No. 2020-2061

In the United States Court of Appeals for the Federal Circuit

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ALI M. TAHA,
on behalf of his deceased brother and his brother's wife,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:17-CV-01174-CFL (HON. CHARLES F. LETTOW)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-2061

Short Case Caption Taha v. US

Filing Party/Entity Plaintiff-Appellant

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/01/2021

Signature: /s/ Aditya Dynar

Name: Aditya Dynar

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Ali M. Taha, on behalf of his deceased brother and his brother's wife	Ali M. Taha, estate of Mohamad E. Taha, Sanaa M. Yassin	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Aditya Dynar	Litigation Counsel	New Civil Liberties Alliance
Kara Rollins	Litigation Counsel	New Civil Liberties Alliance

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

Plaintiff-Appellant is unaware of any pending cases related to this appeal.

GLOSSARY

CFC	Court of Federal Claims
FRCP	Federal Rules of Civil Procedure
IRC	Internal Revenue Code, codified at 26 U.S.C.
IRS	Internal Revenue Service
NPRM	Notice of Proposed Rulemaking
Taxpayers	Ali M. Taha, Mohamad E. Taha (deceased), and Sanaa M. Yassin

ORAL ARGUMENT STATEMENT

Plaintiff-Appellant respectfully requests that the Court should schedule oral argument in this case. Oral argument will likely aid the Court in resolving the case.

JURISDICTIONAL STATEMENT

CFC had subject-matter jurisdiction pursuant to the Tucker Act (28 U.S.C. § 1491) and 28 U.S.C. § 1346(a)(1) over claims seeking refund of taxes paid. *See, e.g.*, *Shore v. United States*, 9 F.3d 1524 (Fed. Cir. 1993).

This Court has appellate jurisdiction under 28 U.S.C. § 1295(a)(3).

Tax-year 2002, 2003 and 2004 tax-refund claims for taxes paid were at issue. This Court had affirmed in part, vacated in part, and remanded the case to CFC to resolve jurisdictional facts that would enable this Court to "meaningfully review [CFC's] jurisdiction determination" "with respect to the 2003 claim." Appx111. CFC, on remand, addressed three material jurisdictional facts: (1) whether Taxpayers filed a tax-refund claim for tax year 2003; (2) whether this refund claim was timely; and (3) whether IRS disallowed the 2003 claim. Appx107.

After a two-day trial, CFC issued an opinion and order concluding that because CFC lacked "jurisdiction over th[e] 2003 tax refund claim," the case is dismissed for lack of subject-matter jurisdiction. Appx9. This Court has appellate jurisdiction to review CFC's dismissal of the case entered after holding an on-remand trial for jurisdictional factfinding. *See, e.g.*, *Reynolds v. Army & Air Force Exchange Serv.*, 846 F.2d 746 (Fed. Cir. 1988).

STATEMENT OF THE ISSUES

Whether CFC erred in concluding that it lacked subject-matter jurisdiction over Taxpayers' suit to obtain a refund of taxes paid.

To answer that question, the Court will need to resolve two other pertinent questions first:

(1) Whether the common-law mailbox rule or the physical-delivery rule governs to ascertain the filing date of tax documents under IRC § 7502;

(2) Whether the seven-year or the three-year statute of limitations of IRC § 6511 governs Taxpayers' tax-refund claim.

STATEMENT OF THE CASE

Mr. Mohamad Taha and Ms. Sanaa Yassin were residents of California and paid taxes in California and to IRS in 2002 and 2003. Appx201. They were also residents of California when they filed the tax-refund claims. [Appx951, Appx953, Appx955]. The refund claim arose from Mr. Mohamad Taha's investment in Atek Construction, Inc., a California S Corporation. Appx199. Mr. Mohamad Taha owned 10% of the shares of Atek Construction, Inc., a California S Corporation, engaged in public contracting and construction. Appx199:8–12, Appx305:11–13.

Mohamad E. Taha (deceased) and his wife Sanaa M. Yassin, with the assistance of Mr. Taha's brother Ali M. Taha, sought a refund of $14,177 for federal income taxes paid for the 2002 and 2003 tax years, plus interest and legal costs. Appx101. IRS disallowed the 2002 claim on December 20, 2007, but not the 2003 claim. Appx102. Taxpayers appealed the disallowance to IRS on January 21, 2008. Appx102. IRS denied that appeal on October 29, 2009. Appx102.

Taxpayers filed an amended 2004 tax return on November 1, 2009 to obtain a tax refund. Appx102. IRS disallowed the 2004 tax-refund claim on November 28, 2012. Appx102. Taxpayers appealed the disallowance to IRS. Appx102.

On May 10, 2017, after exhausting IRS appeals, Taxpayers filed a *pro se* tax-refund suit in the federal district court for the Middle District of Florida. Appx102. That court transferred the case to CFC. Appx103. The transfer complaint was filed on September 18, 2017. Appx103.

On January 30, 2018, IRS moved to dismiss the complaint for lack of jurisdiction under FRCP 12(b)(1) asserting that Taxpayers did not file their tax-refund claims within the three-year statute-of-limitations period. Appx103.

On April 10, 2018, CFC granted IRS's motion to dismiss, combining all three of Taxpayers' tax-refund claims in its analysis. Appx103. In the alternative, CFC concluded that even if Taxpayers had timely filed their tax-refund claims, CFC lacked jurisdiction because Taxpayers did not initiate their suit within two years from the date IRS first mailed notices of disallowance for each claim under IRC § 6532(a)(1). Appx103.

On April 19, 2018, IRS filed a motion asking CFC to clarify when the two-year statute-of-limitations period began to run with respect to the 2003 tax-refund claim. Appx103. CFC determined it need not resolve that issue. Appx103.

The first appeal to this Court followed under 28 U.S.C. § 1295(a)(3). Appx103. This Court concluded that CFC "correctly found that it lacked jurisdiction" "[c]oncerning the 2002 and 2004 claims" because Taxpayers "did not file their tax refund suit within the statutorily-prescribed two-year period from the date the IRS first mailed notices of disallowance for those claims" as IRC § 6532(a)(1) requires. Appx106.

As to the 2003 tax-refund claim, this Court remanded for CFC to find three material jurisdictional facts: (1) whether Taxpayers filed the 2003 tax-refund claim; (2) whether it was timely; and (3) whether IRS disallowed the 2003 claim. Appx107.

On remand, CFC held a two-day trial in Tampa, Florida during which Mr. Ali Taha appeared *pro se* for Taxpayers. Appx1, Appx187, Appx403. On April 1, 2020, CFC issued an opinion and order and answered this Court's three questions, Appx107, as follows:

Taha II **Questions**	**CFC's Answers**
Whether Taxpayers filed a tax-refund claim for tax year 2003.	"It is likely that plaintiffs' 2003 amended tax return would have been received by the IRS around the same time their 2002 amended tax return was received [*viz.*] … November 29, 2007." Appx8. But "plaintiffs cannot show that they filed a claim for refund with the IRS as required for jurisdiction in this court." Appx8.
Whether the 2003 tax-refund claim was timely.	"Because plaintiffs … are not entitled to the extended seven-year limitations period provided by Subsection 6511(d) … plaintiffs' 2003 amended tax return, if considered filed, would be untimely." Appx9.
Whether IRS disallowed the 2003 claim.	"IRS never disallowed this refund claim." Appx4. "[T]he government does not contend that the claim was ever disallowed." Appx4 n.6.

After CFC entered judgment dismissing the 2003 tax-refund claim for lack of subject-matter jurisdiction on April 1, 2020, Appx10, Taxpayers, *pro se*, filed a motion for reconsideration, which CFC denied on May 1, 2020. Appx11. Taxpayers, *pro se*, filed a renewed motion for reconsideration, which CFC denied on June 1, 2020. Appx12.

Taxpayers then filed a *pro se* notice of appeal, which gave rise to this appeal. Appx25. Taxpayers retained undersigned counsel *pro bono* to represent them on appeal.[1] Granting an unopposed motion to set briefing deadlines, this Court entered a briefing schedule. This opening brief follows.

[1] Undersigned counsel represents all Taxpayers, *viz.*, Mr. Ali M. Taha, estate of Mr. Mohamad E. Taha (deceased), and Ms. Sanaa M. Yassin.

SUMMARY OF THE ARGUMENT

CFC erred in concluding that it lacked subject-matter jurisdiction over Taxpayers' tax-refund suit. Of the three statutory requirements needed to maintain such a suit, only one is at issue: whether the refund claim was "duly filed" under IRC § 7422(a). The refund claim is duly filed if the filing date (as determined under IRC § 7502) falls within the applicable statute-of-limitations period of IRC § 6511.

Per the common-law mailbox rule, Taxpayers proved that they filed the refund claim a few days before November 29, 2007, Appx8, which is well within the applicable seven-year limitations period that started to run on April 14, 2004, Appx101.

Section 7502's text leaves intact the common-law mailbox rule. Congress did not limit delivery methods to only registered or certified mail in that section. Nor did Congress limit the methods of proving the filing date. The common-law presumption canon also reinforces that reading. 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 contrary statutory purpose is evident. There is nothing in the legislative history suggesting that Congress wanted to supplant the common-law mailbox rule; in fact, that history shows that Congress wanted to *preserve* the application of the mailbox rule. Under the mailbox rule, which was considered settled by the Supreme Court as far back as 1884, proof of proper mailing, including testimonial and circumstantial evidence gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such mailing would ordinarily take to arrive.

In 2011, however, IRS retroactively amended the pertinent regulations, contrary to statute, and made registered or certified mail receipts the *only* evidence that can conclusively or presumptively establish the delivery date. The Court has no occasion to defer under the *Brand X* and *Chevron* doctrines[2] to IRS's interpretation of Section 7502 given in 26 C.F.R. § 301.7502-1 because deference presumptively applies only to the agency's reasonable reading of an ambiguous statute. Here, at best, the statute is silent, and any lingering gap has already been filled by the common-law presumption canon with the common-law mailbox rule. Other factors triggering deference are also absent.

If the Court nonetheless gives IRS's 2011 regulation deference, it should flag the severe constitutional problems with such deference. Deference subverts *stare decisis*, violates the Fifth Amendment's Due Process Clause, undermines judicial independence and the duty of Article III judges to say what the law is, and violates the separation-of-powers doctrine. At the very least, the Court should clarify that deferring under *Brand X* does not mean a cursory magic-words review of the first-in-time court's decision.

Further, the seven-year statute of limitations of IRC § 6511(d)(1) governs because Taxpayers' refund claim squarely falls under IRC § 165(g) and could plausibly fall under IRC § 166. Taxpayers filed the refund claim within that seven-year period. IRS's arguments respecting Section 166 are not fatal to Taxpayers' refund claim under that section, and IRS's arguments respecting Section 166 do not foreclose Taxpayers' refund claim based on Section 165(g).

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[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

The Court should reverse CFC's decision and conclude that CFC has subject-matter jurisdiction over Taxpayers' refund suit because, under the common-law mailbox rule, they filed their refund claim a few days before November 29, 2007, which was within the limitations period of IRC § 6511(d). The Court should then remand for further proceedings consistent with that conclusion.

ARGUMENT

CFC erred in concluding that it lacked subject-matter jurisdiction over Taxpayers' tax-refund suit.

I. STANDARD OF REVIEW

This Court reviews *de novo* CFC's decisions dismissing for lack of subject-matter jurisdiction and reviews for clear error CFC's underlying factual findings. *Ferreiro v. United States*, 350 F.3d 1318, 1324 (Fed. Cir. 2003). Taxpayers/Appellants must establish jurisdiction by a preponderance of the evidence. *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014). If there is a factual dispute as to jurisdictional facts, the trial court must resolve that dispute and is permitted to look beyond the pleadings to do so. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993).

II. CFC HAD SUBJECT-MATTER JURISDICTION OVER TAXPAYERS' SUIT BECAUSE THEY MET RELEVANT STATUTORY REQUIREMENTS

To maintain a civil action in federal court under 28 U.S.C. § 1346(a)(1) "for recovery of" overpaid taxes—and to overcome sovereign immunity—the taxpayer must meet three requirements:

(1) the taxpayer must fully pay the tax before refund is sought. *Flora v. United States*, 362 U.S. 145, 176 (1960);

(2) the refund claim must be "duly filed" under IRC § 7422(a); and

(3) the tax-refund suit must be filed within the period given in IRC § 6532(a)(1).

The first requirement is not at issue. No one disputes that Taxpayers fully paid their taxes before seeking a refund of the overpaid portion.

This Court partially answered the third requirement in the *pro se* appeal with respect to the 2002 and 2004 claims, but not the 2003 claim. Appx111 ("[T]he Claims Court lacks jurisdiction over the 2002 and 2004 claims because Appellants did not commence their action within two years of the IRS first disallowing those claims."). As to the 2003 claim, IRS has now conceded, and CFC so found, that "IRS never disallowed this refund claim." Appx4. "[T]he government does not contend that the claim was ever disallowed." Appx4 n.6. The third requirement is not at issue for the 2003 claim because having never disallowed the 2003 claim, the IRC § 6532(a)(1) statute of limitations has not begun to run.

The dispute here primarily involves the second requirement—whether the refund claim was "duly filed" under IRC § 7422(a). If, as here, the filing date of the refund claim is disputed, IRC § 7502 resolves the dispute as to the filing date, and IRC § 6511 answers whether that filing date is within the applicable limitations period. 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. IRC § 7502(a)(1). The filing date must fall within the applicable limitations period of IRC § 6511. Thus, the refund claim is "duly filed" within the meaning of Section 7422(a) if the "postmark" date per IRC § 7502 falls within the applicable limitations period of IRC § 6511.

A. IRC § 7502

IRC § 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; or, (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).

After Section 7502's enactment in 1954, a circuit split developed. On one side sit circuits holding that Section 7502 is "exclusive" and that it displaces the common-law mailbox rule altogether.[3] In these circuits, Section 7502 does not tolerate testimonial and circumstantial evidence to prove when a document was mailed (and therefore presumptively delivered). These are the physical-delivery-rule circuits. Taxpayers would not be able to prove the filing date in these circuits because the only evidence Mr. Taha had establishing "November 29, 2007" as the 2003 refund-filing date was Mr. Taha's testimony and documentary evidence. Appx6, Appx8.

On the other side of the split sit circuits concluding that Section 7502 is best read as providing a safe harbor for taxpayers. These circuits rely on the principle that statutes should not be read as displacing the common law unless Congress clearly so expressed.[4] At common law, proof of proper mailing—including 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.

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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); *Carroll v. Commissioner*, 71 F.3d 1228 (6th Cir. 1995) (citing *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986); *Surowka v. United States*, 909 F.2d 148 (6th Cir. 1990)).

[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 *Estate of Wood v. Commissioner*, 92 T.C. 793 (1989) (*en banc*)); *Sorrentino v. IRS*, 383 F.3d 1187 (10th Cir. 2004).

Anderson v. United States, 966 F.2d 487, 491–492 (9th Cir. 1992); *but see Baldwin v. United States*, 921 F.3d 836, 840 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 690 (2020). These are the common-law-mailbox-rule circuits. Taxpayers' refund claim would be considered delivered on November 29, 2007 in these circuits.

The Fourth and Federal Circuits have declined to take sides on whether the common-law mailbox rule survives the adoption of Section 7502. *See 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)). This Court should decide that open question and conclude that Section 7502 does not displace the common-law mailbox rule.

Apparently to resolve the circuit split, IRS issued a Notice of Proposed Rulemaking seeking to amend 26 C.F.R. § 301.7502-1 to side with the physical-delivery-rule circuits (and thereby overrule the circuit courts preserving the common-law mailbox rule). 69 Fed. Reg. 56377-01 (Sep. 21, 2004). In 2011, IRS amended the regulation and adopted the physical-delivery rule, discarding the common-law mailbox rule in the Notice of Final Rulemaking. 76 Fed. Reg. 52561-01 (Aug. 23, 2011) ("2011 Regulation").

B. IRC § 6511

IRC § 6511(a) provides that a refund claim "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." But "[i]f the claim for credit or refund relates to an overpayment of tax … on account of … [t]he deductibility by the taxpayer, under section 166 or section 832(c), of a debt as a debt which became worthless, or,

under section 165(g), of a loss from worthlessness of a security," then "in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 7 years from the date prescribed by law for filing the return for the year with respect to which the claim is made." IRC § 6511(d)(1).[5]

Section 166 applies to "a taxpayer other than a corporation," such as Taxpayers here, who deducts "debt which becomes worthless." IRC §§ 166(a)(1), (d)(1). Business debt is not defined in statute. "Nonbusiness debt" means debt other than "a debt created or acquired … in connection with a trade or business of the taxpayer; or … a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." IRC § 166(d)(2). Worthless business debt is fully refundable; worthless nonbusiness debt is refundable in amounts computed under IRC § 1212 as capital loss. Refund claims based on worthless business debt fall under the seven-year limitations period of IRC § 6511(d)(1); those based on worthless *non*business debt fall under the limitations period of IRC § 6511(d)(2)(A), which "ends 3 years after the time prescribed by law for filing the return … for the taxable year of the net operating loss or net capital loss which results in such carryback."

Section 165(g) applies to any "security" that "becomes worthless." IRC § 165(g)(1). "Security" is defined as "(A) a share of stock in a corporation; (B) a right to subscribe for, or to receive, a share of stock in a corporation; or (C) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered

[5] IRC § 832(c), relating to the "taxable income of an insurance company" is not relevant in this case.

form." IRC § 165(g)(2)(A)–(C). No on-point case from this Court was found. However, CFC has held in *Draper v. United States*, 62 Fed. Cl. 409, 413 (2004), that only shares issued by a "corporation or a government entity" qualify as a "security" within the plain meaning of IRC § 165(g). Further, "the taxpayer's worthless investment must be both a 'capital asset' and a 'security'[.]" *Draper*, 62 Fed. Cl. at 413. A "capital asset" is any "property held by the taxpayer (whether or not connected with his trade or business)." IRC § 1221(a).

III. THE COMMON-LAW MAILBOX RULE GOVERNS

CFC erroneously concluded that the physical-delivery rule governs. Appx7. Under that rule, Taxpayers needed "to show that the [2003 tax-refund] form was actually delivered to the IRS or that they otherwise met the requirements of IRC § 7502." Appx7. CFC concluded that "the court is foreclosed from applying the common-law mailbox rule, considering the language of [26 C.F.R.] § 301.7502-1(e)(2)." Appx7-Appx8. Because "the requisite evidence" under the physical-delivery rule was "[a]bsent," CFC ruled that Taxpayers "cannot show that they filed a claim for refund with the IRS as required for jurisdiction in this court pursuant to IRC § 7422," and as a result, "the court does not have subject-matter jurisdiction over [Taxpayers'] 2003 tax refund claim." Appx8.

This Court should reverse CFC's conclusion and adopt the common-law mailbox rule to determine the filing date of tax filings. The question is one of first impression in this Circuit. CFC applies the physical-delivery rule to tax filings whereas the U.S. Tax Court for example (which deals with a disproportionately higher number of tax-refund suits), has long applied the common-law mailbox rule to tax filings. *Estate*

of Wood v. Comm'r, 92 T.C. 793 (1989) (*en banc*), *aff'd*, 909 F.2d 1155, 1161 (8th Cir. 1990) (the common-law mailbox rule applies); *Mitchell Offset Plate Serv., Inc. v. Comm'r*, 53 T.C. 235 (1969) (the common-law mailbox rule applies even when tax documents are not received by IRS); *see also Martinez v. United States*, 101 Fed. Cl. 688, 693 (2012) ("[T]he Federal Circuit did not expressly adopt either rule.") (citing *Davis v. United States*, 230 F.3d 1383 (Fed. Cir. 2000)).

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 2011 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 2011 Regulation in an effort to get rid of the court decisions it did not like on this topic.

A. Section 7502's Text Leaves the Common-Law Mailbox Rule Intact

IRC § 7502(a) (emphasis added) gives the "general rule" for what is the "date of delivery" of a tax document:

> If any [tax 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 is, after such period or such date, *delivered* by *United States mail* to the agency, officer, or office with which such [tax] document is required to be filed, … the date of the United States *postmark* stamped on the cover in which such [tax

> document] is mailed shall be *deemed to be the date of delivery* or the date of payment, as the case may be.

IRC § 7502(c) gives special rules for tax documents sent by registered or certified mail, or electronically filed. If the tax document is sent by "United States registered mail … such registration shall be *prima facie* evidence that the [tax document] was delivered to the agency, officer, or office to which addressed; and … the date of registration shall be deemed the postmark date." IRC § 7502(c)(1). If the tax document is sent by United States certified mail or electronically filed, the "Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) [*i.e.*, registered mail] with respect to *prima facie* evidence of delivery and the postmark date shall apply to certified mail and electronic filing." IRC § 7502(c)(2). IRC § 7502(f) permits filings by "private delivery services" such as FedEx, DHL, UPS, etc.

Nowhere in IRC § 7502 did Congress limit delivery methods to only registered or certified mail. Congress repeatedly stated that for *all* methods of mailing, the *postmark* date is deemed the *delivery* date. Nowhere in IRC § 7502 did Congress limit the ways in which the postmark date (and therefore the delivery date) can be proved.

That plain meaning should control. This Court "will not bend or strain the words of a statute to change its meaning unless there is a persuasive and clear showing that Congress did not intend for the letter of the statute to prevail." *LSI Computer Systems, Inc. v. U.S. International Trade Com'n*, 832 F.2d 588, 590 (Fed. Cir. 1987) (cleaned up). When "construing explicit language" under the plain-meaning rule, the "judicial inquiry is complete, except in rare and exceptional circumstances. In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Id.* (cleaned up).

Taxpayers proved at trial that the postmark date for the 2003 refund claim was a few days before November 29, 2007.[6] This Court had specifically remanded the case to CFC to make that finding. Appx107. That finding of fact should have been conclusive.

B. The Common-Law Presumption Canon Reinforces the Answer

If the plain-meaning rule does not settle the matter, the common-law presumption canon should. Under the common-law presumption canon, the common-law mailbox rule (which allows testimonial and circumstantial evidence to prove the postmark date) governs.

Many courts have simply ruled, based on the plain meaning of Section 7502 that the "postmark" date of a tax document sent by "United States mail" can be proved by presenting credible testimonial or documentary evidence. *See, e.g.*, *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992). But every court that has expressly evaluated whether Section 7502 is silent, ambiguous, or unambiguous has said 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); *Baldwin*, 921 F.3d at 842.

If there is "statutory silence in the face of existing common law," "courts presume that general statutory language incorporates established common-law

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[6] *See* Appx8 ("It is likely that plaintiffs' 2003 amended tax return would have been *received* by the IRS around the same time their 2002 amended tax return was received [*viz.*] … November 29, 2007.") (emphasis added). Because CFC found that IRS would have "received" the 2003 refund claim on November 29, 2007, it follows that the postmark date would have been a few business days before November 29, 2007. Those three/four business days do not affect the outcome of this case. For ease of reference, this brief uses "November 29, 2007" and "November 2007" interchangeably with "a few days before November 29, 2007."

principles … unless 'a statutory purpose to the contrary is evident.'" *Arangure v. Whitaker*, 911 F.3d 333, 337 n.2, 339 (6th Cir. 2018) (citation omitted). The common-law presumption canon is "not based on a normative judgment that the common law is better as a matter of 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; *Arista Networks, Inc. v. Cisco Systems, Inc.*, 908 F.3d 792, 802 (Fed. Cir. 2018) ("Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.") (cleaned up); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles."); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) (same).

It is hard to come by "an interpretive tool more traditional than the centuries-old common-law presumption." *Arangure*, at 343 (cleaned up). The Supreme Court said so 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").

The common-law mailbox rule has an ancient pedigree. In 1884, the Supreme Court stated that the rule was "well settled" at that time for letters sent by United States mail:

> 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.

Rosenthal v. Walker, 111 U.S. 185, 193 (1884). Cases concluding that the common-law mailbox rule governs under Section 7502 have relied on *Rosenthal*. *Anderson*, for example, held, "[n]either the language of the statute nor Ninth Circuit precedent bars admission of extrinsic evidence to prove 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." 966 F.2d at 491.

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); 38 U.S.C. § 7266 (following the common-law mailbox rule); 39 U.S.C. § 404 (the postal service follows the common-law mailbox rule); 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); 52 U.S.C. §§ 30104(a)(2)(A)(i), (a)(4)(A)(ii), (a)(5) (abrogating the common-law mailbox rule, restricting mailing methods); Supreme Court Rule 29 (following the common-law mailbox rule); Fed. R. App. P. 25 (same); Fed. R. Bankr. P. 8011 (same).

The Sixth Circuit and this Court, as *Arangure* and *Arista Networks* show respectively, give no effect to agency interpretations of statutes in derogation of the common law. Nor do the Second, Fifth, Ninth, Eleventh, and D.C. Circuits.[7] The Court should follow that rule and conclude that, if Section 7502 is silent, that silence does not displace the common-law mailbox rule permitting testimonial or circumstantial evidence to prove the postmark, and therefore, the delivery, date. Taxpayers "presented testimony regarding circumstantial evidence of mailing, … as well as a copy of the original 2003 [refund claim] they allege they filed." Appx7. Based on that evidence, CFC concluded as a factual matter that the 2003 refund claim "would have been received by the IRS … on November 29, 2007." Appx8.

Baldwin, a Ninth Circuit case on which CFC relied, 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

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[7] *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" (citation omitted)).

"dueling principl[e] of statutory interpretation," on par with IRS's "equally permissible construction of the statute." 921 F.3d at 843. In effect, *Baldwin* and CFC performed *no* traditional-tool analysis to determine whether Section 7502 is silent, ambiguous, or unambiguous. Instead, assuming the statute was silent, *Baldwin* and CFC concluded at *Chevron* Step Two that IRS's interpretation was "permissible" without first conducting a *Chevron* Step One analysis by applying statutory-construction canons like the common-law presumption canon that specifically applies in statutory-silence scenarios. *Id.* That shortcut approach collapses the whole *Chevron* inquiry into *Chevron* Step Two.

Brand X, however, did not endorse this game of hopscotch that skips the traditional-tool analysis, and *Kisor* explicitly forbade it.[8] The Court should clarify that this Circuit like many sister circuits conducts a thorough analysis of the statutory text using traditional tools of statutory construction. And, it only proceeds to *Chevron* Step Two if there is still genuine ambiguity—which does not include mere statutory silence—after applying traditional tools like the common-law presumption canon.

C. Legislative History Supports Taxpayers' Reading of Section 7502

To the extent that legislative history plays a role in textual analysis, the history of Section 7502 also shows why Congress did not prohibit use of the common-law mailbox rule to prove the postmark date. The historical record shows that Congress meant for courts to apply the common-law mailbox rule.

[8] *Kisor* requires a thorough traditional-tool analysis before granting *Auer/Kisor* deference. The Court should do the same in the *Chevron/Brand X* context. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Congress enacted Section 7502 "to mitigate the harsh inequities of a literal adherence of 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." *Wells Marine, Inc. v. Renegotiation Bd.*, 54 T.C. 1189, 1192–93 (1970). Section 7502 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) (emphasis added)).

In sum, applying all available traditional tools of statutory construction, this Court should conclude that Taxpayers proved under the common-law mailbox rule that the postmark date (which is deemed to be the delivery date under IRC § 7502) for the 2003 refund claim was a few days before November 29, 2007.

D. The Court Should Not Bring *Brand X* or *Chevron* Deference to Bear on This Case

In 2011, IRS amended 26 C.F.R. § 301.7502-1 and tried to make registered or certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received—for "all documents mailed after September 21, 2004." 26 C.F.R. §§ 301.7502-1(e)(2)(i), (g)(4) ("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."). Taxpayers mailed the 2003 refund claim at issue here a few days before November 29, 2007, Appx8—*i.e.*, four years before the 2011 Regulation went into effect, but about three years after the September 21, 2004 retroactive effective date of the 2011 Regulation. CFC, feeling it is "left with little room for digression" from the Ninth Circuit's decision in *Baldwin*, concluded that it "is foreclosed from applying the common-law mailbox rule, considering the language of … § 301.7502-1(e)(2)." Appx7–Appx8.

1. Thorough Statutory Construction Is Required Post-*Kisor*

The Ninth Circuit decided *Baldwin* in April 2019, two months before the Supreme Court decided *Kisor* in June 2019. *Baldwin* did not have the benefit of *Kisor*, but CFC had that benefit. So does this Court. This Court should correct CFC's error by following *Kisor*'s teachings.

Baldwin, concluding that "IRC § 7502 is silent as to whether the statute displaces the common-law mailbox rule," concluded that such statutory silence triggers the *Brand X* deference doctrine whereby courts "employ the familiar two-step analysis under *Chevron*." 921 F.3d at 842. In a single paragraph, without "empty[ing]" the "legal toolkit," *Kisor*, 139 S. Ct. at 2415, and without employing any traditional tools of statutory construction (such as the plain-meaning rule, or the common-law presumption canon), the Ninth Circuit decided at *Chevron* Step One that Section 7502 is "silent." Then proceeding immediately to *Chevron* Step Two, again in a single paragraph, the court held that IRS's "construction of the statute is reasonable." *Id.* at 843.

The Supreme Court denied certiorari in *Baldwin v. United States*, 140 S. Ct. 690 (2020). Justice Clarence Thomas, author of *Brand X*, dissented from the denial of certiorari because he would take "a step away from the abyss by revisiting *Brand X*" because *Brand X* "has taken this Court to the precipice of administrative absolutism." *Id.* at 695.

This Court is not compelled to follow the Ninth Circuit's *Baldwin* decision rejecting the common-law mailbox rule. Post-*Kisor*, the Court must engage in robust traditional statutory construction—an analysis that points to adopting the common-law mailbox rule. Constitutional avoidance also suggests not applying *Brand X* or *Chevron* deference aggressively where they are not warranted. *Arangure*, 911 F.3d at 339–341.

2. Statutory Silence Does Not Trigger *Brand X* Deference

Brand X deference is not triggered in statutory-silence cases. It presumably applies only to a "reasonable reading of an ambiguous statute" but not when the statute is unambiguous or silent. *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009); *see also Kisor*, 139 S. Ct. at 2414 ("the possibility of deference can arise only if a regulation is genuinely ambiguous"); *Home Concrete*, 566 U.S. at 488 (same, with explicit reference to *Brand X* deference). Except for *Baldwin*, circuit courts have not applied *Brand X* in statutory-silence situations. This Court should follow the Supreme Court's directives in *Eurodif*, *Home Concrete*, and *Kisor*, and not defer under *Brand X* in statutory-silence situations, because there is "no statutory uncertainty to be resolved." *Id.*

If this Court feels compelled to defer under *Brand X*, it should call on the Supreme Court to revisit the doctrine. Many lower-court judges have urged the Supreme Court to revisit *Brand X*. *See* discussion in Part III(D)(6), *infra* (collecting

cases). Even its author would revisit *Brand X*. The *Brand X* deference doctrine erodes *stare decisis*, it is unworkable, and it was wrongly decided.

3. *Brand X* Subverts *Stare Decisis*

Brand X enables agencies to circumvent *stare decisis*. It empowers agencies to eviscerate precedents they do not like via regulation—even long-established ones like *Anderson* (9th Cir. 1992), and *Rosenthal* (1884), and the centuries-old common-law mailbox rule. The agencies may then replace unfavorable precedents by providing only cursory justification for the changes—not "special justification" as is required to overcome *stare decisis*. *Kisor*, 139 S. Ct. at 2422. Adherence to and judicial respect for *stare decisis*, therefore, should compel not deferring under *Brand X*.

Brand X allows agencies to undercut predictability, stability, fair notice to parties like Taxpayers, reasonable reliance, and settled expectations—values that *stare decisis* and the Fifth Amendment's 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*, 139 S. Ct. at 2422 (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). Justice Breyer, dissenting in *Franchise Tax Bd. of California v. Hyatt*, said: "The people of this Nation rely upon stability in the law. Legal stability allows lawyers to give clients sound advice and allows ordinary citizens to plan their lives. Each time the Court overrules a case, the Court produces increased uncertainty." 139 S. Ct. 1485, 1506

(2019) (Breyer, J, dissenting). *Brand X*, which allows executive-branch agencies to overrule federal-court decisions, only magnifies uncertainty and instability.

This case illustrates the stability and fair notice problem especially well. In light of longstanding common law, a decades-old statute, and many federal appellate decisions, Mr. Taha had every reason to expect that he would be able to rely on extrinsic evidence (should it become necessary) to prove he mailed the refund claim on time. Instead, if this Court were to afford *Brand X* deference, IRS in one swoop will erase the common law, the statute, and federal-court precedent simply by passing a new regulation—*after* Taxpayers had already mailed their return (and *after* they have lost any opportunity to comply with the new rule). Such palpable unfairness is diametrically opposed to *stare decisis* values like fair notice and reasonable reliance.

Stare decisis is no impediment for this Court to interpret Section 7502 using traditional tools of statutory construction without resort to *Brand X* deference. There is no on-point precedent compelling the Federal Circuit to agree with the Ninth. And *Kisor* undercuts any persuasive value *Baldwin* might otherwise have. *Kisor*, which is binding precedent, requires this Court to apply traditional tools of statutory analysis before deferring to an agency interpretation.

Brand X supplies a mechanism to federal agencies to subvert *stare decisis*. This Court should not endorse that subversion by giving IRS's 2011 Regulation *Brand X* deference. Instead, it should apply traditional tools of statutory construction under *Kisor*, decline to apply deference in the face of statutory silence, and flag the *Brand X* doctrine's constitutional problems for the Supreme Court—including the fact that it is tempting lower courts to defer to federal agency interpretations when a statute is silent.

4. *Brand X* Is Unworkable

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 Taxpayers are doomed if they comply with court precedent, common law, or the statute. Mr. Mohamad Taha and Ms. Sanaa Yassin were residents of California and paid taxes in California and to IRS in 2002 and 2003. Appx201. They were also residents of California when they filed the tax-refund claims. [Appx951, Appx953, Appx955]. The refund claim arose from Mr. Mohamad Taha's investment in Atek Construction, Inc., a California S Corporation. Appx199. They had an expectation in 2007, when they mailed the 2003 refund claim, Appx8, that Ninth Circuit's *Anderson* (1992) and the Supreme Court's *Rosenthal* (1884) decisions would control. *Anderson* was not overruled until *Baldwin* (2019) was decided. Taxpayers did not know, at the time they made their fateful decision to mail their refund by regular U.S. mail, that they needed to predict whether IRS might change its interpretation of Section 7502 four years later (in 2011). Tasking Taxpayers to be omniscient is the antithesis of a workable rule of law.

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 make *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*—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." 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 (per Roberts, C.J., Thomas, Alito, JJ.).

The delegation rationale should be unavailable when a statute, as here, is *silent*. If the rule were otherwise, 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).

Section 7502's silence as to whether it supplements or supplants the common-law mailbox rule compels the conclusion that the common law still applies under the common-law presumption canon. *See Arangure*, 911 F.3d at 337 n.2, 339. Such silence does not create a gap for the administrative agency to fill. It forms the basis for a traditional rule of construction—the common-law presumption canon—which takes precedence over a deference doctrine.

At the time Taxpayers mailed their refund claim in November 2007, IRS's now-current rule—allowing only registered or certified mail receipts to prove the postmark date—was not the law. The law, as it stood then was the Ninth Circuit's *Anderson*

decision. Deferring to IRS under *Brand X* in such retroactive circumstances would mean that Taxpayers erred in complying with established circuit precedent.[9]

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 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).

This Circuit has not previously interpreted Section 7502. The most workable resolution would be for it to use available traditional tools of statutory construction, per *Kisor*, including the common-law presumption canon, to interpret it in the first instance without resorting to *Brand X* or *Chevron* and deferring to 26 C.F.R. § 301.7502-1.

5. Deferring Under *Brand X* or *Chevron* Violates the Fifth Amendment's Due Process Clause

Deferring to the agency's interpretation of a statute, especially 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."

[9] IRS would charge Taxpayers with a duty to comply with a pending Notice of Proposed Rulemaking. What eventually became the 2011 Regulation was first published as an NPRM in 2004. 69 Fed. Reg. 56377-01 (Sep. 21, 2004).

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of powers 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 Taxpayers. *Brand X* deference "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).

Typically, 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 most-recent interpretation of the law. But 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 Com'n*, 138 S. Ct. 1719, 1732, 1734 (2018) (Kagan, J., concurring).

6. Deferring Under *Brand X* or *Chevron* Impairs Judicial Independence Under Article III

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). 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 it "would leave the Board free to disregard any

prior Supreme Court or court of appeals interpretation of the NLRA." Refusing to abandon judicial independence, the *MikLin* majority withheld *Brand X* deference from the NLRB's new interpretation that had effectively "overruled" the Supreme 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. IRS casually discards a centuries-old common-law mailbox rule. It is contrary to the plain meaning of an act of Congress that left settled common law intact. Worse still, *Brand X* deference here would be given to IRS's Notice of *Proposed* Rulemaking issued in 2004. 69 Fed. Reg. 56377-01 (Sep. 21, 2004). The 2011 Regulation was not amended until the Notice of Final Rulemaking was issued in August 2011—four years *after* Taxpayers had already mailed their 2003 refund claim. 76 Fed. Reg. 52561-01 (Aug. 23, 2011). Taxpayers were unable to order their actions in advance to conform with the law. That violates fundamental rule-of-law precepts and the Due Process Clause.

IRS did not bother to engage in a traditional-tool analysis in its notices of proposed and final rulemaking. *See* 69 Fed. Reg. 56377-01; 76 Fed. Reg. 52561-01. The 2011 Regulation is a perfunctory five-page rulemaking. While *Chevron* and *Kisor* require courts to engage in a rigorous traditional-tool analysis to reach the best interpretation of statutes and regulations, *Brand X* allows a back door through which agencies can subvert such interpretations while doing far less careful analysis (including abandoning the centuries-old common-law mailbox rule, which Congress can abrogate only with a

clear statement, not mere silence). This problem is of *Brand X*'s making, but because *Brand X* did not address that problem, this Court is therefore free not to apply *Brand X* and instead clarify that an agency cannot overturn a previous court decision that has employed traditional tools in interpreting a statute. Otherwise, good, independent judicial analysis will be routinely overturned by sloppy, self-serving, outcome-driven agency regulations.

Several jurists have explicitly urged the Supreme Court to revisit *Brand X*. *See Gutierrez-Brizuela*, 834 F.3d at 1150–51 (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] decision[s] like some sort of super court of appeals." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). A straightforward statutory-construction analysis of Section 7502 in place of deferring under *Brand X* would restore due process and judicial independence. That is the appropriate course of action for this Court to take in this case.

7. Deferring Under *Brand X* or *Chevron* 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, concurring in the judgment) (cleaned up). Justice Thomas, who authored *Brand X*, criticized it later and explained that it "raised serious separation-of-powers questions," "is in tension with Article III's Vesting Clause," and "Article I's [Vesting Clause]." *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring). Dissenting from denial of certiorari, Justice Thomas would now revisit the *Brand X* deference doctrine. *Baldwin*, 140 S. Ct. 690. 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* or dictates circuit precedent in this Circuit, 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*, 834 F.3d at 1150; *see also De Niz Robles*, 803 F.3d 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 requires not merely judicial deference to agency interpretation, but also judicial acquiescence in agency non-deference to judicial interpretation. This state of affairs comprises 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 "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). This

Court should call out this "serious separation-of-powers" problem with *Brand X* and preserve the common-law mailbox rule in interpreting Section 7502 *de novo*. *Michigan v. EPA*, 576 U.S. at 760 (Thomas, J., concurring); *Baldwin*, 140 S. Ct. 690 (Thomas, J., dissenting from denial of certiorari).

8. *Home Concrete* Provides Another Way to Lessen the Unconstitutional Impact of *Brand X*

Brand X analysis cannot turn on whether the first-in-time court characterized the statute as silent, ambiguous, or unambiguous. 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 allowed to trump judicial decisions that have scrupulously applied traditional tools of statutory construction.

Baldwin, instead, performed a cursory magic-words review. Because *Anderson* did not explicitly say whether Section 7502 is silent, ambiguous, or unambiguous, the court deferred under *Brand X* to the agency's supposedly permissible or reasonable reading of the statute. 921 F.3d at 843.

Home Concrete indicates how this Court might apply *Brand X* in the event it feels compelled to follow it. In *Home Concrete*, the Supreme Court had evaluated whether a Treasury Regulation interpreting a statute trumped a prior Supreme Court decision, *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), interpreting a tax statute. *Colony* said that

"it cannot be said that the language is unambiguous." 357 U.S. at 33. *Home Concrete* relied on this statement to conclude that the statute is "now unambiguous," 566 U.S. at 489 (cleaned up), and it declined to defer under *Brand X* to IRS's regulation. Justice Breyer's majority opinion suggests that a court confronted with the question of whether *Brand X* applies should look to *how* the first-in-time court analyzed the text of the statute, not the *label* the court used. When a prior court decision's methodology "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 489–490.

9. IRS Has No Claim to Substantive or Special Expertise to Thereby Trigger *Brand X* or *Chevron*

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, in methods of proving a proposition through testimony, circumstantial, or documentary evidence in federal court, or U.S. mail mailing methods. *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, 292–293 (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").

It simply cannot be that Congress abrogated common law in Section 7502 (engaging in ordinary statutory construction reveals 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, 931–932 (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). As it did in these prior cases, the Federal Circuit should likewise conclude (joining the Third, Eighth, Ninth (under *Anderson*), and Tenth Circuits) that Section 7502 supplements and does not supplant the common-law mailbox rule. The Court should clarify that *Brand X* applies at most in rare instances where the meaning of the statute truly cannot be ascertained using ordinary statutory-construction methods and prior court opinions did not employ traditional tools of statutory analysis.

That approach would be consistent with the ones the Supreme Court took in *Kisor* and *United States v. Dickson*, 40 U.S. 141 (1841). Justice Story 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." *Id.* at 161–162.

10. The Court Remains Free to Expound on *Brand X*'s Constitutional Defects

There are many reasons, as explained above, that *Brand X* does not apply in circumstances like the one this case presents. Even if this Court must follow *Brand X*,

its judges remain free to expound on *Brand X*'s constitutional defects.[10] *Brand X* itself did not address the constitutional objections that Taxpayers raise here. It cannot, therefore, be said that the Supreme Court has rejected these constitutional arguments by adhering to *Brand X* for 15 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 Taxpayers 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 opining on the constitutionality of *Brand X* deference now.

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[10] *See* Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126–27 (1999) (differentiating opinions from judgments) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment. As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that settles authoritatively what is to be done—and the only thing that the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made." (cleaned up)); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

To be sure, this Court cannot declare the *Brand X* doctrine unconstitutional, but it can recognize that *Home Concrete* and *Kisor* have cabined it. "It is [the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The lower courts must simply follow the mandates emanating from the Supreme Court. It is particularly telling that a growing number of appellate judges—and Justices of the Supreme Court—have nonetheless called upon the Supreme Court to reconsider *Brand X*. This Court should join that ever louder chorus. There is no reason to "perpetuat[e]" a faulty "practice" just because it has been around for 15 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).

Because of the judges' duty to say what the law is, they must opine on *Brand X*'s failings. *Cf. United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 802 (Fed. Cir. 2020) (applying *Kisor* and declining to defer to Department of Commerce's interpretation). Other circuits' judges have written such opinions many times in response to Supreme Court decisions that they regard as lawless or unconstitutional, and it is an appropriate and respectful way to provoke reconsideration of a mistaken Supreme Court decision.[11]

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[11] *See Wilson v. Safelite Group, Inc.*, 930 F.3d 429 (6th Cir. 2019); *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (per Gorsuch, J.); *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018); *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259 (Mich. 2008); *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit); *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018) (per Thapar, J.); *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone" & Reinhardt, J., dissenting); *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019)

The Court should give serious consideration to the above option—if only to avoid another—that of recusal. The code of judicial conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which … the judge has a personal bias or prejudice concerning a party."[12] Though *Brand X* involves an institutionally imposed bias rather than personal prejudice, the resulting impartiality is inescapable, for the case requires judges systematically to favor an agency's statutory interpretations over those offered by opposing litigants. And a judge cannot excuse this bias by invoking the judge's duty to follow the Supreme Court, for there is no "superior-orders defense" available in the Code of Conduct.

If this Court feels obligated to follow *Brand X*—that is, if its judges feel condemned by *stare decisis* to abandon their independent judgment and exhibit bias in favor of one of the litigants—it is difficult to see how they can comply with the Code of Conduct without recusing themselves. To avoid this extreme situation in which judges are caught between *stare decisis* and their duty to recuse themselves, the judges

(Kethledge, J., dissenting); *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (*en banc*); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (per Berzon, J., dissenting, joined by Pregerson, Fisher, Paez, JJ.); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., authoring the panel opinion and writing a separate concurrence); *American Institute for International Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1346 (C.I.T. 2019) (Katzman, J., dubitante); *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting, joined by Kennedy, Alito, JJ.); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (Gorsuch, J., concurring in the judgment, joined in part by Thomas, Alito, Kavanaugh, JJ.).

[12] Canon 3(C)(1)(a), Code of Conduct for United States Judges, https://bit.ly/2MvheHk.

should take seriously the option of opining that *Brand X* is unconstitutional—notwithstanding that it is a Supreme Court precedent.

Brand X puts judges in an impossible situation; it is an assault on their duty of independence, their oath, and the unbiased due process of their courts. It compels them to betray the core responsibilities of judicial office. It is long past time for conscientious judges to call out the ways in which this "deference" has corrupted the judiciary—and to advocate a return to the judicial independence and unbiased judgments that our Constitution demands.

A rigorous analysis employing ordinary statutory-interpretation tools should resolve this case. The only "reflexive" portion of a court's analysis should be to turn to statutory construction as its first resort to analyze the applicable statute using ordinary tools of statutory construction, including canons of construction. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

IV. THE SEVEN-YEAR STATUTE OF LIMITATIONS GOVERNS

CFC erred in concluding that the catch-all three-year statute of limitations of IRC § 6511(a) governs. This Court should conclude that the seven-year statute of limitations of IRC § 6511(d) governs. As relevant here, the seven-year statute applies to "refund" claims "under section 166 or … section 165(g)." IRC § 6511(d)(1). Taxpayers' refund claim fits the Section 165(g) requirements.

The business-debt-based refund under IRC § 166 is materially different from the worthless-security-based refund under IRC § 165(g). Section 166 distinguishes between worthless business debt and worthless nonbusiness debt. Worthless business debt is fully refundable; worthless nonbusiness debt is refundable in amounts computed under IRC § 1212 as capital loss. "Nonbusiness debt" means debt other than "a debt created or acquired … in connection with a trade or business of the taxpayer; or … a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." IRC § 166(d)(2). To qualify for a worthless-security-based refund under IRC § 165(g), it does not matter that the shares of Atek's corporate stock held by Mr. Mohamad Taha were or were not connected with his trade or business because Congress has expressly said so in IRC §§ 165(g) and 1221: "whether or not connected with his trade or business." The plain meaning of the statute governs.

A. Taxpayers' Refund Claim Falls Under Section 165(g)

To invoke Section 165(g), "the taxpayer's worthless investment must be both a 'capital asset' and a 'security.'" *Draper*, 62 Fed. Cl. at 413. A "capital asset" is any "property held by the taxpayer (whether or not connected with his trade or business)." IRC § 1221(a). A "security" is defined as "(A) a share of stock in a corporation; (B) a

right to subscribe for, or to receive, a share of stock in a corporation; or (C) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form." IRC § 165(g)(2)(A)–(C).

Mr. Mohamad Taha owned 10% of the shares of Atek Construction, Inc., a California S Corporation, engaged in public contracting and construction. Appx199:8–12, Appx305:11–13, [Appx575–Appx576 at ¶¶ 10–11]. Owning shares of stock in a corporation is ownership of a "capital asset." CFC concluded as a factual matter that Taxpayers' income on which tax was paid and refund is now sought "was capital, not debt." Appx8. This much is undisputed as a matter of fact.

As a legal matter, IRC § 1221 gives a series of items that are not considered a "capital asset." Mr. Mohamad Taha's 10% shares of stock in Atek Construction, Inc. do not fall under any of those IRC § 1221 exclusions. All "property held by the taxpayer" not within the narrow list of exclusions is a "capital asset." The shares at issue here are not "stock in trade of the taxpayer," not property "used in his trade or business," not intellectual property, not "accounts or notes receivable acquired" by Mr. Mohamad Taha "in the ordinary course of trade or business," not a "commodities derivative financial instrument held by a commodities derivatives dealer," not a "hedging transaction," and not "supplies of a type regularly used or consumed by" Mr. Mohamad Taha. IRC § 1221(a)(1)–(8). The Court should therefore conclude that the basis for refund is worthlessness of a "capital asset."

Mr. Mohamad Taha's 10% share is also a "security" because it is "a share of stock in a corporation[.]" IRC § 165(g)(2)(A). IRS does not dispute that as a factual matter.

The Court should therefore conclude that the basis for refund is worthlessness of a "security."

IRS also does not dispute as a factual matter that Mr. Mohamad Taha's 10% share is "worthless." The Court should therefore conclude that Taxpayers can invoke Section 165(g) and the corresponding seven-year limitations period of IRC § 6511(d), because the basis for the refund claim is the worthlessness of Mr. Mohamad Taha's 10% share, which is a "capital asset" and a "security."

Congress determined that the statute of limitations for taxpayers wanting a refund of taxes paid on worthless securities under Section 165(g) should be seven years, not three. IRC § 6511(d)(1). Taxpayers filed their 2003 tax return on April 14, 2004. Appx101. The filing date for the 2003 tax-refund claim is November 29, 2007. Appx8. The refund-filing date is well within seven years of the initial tax-return-filing date of April 14, 2004. The Court should conclude that Taxpayers filed the refund claim within the seven-year statute-of-limitations period. Taxpayers, therefore, "duly filed" the refund claim under IRC § 7422(a) such that CFC had subject-matter jurisdiction over their tax-refund suit.

B. *Whipple* Is Not Fatal to Taxpayers' Refund Claim Under Section 166

For Taxpayers' refund claim to fall under Section 166, they have to show that the claimed refund is based on worthlessness of "business debt," not "nonbusiness debt." Tellingly, IRC § 166 does not define "business debt." It only defines "nonbusiness debt." Relying on *Whipple v. Commissioner*, 373 U.S. 193, 202 (1963), CFC

concluded that "Mr. Mohamad Taha's role as only a shareholder makes his interest nonbusiness for purposes of Section 166." Appx9.

Whipple is controlling—both for what it says and what it does not. As this Court recognized, Taxpayers can "plausibly" claim a refund based on Section 166. Appx109. Because the Court can resolve this case based on Taxpayers' Section 165(g) argument, it is not necessary to decide whether Taxpayers' refund claim could also fall under Section 166, even if it likely does.

Whipple, as this Court recognized, does not prevent shareholders like Mr. Mohamad Taha—who own shares in a "family-run business" like Atek Construction, Inc.—to classify "unpaid shareholder income" as "'business' bad debt." Appx109. The phrase "trade or business" is a court-created term of art, and Congress, when it amended what is now Section 166 did "not … distur[b] the Court's definition of 'trade or business.'" 373 U.S. at 200. Addressing the history of amendments to what is now Section 166, *Whipple* said, "Congress restricted the full deduction under [Section 166] to bad debts incurred in the taxpayer's trade or business and provided that *'nonbusiness' bad debts were to be deducted as short-term capital losses*." *Id.* at 200–201 (cleaned up; emphasis added).

Assuming *arguendo* that Taxpayers' refund claim is based on nonbusiness bad debt, the refund claim would be timely filed under the statute of limitations that applies to refunds of a "short-term capital loss." That statute of limitations is three years from "the time prescribed for filing the return … for the taxable year of the … loss which results in such carryback." IRC §§ 6511(d)(2)(A), (d)(2)(B)(iii)(II); *see also* IRC § 1212 (computing refund amounts for short-term capital losses).

The November 29, 2007 refund-filing date is comfortably within three years of April 15, 2005—the filing deadline for filing the return for tax-year 2004, which is the "taxable year of the … loss which result[ed]" in the refund claim. Appx8. Nothing in *Whipple* amends the applicable limitations periods for business and nonbusiness bad debts.

IRS's attempt at trial to distinguish between business bad debt and nonbusiness bad debt under Section 166 is, therefore, largely academic. Assuming the basis for the refund is a business bad debt, the seven-year statute of limitations of Section 6511(d)(1) applies. Assuming the basis for the refund is a nonbusiness bad debt, the statute of limitations of Section 6511(d)(2)(A) applies. Taxpayers filed the refund claim well within the period allowed by either.

C. IRS's Arguments Respecting Section 166 Do Not Foreclose Taxpayers' Refund Claim Based on Section 165(g)

In the Court of Federal Claims, IRS tended to focus exclusively on Section 166 to distract CFC from the straightforward import and application of Section 165(g) to Taxpayers' tax-refund claim. While Taxpayers' *pro se* filings in the CFC and in the first appeal to this Court were not entirely clear as to which of the three sections—165(g), 166, or 832(c)—they were invoking as grounds for claiming that the seven-year statute-of-limitations period applies to their tax-refund claim, Taxpayers have clearly—and consistently—invoked IRC § 6511(d), thus preserving their Section 165(g) argument and preserving their argument that the refund claims were filed within the limitations periods given in IRC § 6511(d)(1) or IRC § 6511(d)(2)(A).

Any lack of clarity on the part of *pro se* Taxpayers, therefore, should not have distracted CFC from determining whether it had subject-matter jurisdiction, for both CFC and this Court are required to determine jurisdictional questions *sua sponte* if needed. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) ("A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal."); *Metabolite Laboratories, Inc. v. Laboratory Corp. of America Holdings*, 370 F.3d 1354, 1369 (Fed. Cir. 2004) ("Subject matter jurisdiction is an inquiry that this court must raise *sua sponte*, even where, as here, neither party has raised this issue."); *Diggs v. Dep't of Housing & Urban Dev't*, 670 F.3d 1353, 1355 (Fed. Cir. 2011) ("[S]ubject matter jurisdiction cannot be conferred by waiver, estoppel, or consent.").

Furthermore, *pro se* filings are liberally construed. *Erikson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed.") (cleaned up); *Simanonok v. Simanonok*, 918 F.2d 947, 953 (Fed. Cir. 1990) (concluding that because a *pro se* plaintiff did not understand the "jurisdictional issue nor its implications," the Court had no "opportunity to consider a well-briefed" jurisdictional question and, therefore, a subsequent appellate decision reaching a different conclusion than the first appellate decision does not "run afoul of … adherence to the law of the case" doctrine). This Court should not fall for IRS's distraction. It should instead fully review the jurisdictional question *de novo* because a *pro se* filer's lack of awareness of or failure to flesh out all available jurisdictional arguments does not waive them.

IRS's strongest argument on why the Court should consider Taxpayers' Section 165(g) argument to be waived is likely based on the following language from this Court's decision on the first appeal:

> The timeliness of the 2003 claim depends on whether it relates to 'business' bad debt, such that the longer limitation period applies. Appellants alleged in the complaint (and continue to do so on appeal) that their 2003 claim relates to 'business' bad debt, and was therefore timely filed within the applicable seven year period under § 6511(d)(1). … The Claims Court found that Appellants' documents suggest that Atek could have been a family-run business, which in turn could suggest that Mr. M. Taha's unpaid shareholder income could plausibly be classified as 'business' bad debt. The Claims Court, however, did not resolve this factual issue.

Appx108–Appx109. This Court did not limit CFC's jurisdictional factfinding to only finding facts respecting Section 166. To the contrary, this Court's remand instruction required CFC to find facts that will inform whether the three-year or the seven-year statute-of-limitations period applies. Appx107. In other words, the applicability of Section 6511(d)(1) depends on not just Section 166, but also on Section 165(g) and Section 832(c).

Taxpayers proved by a preponderance of the evidence—the applicable standard of proof for establishing jurisdictional facts—that their refund claim meets the requirements of, at the very least, IRC § 165(g) as a factual matter to which the seven-year limitations period applies. They also proved they filed the refund claim within the applicable limitations period for worthless nonbusiness debt. That factual basis is sufficient for this Court to now apply existing legal requirements pertaining to Section 165(g) and 166 to established facts.

Taxpayers filed the tax-refund claim well within the applicable limitations periods. Their tax-refund claim is, therefore, "duly filed" under IRC § 7422(a). The

Court should hold that CFC erred in concluding that it lacked subject-matter jurisdiction over Taxpayers' tax-refund suit.

CONCLUSION

The Court should reverse CFC's decision and conclude that CFC had subject-matter jurisdiction over Taxpayers' tax-refund suit. Under the common-law mailbox rule, the Court should deem their refund claim filed on or a few days before November 29, 2007, which makes it timely filed within either of the two applicable limitations periods of IRC § 6511(d), and the Court should remand for further proceedings consistent with that conclusion.

Respectfully submitted, on February 1, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **13,580** words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the Court's Case Management / Electronic Case Filing (CM/ECF) system. All participants have consented to service by electronic mail:

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