming a refund of amounts paid through withholding during 2001. The date of the postmark on the envelope containing the return and claim for refund is April 15, 2005. The return and claim for refund are received by the Internal Revenue Service (IRS) on April 18, 2005. Amounts withheld in 2001 exceeded A's tax liability for 2001 and are treated as paid on April 15, 2002, pursuant to section 6513.

(ii) Even though the date of the postmark on the envelope is after the due date of the return, the claim for refund and the late filed return are treated as filed on the postmark date for purposes of this paragraph

(f). Accordingly, the return will be treated as filed on April 15, 2005. In addition, the claim for refund will be treated as timely filed on April 15, 2005. Further, the entire amount of the refund attributable to withholding is allowable as a refund under section 6511(b)(2)(A).

(g) **Effective date—**

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

(2) **Claim for credit or refund on late filed tax return**. Paragraph (f) of this section applies to any claim for credit or refund on a late filed tax return described in paragraph (f)(1) of this section except for those claims for credit or refund which (without regard to paragraph (f) of this section) were barred by the operation of section 6532(a) or any other law or rule of law (including res judicata) as of January 11, 2001.

(3) **Electronically filed documents**. This section applies to any electronically filed return, claim, statement, or other document transmitted to an electronic return transmitter that is authorized to provide an electronic postmark pursuant to paragraph (d)(2) of this section after January 11, 2001.

26 C.F.R. § 301.7502-1
[Current Version, 76 Fed. Reg. 52561-01 (Aug. 23, 2011)]

Timely mailing of documents and payments treated as timely filing and paying

(a) **General rule**.
Section 7502 provides that, if the requirements of that section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope or other appropriate wrapper (envelope) in which the document or payment was mailed. Thus, if the envelope that contains the document or payment has a timely postmark, the document or payment is considered timely filed or paid even if it is received after the last date, or the last day of the period, prescribed for filing the document or making the payment. Section 7502 does not apply in determining whether a failure to file a return or pay a tax has continued for an additional month or fraction thereof for purposes of computing the penalties and additions to tax imposed by section 6651. Except as provided in section 7502(e) and § 301.7502–2, relating to the timely mailing of deposits, and paragraph (d) of this section, relating to electronically filed documents, section 7502 is applicable only to those documents or payments as defined in paragraph (b) of this section and only if the document or payment is mailed in accordance with paragraph (c) of this section and is delivered in accordance with paragraph (e) of this section.

(b) **Definitions**—

(1) **Document defined**.

(i) The term document, as used in this section, means any return, claim, statement, or other document required to be filed within a prescribed

period or on or before a prescribed date under authority of any provision of the internal revenue laws, except as provided in paragraph (b)(1)(ii), (iii), or (iv) of this section.

(ii) The term does not include returns, claims, statements, or other documents that are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing.

(iii) The term does not include any document filed in any court other than the Tax Court, but the term does include any document filed with the Tax Court, including a petition and a notice of appeal of a decision of the Tax Court.

(iv) The term does not include any document that is mailed to an authorized financial institution under section 6302. However, see § 301.7502–2 for special rules relating to the timeliness of deposits and documents required to be filed with deposits.

(2) **Claims for refund**—

(i) **In general**. In the case of certain taxes, a return may constitute a claim for credit or refund. Section 7502 is applicable to the determination of whether a claim for credit or refund is timely filed for purposes of section 6511(a) if the conditions of section 7502 are met, irrespective of whether the claim is also a return. For rules regarding claims for refund on late filed tax returns, see paragraph (f) of this section. Section 7502 is also applicable when a claim for credit or refund is delivered after the last day of the period specified in section 6511(b)(2)(A) or in any other corresponding provision of law relating to the limit on the amount of credit or refund that is allowable.

(ii) **Example**. The rules of paragraph (b)(2)(i) of this section are illustrated by the following example:

Example.

(A) Taxpayer A, an individual, mailed his 2004 Form 1040, "U.S. Individual Income Tax Return," on May 10, 2005, but no tax was paid at that time because the tax liability disclosed by the return had been completely satisfied by the income tax that had been withheld on A's wages. On April 15, 2008, A mails, in accordance with the requirements of this section, a Form 1040X, "Amended U.S. Individual Income Tax Return," claiming a refund of a portion of the tax that had been paid through withholding during 2004. The date of the postmark on the envelope containing the claim for refund is April 15, 2008. The claim is received by the IRS on April 18, 2008.

(B) Under section 6511(a), A's claim for refund is timely if filed within three years from May 10, 2005, the date on which A's 2004 return was filed. As a result of the limitations of section 6511(b)(2)(A), if A's claim is not filed within three years after April 15, 2005, the date on which A is deemed under section 6513 to have paid his 2004 tax, A is not entitled to any refund. Because A's claim for refund is postmarked and mailed in accordance with the requirements of this section and is delivered after the last day of the period specified

in section 6511(b)(2)(A), section 7502 is applicable and the claim is deemed to have been filed on April 15, 2008.

(3) **Payment defined**.

(i) The term payment, as used in this section, means any payment required to be made within a prescribed period or on or before a prescribed date under the authority of any provision of the internal revenue laws, except as provided in paragraph (b)(3)(ii), (iii), (iv), or (v) of this section.

(ii) The term does not include any payment that is required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing. See, for example, section 6302(h) and the regulations thereunder regarding electronic funds transfer.

(iii) The term does not include any payment, whether it is made in the form of currency or other medium of payment, unless it is actually received and accounted for. For example, if a check is used as the form of payment, this section does not apply unless the check is honored upon presentation.

(iv) The term does not include any payment to any court other than the Tax Court.

(v) The term does not include any deposit that is required to be made with an authorized financial institution under section 6302. However, see § 301.7502–2 for rules relating to the timeliness of deposits.

(4) **Last date or last day prescribed**. As used in this section, the term the last date, or the last day of the period, prescribed for filing the document or making the payment includes any extension of time granted for that action. When the last date, or the last day of the period, prescribed for filing the document

or making the payment falls on a Saturday, Sunday or legal holiday, section 7503 applies. Therefore, in applying the rules of this paragraph (b)(4), the next succeeding day that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment. Also, when the last date, or the last day of the period, prescribed for filing the document or making the payment falls within a period disregarded under section 7508 or section 7508A, the next succeeding day after the expiration of the section 7508 period or section 7508A period that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment.

(c) **Mailing requirements**—

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

(i) **Envelope and address**. The document or payment must be contained in an envelope, properly addressed to the agency, officer, or office with which the document is required to be filed or to which the payment is required to be made.

(ii) **Timely deposited in U.S. mail**. The document or payment must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual as incorporated by reference in the postal regulations, includes mail transmitted within, among,

and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Section 7502 does not apply to any document or payment that is deposited with the mail service of any other country.

(iii) **Postmark—**

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

the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

(B) Postmark made by other than U.S. Postal Service—

(1) In general. If the postmark on the envelope is made other than by the U.S. Postal Service—

(i) The postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and

(ii) The document or payment must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

(2) Document or payment received late. If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when

a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes—

(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

(ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(iii) The cause of the delay.

(3) U.S. and non-U.S. postmarks. If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

(2) **Registered or certified mail**. If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the

risk that the document or payment will not be post-marked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

(3) **Private delivery services**. Under section 7502(f)(1), a service of a private delivery service (PDS) may be treated as an equivalent to United States mail for purposes of the postmark rule if the Commissioner determines that the service satisfies the conditions of section 7502(f)(2). Thus, the Commissioner may, in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), prescribe procedures and additional rules to designate a service of a PDS for purposes of the post-mark rule of section 7502(a).

(d) **Electronically filed documents—**

(1) **In general**. A document filed electronically with an electronic return transmitter (as defined in paragraph (d)(3)(i) of this section and authorized pursuant to paragraph (d)(2) of this section) in the manner and time prescribed by the Commissioner is deemed to be filed on the date of the electronic postmark (as defined in paragraph (d)(3)(ii) of this section) given by the authorized electronic return transmitter. Thus, if the electronic postmark is timely, the document is considered filed timely although it is received by the agency, officer, or office after the last date, or the last day of the period, prescribed for filing such document.

(2) **Authorized electronic return transmitters**. The Commissioner may enter into an agreement with an electronic return transmitter or prescribe in forms, instructions, or other appropriate guidance the procedures under which the electronic return transmitter is authorized to provide taxpayers with an electronic postmark to acknowledge the date and

time that the electronic return transmitter received the electronically filed document.

(3) **Definitions—**

(i) **Electronic return transmitter**. For purposes of this paragraph (d), the term electronic return transmitter has the same meaning as contained in section 3.01(4) of Rev. Proc. 2000–31 (2000–31 I.R.B. 146 (July 31, 2000)) (see § 601.601(d)(2) of this chapter) or in procedures prescribed by the Commissioner.

(ii) **Electronic postmark**. For purposes of this paragraph (d), the term electronic postmark means a record of the date and time (in a particular time zone) that an authorized electronic return transmitter receives the transmission of a taxpayer's electronically filed document on its host system. However, if the taxpayer and the electronic return transmitter are located in different time zones, it is the taxpayer's time zone that controls the timeliness of the electronically filed document.

(e) **Delivery—**

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

(2) **Exceptions to actual delivery—**

(i) **Registered and certified mail**. In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to

the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

(ii) **Equivalents of registered and certified mail**. Under section 7502(f)(3), the Secretary may extend the prima facie evidence of delivery rule of section 7502(c)(1)(A) to a service of a designated PDS, which is substantially equivalent to United States registered or certified mail. Thus, the Commissioner may, in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), prescribe procedures and additional rules to designate a service of a PDS for purposes of demonstrating prima facie evidence of delivery of a document pursuant to section 7502(c).

(f) **Claim for credit or refund on late filed tax return—**

(1) **In general**. Generally, an original income tax return may constitute a claim for credit or refund of income tax. See § 301.6402–3(a)(5). Other original tax returns can also be considered claims for credit or refund if the liability disclosed on the return is less than the amount of tax that has been paid. If section 7502 would not apply to a return (but for the operation of

paragraph (f)(2) of this section) that is also considered a claim for credit or refund because the envelope that contains the return does not have a postmark dated on or before the due date of the return, section 7502 will apply separately to the claim for credit or refund if—

(i) The date of the postmark on the envelope is within the period that is three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid (see section 6513), and the claim for credit or refund is delivered after this three-year period; and

(ii) The conditions of section 7502 are otherwise met.

(2) **Filing date of late filed return**. If the conditions of paragraph (f)(1) of this section are met, the late filed return will be deemed filed on the postmark date.

(3) **Example**. The rules of this paragraph (f) are illustrated by the following example:

Example.

(i) Taxpayer A, an individual, mailed his 2001 Form 1040, "U.S. Individual Income Tax Return," on April 15, 2005, claiming a refund of amounts paid through withholding during 2001. The date of the postmark on the envelope containing the return and claim for refund is April 15, 2005. The return and claim for refund are received by the Internal Revenue Service (IRS) on April 18, 2005. Amounts withheld in 2001 exceeded A's tax liability for 2001 and are treated as paid on April 15, 2002, pursuant to section 6513.

(ii) Even though the date of the postmark on the envelope is after the due date of the

return, the claim for refund and the late filed return are treated as filed on the postmark date for purposes of this paragraph (f). Accordingly, the return will be treated as filed on April 15, 2005. In addition, the claim for refund will be treated as timely filed on April 15, 2005. Further, the entire amount of the refund attributable to withholding is allowable as a refund under section 6511(b)(2)(A).

(g) **Effective date**—

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

(2) **Claim for credit or refund on late filed tax return**. Paragraph (f) of this section applies to any claim for credit or refund on a late filed tax return described in paragraph (f)(1) of this section except for those claims for credit or refund which (without regard to paragraph (f) of this section) were barred by the operation of section 6532(a) or any other law or rule of law (including res judicata) as of January 11, 2001.

(3) **Electronically filed documents**. This section applies to any electronically filed return, claim, statement, or other document transmitted to an electronic return transmitter that is authorized to provide an electronic postmark pursuant to paragraph (d)(2) of this section after January 11, 2001.

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