NO. 13-278

In The
Supreme Court of the United States

ROBERT W. STOCKER II AND LAUREL A. STOCKER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CENTER FOR THE FAIR ADMINISTRATION OF TAXES AS *AMICUS CURIAE* IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taxpayer may prove the timely filing of a tax refund claim through evidence other than an actual postmarked envelope or a registered or certified mail receipt, as the Third, Eighth, Ninth, and Tenth Circuits and the Tax Court have held, or whether the only evidence admissible to establish timely filing is the envelope or receipt itself, as the First, Second, and Sixth Circuits have held.

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INTEREST OF *AMICUS*

This *amicus* brief is being filed with the written consent of both parties.

Amicus Center for the Fair Administration of Taxes ("CFAT") is a section 501(c)(3) non-profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 32 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

The present case offers this Court the opportunity to resolve a long-standing split among the Circuit Courts of Appeal, thereby alleviating a lack of horizontal equity among large numbers of taxpayers. This lack of horizontal equity on an issue that affect a large number of taxpayers is particularly detrimental to the fair administration of the tax laws. The holding of the Sixth Circuit is also

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[1] No person other than the named *amicus* or their counsel authored this brief or provided financial support for this brief.

detrimental to the fair administration of the tax laws because that holding prohibits taxpayers from offering all relevant evidence, including secondary and circumstantial evidence, to prove the date of a postmark where the postmark itself is unavailable.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case to resolve a clear, long-standing split among the Circuit Courts of Appeal. The disparate treatment of similarly situated taxpayers is untenable.

The issue presented in this case affects a large number of taxpayers in a variety of contexts. This includes taxpayers who mail their tax returns, taxpayers who mail claims for refund, and taxpayers who mail their Tax Court petitions. Thus, this issue is administratively important to both taxpayers as a whole and to the government.

The present case is not governed by the recent amendments to the Treasury Regulations issued under section 7502. These regulations, are symptomatic of the IRS's improper treatment of section 7502 as a limitation upon taxpayers, rather than as an aid to taxpayers, do not address.

If this Court does not grant review in this case, it will perpetuate significant unfairness in the administration of the tax laws. The IRS ought not to be able to prevent courts from exercising jurisdiction over refund suits by losing, misplacing or destroying the envelope bearing the postmark which proves the date on which the refund claim was mailed. It is not

proper or fair to bar taxpayers from presenting all relevant evidence in court to establish the date of a postmark as a direct result of the IRS engaging in the spoliation of evidence.

This is particularly so given that the IRS, when it loses, misplaces or destroys its own files, is permitted by the courts to offer secondary evidence of the contents of those files. Given this point, and given that the loss, misplacement and destruction of a statistically small but numerically significant number of documents is a virtual certainty in light of the many millions of documents handled by the IRS and by the Postal Service, it is neither fair nor logical to prohibit taxpayers from offering secondary evidence of the date of a postmark where the actual postmark is no longer available.

ARGUMENT

I. This Court Should Grant Review Because There is a Clear Split Among the Circuit Courts of Appeal

The Circuit Courts of Appeal hopelessly disagree over whether 26. U.S.C. § 7502 permits taxpayers to submit evidence of the date of a postmark which shows that they timely mailed their documents to the IRS under the "timely mailed is timely filed" provisions of that section other than the postmark itself. The IRS's position that taxpayers may not offer any evidence other than the postmark itself has been adopted by the First, Second and Sixth Circuits, all of which prohibit the admission of any evidence of timely mailing with the United

States Postal Service other than the actual postmark. *See Main Medical Center v. United States,* 675 F.3d 110 (1st Cir. 2012), *Deutsch v. Commissioner,* 599 F.2d 44 (2d Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980), *Stocker v. United States,* 705 F.3d 225 (6th Cir. 2013).

The Third, Eighth, Ninth and Tenth Circuits disagree with the IRS's position and allow a taxpayer to offer evidence of the date of a postmark other than the postmark itself, such as testimonial evidence from the taxpayer and other witnesses, for purposes of proving that a document was timely mailed under the "timely mailed is timely filed" rule. *See Philadelphia Marine Trade Ass'n—Int'l Longshoremen's Ass'n Pension Fund v. Commissioner,* 523 F.3d 140 (3d Cir. 2008), *Estate of Wood v. Commissioner,* 909 F.2d 1155 (8th Cir. 1990), *Lewis v. United States,* 144 F.3d 1220 (9th Cir. 1998), *Sorrentino v. IRS,* 383 F.3d 1187 (10th Cir. 2004), *cert. denied,* 546 U.S. 812 (2005).

The Tax Court likewise permits the use of evidence other than the postmark itself for purposes of proving the date of a postmark under the "timely mailing is timely filing" rule of §7502. *See, e.g., Gibson v. Commissioner,* Tax Court Memo 2002-218, 84 T.C.M. (CCH) 263 (2002).

The Tax Court is a national court and will therefore normally issue consistent rulings on a particular issue, regardless of where the taxpayer is located. But the Tax Court follows the decisions of the Court of Appeals to which venue on appeal lies in each particular case. See 26 U.S.C. §7482(b), *Golsen*

v. Commissioner, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Thus, in cases brought in the Tax Court, individual taxpayers who reside in the First, Second and Sixth Circuits are treated differently from identically situated taxpayers residing in all other Circuits.

Similarly, in tax refund suits brought by taxpayers located in the First, Second and Sixth Circuits, taxpayers are treated differently from identically situated taxpayers located in the Third, Eighth, Ninth and Tenth Circuits. The only fact which causes a difference in the result is the residence of the taxpayer.

For those taxpayers located in all other Circuits (Fourth, Fifth, Seventh, D.C. and Federal), District Courts in which refund suits are brought have no binding precedent on this issue. (The rulings of the Tax Court are not binding on District Courts.) Identically situated taxpayers residing in these remaining Circuits can thus face disparate results at the trial level, depending on whether litigation was brought in the Tax Court or in the District Court.

Such disparate treatment of similarly situated taxpayers, based solely on the residence of the taxpayer or based solely on the forum in which the litigation is brought, is an anathema to the fair administration of the tax laws.

II. The Issue Presented in This Case Affects a Large Number of Taxpayers

The issue of whether taxpayers may use evidence other than the actual postmark to prove the date of postmark for purposes of the "timely mailed is timely filed" rule in section 7502 affects a large number of taxpayers in a variety of situations. This is because taxpayers mail many different types of documents to the IRS and because the "timely mailed is timely filed" rule also applies to documents filed with the Tax Court.

Taxpayers who timely mail income tax returns which are treated as "late" by the IRS, due to mishandling, loss or destruction by the Postal Service or by the IRS, can be charged late filing penalties of anywhere from 5% to 25% of the unpaid balance shown on the return if the IRS. 26 U.S.C. § 6651(a)(1). The penalty is 5% per month for each month (or fraction thereof) for which the return is late. Thus, a 25% late filing penalty can be imposed a mere five months after the return was due.

There are a variety of information returns which are filed by taxpayers each year. Failure to file these information returns on a timely basis can result in the imposition of significant penalties. *See, e.g.,* 26 U.S.C. §§ 6038A(d) (imposing minimum penalty of $10,000 for failure to timely file Form 5471), 6038B (imposing potentially significant penalty for failure to timely file Form 926), 6038C(c) (imposing minimum penalty of $10,000 for failure to timely file Form 5472), 6039F(c) (imposing penalty of up to 25% of the amount received as gifts from

outside the United States for failure to file timely Form 3520), and 6677 (imposing penalties of 35% of amounts transferred to or from certain foreign trusts for failure to file timely Form 3520). These are just some of the penalties that can be imposed for a failure to file timely the many different types of information returns required to be filed by various sections of the Internal Revenue Code.

Taxpayers file by mail, and will continue to file by mail in the future, over 90 million returns each year.[2] Thus, even a combined USPS and IRS mishandling/loss rate of 1% would mean that over 900,000 tax returns mailed to the IRS are mishandled, lost or destroyed annually.[3]

Many taxpayers such as the Stockers mail claims for refund to the IRS. The Stockers' case illustrates what can happen if claim or the envelope in which it was mailed is mishandled, lost or destroyed.

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[2] Brett Collins, *IRS Publication. Trend in Grand Total Returns: Calendar Years 2011-2018, Available at:* http://www.irs.gov/pub/irs-soi/12rswinbulreturnfilings.pdf.

[3] The actual mishandling rate of mail sent via ordinary USPS mail is not clear. Wiki Answers estimates this rate as being as high as 3% to 5%, but offers no details in support of these figures. *See Wiki Answers, Question Regarding Percentage of Lost Standard USPS Mail, available at* http://wiki.answers.com/Q/What_is_the_percentage_of_lost_standard_USPS_mail (last viewed Sept. 29, 2013).

Many taxpayers also mail their petitions to the Tax Court. If a taxpayer files a late Tax Court petition, the taxpayer is left without a pre-payment judicial forum in which to litigate the deficiency asserted by the IRS. *Compare Quarterman v. Commissioner,* T.C. Memo 2011-258, 102 T.C.M. (CCH) 437 (2011) (Court held that, even in the absence of a US postmark on an envelope mailed from overseas, a petition received after the deadline for filing a Tax Court petition was timely, based on circumstantial evidence), *with Brown v. Commissioner,* 74 T.C.M. (CCH) 1449 (T.C. 1997), *aff'd without published opinion,* 181 F.3d 99 (6th Cir. 1999) (Tax Court was precluded from considering circumstantial evidence of the date of the postmark as the result of Sixth Circuit precedent; "late" Tax Court petition was dismissed for lack of jurisdiction).

Thus, the issue presented in this case is administratively important to both taxpayers and to the IRS.

III. The Present Case Is Not Governed by the Recent Amendments to the Treasury Regulations Issued Under Section 7502

On August 23, 2011, effective for documents mailed to the IRS on or after September 21, 2004, the Treasury Department revised Treas. Reg. § 301.7502-1(e). This revision interprets the "safe harbor" provisions of section 7502(c) in a manner that is completely inconsistent with the purpose of the statute. Nevertheless, the present case is not governed the revised regulations.

The revised version of Treas. Reg. § 301.7502-1(e) provides as follows:

> 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.

26 C.F.R. § 301.7502-1(e)(2) (2011).

This amended regulation addresses only the issue of proof of actual delivery. In the present case, it is undisputed that the envelope in which the refund claim was mailed was actually delivered to the IRS. The issue in the present case, whether a taxpayer may introduce evidence other than the actual postmark to prove the date of the postmark where the envelope was received by IRS and then lost, misplaced or destroyed by the IRS, is not addressed by the amended regulation.

But the approach taken by the Treasury Department in this amended regulation is symptomatic of the IRS's improper treatment of section 7502 as a limitation upon taxpayers, rather

than as an aid to taxpayers. Section 7502 is a remedial statute, whose purpose is to provide relief for taxpayers. This is demonstrated by both the language of the statute, see Petition for Certiorari at pp. 23-25, and the legislative history. *Id.*, at p. 25, S. Rep. No. 9014, 90th Cong., 2d Sess. 20 (1968); H.R. Rep. No. 1104, 90th Cong., 2d Sess. 14 (1968). Granting review in the present case will not only resolve an intractable split among the Circuits, but will also permit this Court to put an end to the IRS's ill-advised efforts to turn a law designed to provide taxpayers with additional protection into a weapon used by IRS to prevent taxpayers from presenting their cases in court.

IV. If This Court Does Not Grant Review, It Will Perpetuate Significant Unfairness in the Administration of the Tax Laws

One of the most troubling aspect of the Sixth Circuit's ruling below is the fact that, whenever the IRS receives a postmarked envelope and thereafter loses, misplaces or destroys that envelope, it is the negligence or misconduct of the IRS which prohibits the taxpayer from being able to prove the date of the postmark. It is highly unlikely that Congress intended to prohibit taxpayers from offering evidence other than the postmark itself to prove the date of a postmark under section 7502 where the postmark was in the possession of the IRS and thereafter misplaced, lost or destroyed by the IRS.

The notion that the IRS can prevent courts from exercising jurisdiction over refund suits by losing, misplacing or destroying the envelope bearing

the postmark which proves the date on which the refund claim was mailed is an anathema to the fair administration of the tax laws. Taxpayers ought not to be barred from presenting all relevant evidence in court to establish the date of a postmark as a direct result of the IRS engaging in the spoliation of evidence. Such spoliation of evidence includes losing, misplacing or destroying the envelope containing the USPS postmark. And the IRS ought not to be provided with an incentive to lose, misplace or destroy documents. Yet that is precisely what will happen if the Sixth Circuit's holding remains good law.

The position taken by the IRS in these types of suits sends a loud and distinct message to taxpayers, namely that the IRS does not want the courts to determine the truth based on all of the relevant, admissible evidence. Where there is no (legible) postmark available, even when such unavailability is due to the IRS's own spoliation of evidence, the IRS wants to prevent taxpayers from presenting probative, relevant evidence to a court so that the court can determine the date of the postmark, based on all of the relevant evidence.

When the IRS tells the taxpaying public that the IRS has no interest in ascertaining the truth based on all relevant evidence, the IRS sets a very poor example for taxpayers and delivers a message to them that is harmful to the administration of the tax laws. That message, which is "we are going to ignore all of your relevant evidence (and will ask the courts to ignore all of your relevant evidence) that

establishes the date of the postmark—we will only consider the date of the postmark on the envelope that you sent to us," is not one that that government should be sending to its taxpayers.

The frustration of taxpayers who are not allowed to present relevant, probative evidence to a court for the purpose of ascertaining the date of a postmark is palpable. Taxpayers who are aware of the IRS's efforts to prevent courts from ascertaining the truth based upon all relevant evidence develop a perception of the IRS that is not conducive to voluntary compliance.

It is undisputed that mail is accidentally lost and misplaced, erroneous delivered to an incorrect address, and inadvertently destroyed by the Postal Service. In fact, mail is sometimes stolen by members of the public and by postal workers. *See e.g., USPS Office of Inspector General Semiannual Report to Congress.*, 17 (Spring 2013) (surveying investigations and convictions of mail theft; including recovery of ten thousand pieces of stolen mail from a California postal worker's residence), *available at:* http://www.uspsoig.gov/sites/default/files/document-library-files/2013/2013_spring_sarc.pdf; *See also id.*, Appendix H Investigative Statistics (finding 171 convictions and 356 administrative actions taken on matters concerning theft, destruction or delay of mail by USPS employees or contractors).

It is likewise undisputed that the IRS loses, misplaces and destroys documents, as it did in the present case. *See, e.g., Malkin v. United States,* 243

F.3d 120 (2d Cir. 2001), *Stoddard v. United States,* 664 F.Supp.2d 774 (E.D. Mich. 2009). In cases such as *Malkin*, courts have allowed the IRS to rely on secondary evidence to prove the contents of documents that were lost or destroyed. There is no logical reasons why taxpayers should not be afforded the same opportunity in the context of cases like the present one, especially given that the delivery of mail to the IRS by the Postal Service, along with the preservation of the postmark by the IRS after mail has been delivered to the IRS, is beyond the taxpayer's control.

There have also been documented instances of improper handling of tax returns by IRS employees. *See, e.g., Tax Administration: Information on IRS's Philadelphia Service Center*, General Accounting Office (Nov. 1985) at page 31 et seq., *available at* http://www.gao.gov/assets/90/86907.pdf.

Given that a) the IRS is allowed to use secondary evidence against taxpayers where the IRS has lost, misplaced or destroyed its files, and b) the loss, misplacement and destruction of a statistically small but numerically significant number of documents is a virtual certainty in light of the many millions of documents handled by the IRS and by the Postal Service, it is neither fair nor logical to prohibit taxpayers from offering secondary evidence of the date of a postmark where the actual postmark is no longer available. And where the IRS itself has lost the postmark, no taxpayer should ever be prevented from offering secondary evidence to prove the date of the postmark.

It is not a valid response for the IRS to say that all taxpayers should mail all documents to the IRS by registered or certified mail. This appears to be the position taken by the IRS in litigation and in the most recent amendment to the regulations issued under section 7502. No doubt the Postal Service would like the additional hundreds of millions of dollars in revenue that it would receive if all taxpayers were to mail all documents to the IRS by registered or certified mail.

But for millions of less well-to-do taxpayers, including single parents who may have a difficult time taking time off during the day to make a trip to the post office, and many of whom have extremely tight budgets, it is not practical for them to send all of their mail to the IRS via registered mail or certified mail. And for these less well-to-do taxpayers, having to pay even a small penalty or losing even a small refund because the IRS or the postal service lost, misplaced or destroyed the mail can be a hardship. Where these taxpayers have relevant evidence of the date of a postmark other than the postmark itself, taxpayers should be permitted to present this evidence. If this evidence is persuasive, they should be able to prevail.

Even where taxpayers make the effort to send mail to the IRS via certified mail, things can go wrong, through no fault of the taxpayers, to the point where there is no direct proof of the postmark. The present case is a prime example of such a situation. *See also Glenn v. Commissioner*, T.C. Memo 2013-33, 105 T.C.M. (CCH) 1228 (2013)

(Postal Service Employee mishandled certified mail by placing certified mail sticker on an envelope to an attorney's business address and placed the original petition in a self-addressed stamped envelope, but petition was considered timely filed).

Taxpayers ought not to be prevented from presenting evidence that is relevant to ascertaining the truth in these situations. That is particularly so where the IRS has engaged in the spoliation of the evidence which the IRS argues must be presented to the court in order for the court to make a finding in the taxpayer's favor regarding the date of the postmark.

The point that, in the present case, there is evidence which contradicts the taxpayer's evidence that the postmark on the envelope in which the claim for refund was mailed was timely does not matter. The District Court below held that it did not have jurisdiction to weigh the conflicting evidence. That conclusion was wrong. A reversal of the Sixth Circuit's holding will not guarantee that the Stockers will prevail on the question of whether the claim for refund was timely mailed. But a reversal will ensure that the ruling on remand by the District Court regarding the timeliness of the refund claim will be based on all relevant evidence.

CONCLUSION

This case is not about whether taxpayers should win or lose on the merits of their refund cases. This case is about whether taxpayers should be jurisdictionally barred from presenting

competent, relevant evidence that their refund claim was timely so that the courts can ascertain the truth regarding the timeliness of that refund claim and, if the claim is timely, consider the merits of their suit.

No amount of polished advocacy by the government can hide the fact that government does not want the courts to resolve the timeliness of refund claims bases on all of the relevant evidence. Simply put, the government does not want courts searching for the truth in a fair and impartial manner, even where the government itself is responsible for the loss of the very evidence which the government argues that the taxpayer must produce to proceed in court. Given that the Sixth Circuit's ruling is contrary to the intent of Congress, and given the split in the Circuit Courts of Appeal, this Court should grant the petition for writ of certiorari in this case.

Respectfully submitted,

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