No. 19-488

In the Supreme Court of the United States

STEVEN T. WALTNER AND SARAH V. WALTNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under 26 U.S.C. 7502 and a regulation promulgated by the Department of the Treasury to implement that provision, petitioners may rely on the common-law mailbox rule to establish the purported timeliness of a notice of appeal that the Tax Court did not receive until long after the deadline.

2. Whether, notwithstanding petitioner's failure to file a timely notice of appeal, the court of appeals had jurisdiction to review the Tax Court's decision in this case based on petitioners' assertion of government fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A6) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 448. The decision of the Tax Court (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2019. A petition for rehearing was denied on July 10, 2019 (Pet. App. A3). The petition for a writ of certiorari was filed on October 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. A variety of tax consequences may depend on whether a tax return or other tax document is timely filed. Until 1954, "the law treated tax documents as timely filed only if they were physically delivered to the [Internal Revenue Service (IRS)] by the applicable deadline." *Baldwin* v. *United States*, 921 F.3d 836, 839-840 (9th Cir. 2019), petition for cert. pending, No. 19-402 (filed Sept. 23, 2019); see *United States* v. *Lombardo*, 241 U.S. 73, 76 (1916) (holding that the word "'file'" as used in a federal statute "means to deliver to the office and not send through the United States mails," and that a paper is filed only "when it is delivered to the proper official and by him received") (citation omitted). Under that physical-delivery rule, a document is timely filed only if it is actually delivered by the applicable deadline, regardless of when it is mailed. See, *e.g.*, *Stebbins' Estate* v. *Helvering*, 121 F.2d 892, 893-894 (D.C. Cir. 1941); *Poynor* v. *Commissioner*, 81 F.2d 521, 522 (5th Cir. 1936). For obvious reasons, the physical-delivery rule can leave "taxpayers vulnerable to postal service malfunctioning." *Anderson* v. *United States*, 966 F.2d 487, 490 (9th Cir. 1992).

In pre-1954 disputes about whether documents had been physically delivered to the IRS on time, some federal courts permitted taxpayers to invoke an evidentiary presumption that came to be known as the "common-law mailbox rule." Pet. App. A5. Under that doctrine, if a taxpayer could persuade the fact-finder that a document had been "properly addressed and deposited in the United States mails, with postage thereon duly prepaid," in time for the document to reach the IRS "in the ordinary course of mail," the taxpayer was entitled to a rebuttable evidentiary presumption that the document

had been physically delivered to the IRS on time—even if the IRS had no record of receiving it. *Detroit Auto. Prods. Corp.* v. *Commissioner*, 203 F.2d 785, 785 (6th Cir. 1953) (per curiam); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952).

In 1954, Congress enacted Section 7502 of the Internal Revenue Code. See Internal Revenue Code of 1954, ch. 736, § 7502, 68A Stat. 895. Section 7502(a) creates a limited exception to the physical-delivery rule. When a tax document that must be filed by a certain deadline is delivered by U.S. mail after that deadline, the date of the postmark on the mailing is "deemed to be the date of delivery," as long as the document is deposited in the mail before the deadline, is ultimately delivered to the proper recipient, and meets certain other specified requirements. 26 U.S.C. 7502(a). For tax documents sent by *registered* U.S. mail, Section 7502(c) establishes a similar rule *and* provides taxpayers with a limited evidentiary presumption if a dispute arises about whether a document was actually delivered. In that circumstance, the registration is "prima facie evidence that the * * * document was delivered," and "the date of registration shall be deemed the postmark date." 26 U.S.C. 7502(c)(1)(A) and (B).

Section 7502 also authorizes the Secretary of the Treasury to promulgate regulations establishing similar rules for tax documents sent by certified mail, electronic mail, or a private delivery service. 26 U.S.C. 7502(c)(2) and (f)(3). The Secretary has exercised that authority to extend similar treatment to tax documents sent via certified mail or by designated private delivery services. See 26 C.F.R. 301.7502-1(c)(2)-(3) and (e)(2); I.R.S. Notice 2016-30, 2016-18 I.R.B. 676.

b. In the decades after Section 7502 was enacted, the courts of appeals disagreed about whether that provision forecloses a taxpayer from relying on the evidentiary presumption of physical delivery that some courts had recognized before 1954. The Sixth Circuit held that Section 7502's exceptions to the physical-delivery rule were "exclusive and complete," and that a taxpayer therefore could not "invoke the judicially-created presumption that material mailed is material received." *Miller* v. *United States*, 784 F.2d 728, 730-731 (1986) (per curiam). The Second Circuit similarly concluded that Section 7502 reflected "a penchant for an easily applied, objective standard," to the exclusion of judicially crafted presumptions. *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980). By contrast, the Eighth and Ninth Circuits held that Section 7502 did not displace the prior evidentiary presumption—*i.e.*, that a taxpayer who could persuade the fact-finder that a tax document was placed in the U.S. mail in time to reach the IRS by the applicable deadline in the ordinary course was entitled to an evidentiary presumption of timely physical delivery, even if Section 7502(c) was inapplicable because the document was not sent by registered or certified mail. See *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1158-1159 (8th Cir. 1990); *Anderson*, 966 F.2d at 490-491 (9th Cir.). And in *Sorrentino* v. *IRS*, 383 F.3d 1187 (2004), cert. denied, 546 U.S. 812 (2005), a single panel of the Tenth Circuit issued three conflicting opinions on the question.

In 2011, after utilizing notice-and-comment rulemaking procedures, the Department of the Treasury amended its regulations to provide "certainty" to taxpayers in light of the conflicting judicial decisions described above. 76 Fed. Reg. 52,561, 52,561 (Aug. 23, 2011). The

agency explained that the amended regulations were intended to clarify that Section 7502 sets forth "the only ways to establish prima facie evidence of delivery of documents that have a filing deadline prescribed by the internal revenue laws, absent direct proof of actual delivery." *Ibid.* In particular, the agency amended its regulations to state:

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

26 C.F.R. 301.7502-1(e)(2)(i). The agency made the amended version of the regulation applicable to "all documents mailed after September 21, 2004," the date when the amendment had been proposed in a notice of proposed rulemaking. 26 C.F.R. 301.7502-1(g)(4); see 76 Fed. Reg. at 52,563; 69 Fed. Reg. 56,377, 56,379 (Sept. 21, 2004).

2. The underlying dispute in this case involves petitioners' attempt to amend numerous tax returns for prior years to indicate that petitioners owed $0 in federal income taxes. C.A. E.R. 16. After determining that those assertions lacked a legal basis, the IRS assessed penalties against petitioners for filing frivolous tax returns. *Ibid.*; see 26 U.S.C. 6702. When petitioners did not pay the penalties, the IRS informed petitioners that it had filed tax liens and intended to levy to collect the unpaid penalties. C.A. E.R. 17. Petitioners challenged the IRS actions through administrative appeals and in

the Tax Court, which held that the IRS could proceed with the proposed collection. See *id.* at 17-22; Pet. App. A1-A2.

Petitioners appealed the Tax Court's decision to the Ninth Circuit, but the Tax Court "did not receive their notice of appeal until long after the filing deadline." Pet. App. A5; see 26 U.S.C. 7483 (setting a 90-day deadline). Petitioners claimed that they had "mailed an earlier notice of appeal before the deadline, but that notice was never delivered." Pet. App. A5. To support their claim of the earlier mailing, petitioners submitted (1) a declaration from petitioner Sarah Waltner stating that, "a few days before the [filing] deadline, she gave the notice of appeal to a private mail-services center to be mailed to the Tax Court"; and (2) "an affidavit from the owner of the mail-services center stating that he [had] mailed the notice by United States first-class mail as instructed." *Ibid.*[1]

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[1] Most disputes regarding the application of Section 7502 have involved the timeliness of filings made with the IRS. This case, by contrast, presents the question whether petitioners filed a timely notice of appeal with the Tax Court. Section 7502, however, broadly encompasses "any return, claim, statement, *or other document* required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date *under authority of any provision of the internal revenue laws*." 26 U.S.C. 7502(a)(1) (emphases added). A notice of appeal seeking review of a Tax Court decision is a "document," and the deadline for filing a notice of appeal in the Tax Court is established by 26 U.S.C. 7483, a "provision of the internal revenue laws." Federal Rule of Appellate Procedure 13(a)(2) states that a notice of appeal seeking review of a Tax Court decision "is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations." Courts of appeals accordingly have long applied Section 7502 and the Treasury Department's implementing regulations in deciding whether notices of appeal seeking review of Tax Court

The court of appeals concluded that it lacked jurisdiction over petitioners' appeal because they had not filed a timely notice of appeal. Pet. App. A6. The court explained that, under the 2011 Treasury regulation discussed above, the only categories of evidence that may be used to prove timely filing are (1) direct proof of actual delivery, (2) proof of proper use of registered or certified mail, and (3) proof of proper use of a duly designated private delivery service. *Id.* at A5-A6. The court noted that it had recently upheld the Treasury regulation in *Baldwin*. *Id.* at A6. Because the evidence petitioners submitted to show a purportedly timely filing did not fall within any of the categories of "allowable evidence" designated by the 2011 regulation, the court held that petitioners' appeal was untimely and dismissed it for lack of jurisdiction. *Ibid.*

ARGUMENT

The court of appeals correctly dismissed petitioners' appeal because petitioners failed to demonstrate timely filing under 26 U.S.C. 7502 and 26 C.F.R. 301.7502-1. As explained by the court in *Baldwin* v. *United States*, 921 F.3d 836 (9th Cir. 2019), petition for cert. pending, No. 19-402 (filed Sept. 23, 2019), and by the government in its brief in opposition in that case, Section 7502 and the Treasury Department's implementing regulation

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decisions were timely filed. See, *e.g.*, *Umbach* v. *Commissioner*, 357 F.3d 1108, 1111 (10th Cir. 2003); *Manchester Grp.* v. *Commissioner*, 113 F.3d 1087, 1089 (9th Cir. 1997) (per curiam); *Lazore* v. *Commissioner*, 11 F.3d 1180, 1182 (3d Cir. 1993); *Estate of Lidbury* v. *Commissioner*, 800 F.2d 649, 655 (7th Cir. 1986). The parties likewise have litigated this case, and the court of appeals decided it, on the understanding that the determination whether petitioners filed a timely notice of appeal is governed by the same legal rules that govern the timeliness of filings with the IRS.

specify the exclusive means to establish timely filing of a tax document that the IRS (or the Tax Court) has no record of receiving.

Petitioners do not dispute that they failed to establish timeliness through any of those specified means. They instead suggest that their filing would have been timely under the common-law mailbox rule, which some courts followed before the Treasury Department revised its regulation in 2011. But petitioners do not identify any conflict among courts of appeals about the meaning or validity of the 2011 regulation, which was the sole basis of the decision below. This case accordingly does not implicate the conflict that petitioners identify, and no other ground for review exists. The petition for a writ of certiorari should be denied.

1. To be timely filed, a tax document generally must be delivered by the filing deadline. Section 7502 establishes several specific exceptions to that rule, including for documents that are postmarked before the deadline and meet other conditions, 26 U.S.C. 7502(a)(1), and documents sent before the deadline using registered mail, 26 U.S.C. 7502(c). In addition, under regulatory authority expressly conferred by Section 7502, the Secretary of the Treasury has provided exceptions for tax documents sent via certified mail or using designated private delivery services. 26 C.F.R. 301.7502-1(c)(2)-(3) and (e)(2); see 26 U.S.C. 7502(c)(2) and (f)(3); see also pp. 4-5, *supra*; *Baldwin*, 921 F.3d at 839-842.

As Section 7502 implies and the Treasury Department's implementing regulation expressly states, those statutory and regulatory exceptions "are the exclusive means" of demonstrating timely filing absent direct proof that a tax document was actually delivered before the filing deadline. 26 C.F.R. 301.7502-1(e)(2)(i); see,

e.g., *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted). Applying the framework established by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals in *Baldwin* correctly upheld the interpretation of Section 7502 that is reflected in the Treasury regulation. See *Baldwin*, 921 F.3d at 842-843; see also Br. in Opp. at 11-18, *Baldwin*, *supra* (No. 19-402) (elaborating the government's argument).

Petitioners do not contend that the evidence they submitted to establish a purportedly timely filing falls within the categories permitted by Section 7502 or the implementing regulation. Nor do they present any sustained argument contesting the Ninth Circuit's decision upholding the regulation in *Baldwin*. They briefly suggest (Pet. 28) that the *Baldwin* court failed to consider the canon of statutory construction that presumes Congress did not intend to depart from the common law. But the court of appeals in *Baldwin* acknowledged that canon before determining that the government's interpretation was reasonable in light of other canons of interpretation—particularly the principle that Congress's express enumeration of exceptions forecloses the implication of additional exceptions. 921 F.3d at 843; see *Hillman*, 569 U.S. at 496.

Petitioners devote most of their argument (Pet. 8-23) to a longstanding division in circuit-court authority about whether Section 7502 supplants the common-law mailbox rule, under which they suggest (Pet. 3) their filing would be timely. But that circuit conflict predates the 2011 regulation that the Treasury Department

adopted to clarify the meaning of Section 7502, see 76 Fed. Reg. at 52,561; *Baldwin*, 921 F.3d at 841, and that petitioners acknowledge (Pet. 22) was the "exclusive[]" basis of the court of appeals' decision. Petitioners thus effectively concede that the pre-regulation circuit conflict they identify is not implicated by this case.

Petitioners observe (Pet. 24) that two district courts since 2011 have "applied the common-law mailbox rule without considering the effect of the" regulation, and they assert (Pet. 23) that two other lower courts (a district court and a bankruptcy court) have "expressed uncertainty" about whether the regulation is valid. But those decisions do not create a circuit conflict, both because they were not issued by courts of appeals and because they do not conflict with the Ninth Circuit's holding in *Baldwin* that the regulation is valid. Cf. *Maine Med. Ctr.* v. *United States*, 675 F.3d 110, 118 n.13 (1st Cir. 2012) (finding the regulation "instructive" but declining to determine whether *Chevron* deference to the regulation was warranted). Petitioners' contention (Pet. 29-31) that this Court's review is needed to resolve the conflict because of the large volume of tax filings is inapposite for the same reason—no meaningful conflict exists.[2]

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[2] Petitioners' suggestion (Pet. 23) that courts have "expressed uncertainty" about the regulation's validity is also flawed. The bankruptcy court in *In re Witcher*, No. 13-614, 2014 WL 4980003 (Bankr. D.D.C. Oct. 6, 2014), resolved the case without reaching the regulation's validity and observed that the regulation "is arguably entitled to deference." *Id.* at *3. The court in *Meinhold* v. *United States*, No. 14-cv-781, 2015 WL 6591462 (D. Colo. Oct. 30, 2015), held that any question as to the regulation's validity was "rendered moot * * * because the [taxpayers] cannot meet their burden even under the more lenient mailbox rule." *Id.* at *4. *Casto* v. *Branch Banking & Trust Co.*, No. 16-cv-5848, 2018 WL 265586 (S.D. W. Va. Jan. 2,

Petitioners also suggest (Pet. 31-32) that Section 7502, as interpreted by the Treasury regulation upheld by the court of appeals, violates their rights under the Due Process Clause. That claim lacks merit. As petitioners observe, this Court's due-process decisions require a "meaningful opportunity to be heard" before the deprivation of certain protected interests. Pet. 32 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971)). But a decision not to recognize the common-law mailbox rule as an exception to the requirement that tax documents be timely received does not deprive taxpayers of a meaningful opportunity to be heard, particularly given the numerous other statutory exceptions to the physical-delivery rule. See pp. 3, 8-9, *supra*. Petitioners do not identify any judicial decision, even among those that have applied the common-law mailbox rule to tax documents, suggesting that the rule is constitutionally required. This Court accordingly should deny petitioners' request for further review of the court of appeals' jurisdictional ruling.[3]

2018), did not involve a tax document, so the court had no reason to apply the regulation. And the regulation was not applicable in *Jones, Bell, Abbott, Fleming & Fitzgerald L.L.P.* v. *United States*, No. 17-cv-7752, 2018 WL 3013359 (C.D. Cal. June 15, 2018), because the taxpayer was not attempting to prove delivery of a tax document. *Id.* at *1-*2. At least two district courts that have considered the validity of the regulation under *Chevron*, moreover, have upheld it. See *McBrady* v. *United States*, 167 F. Supp. 3d 1012, 1017 (D. Minn. 2016); *Jacob* v. *United States*, No. 15-cv-10895, 2016 WL 6441280, at *2 (E.D. Mich. Nov. 1, 2016).

[3] Unlike the petitioner in *Baldwin*, *supra*, petitioner does not ask this Court to reconsider *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). The decision in this case, however, relied directly on *Baldwin*. If the Court grants certiorari in *Baldwin*, it should therefore hold the petition in

2. Petitioners alternatively contend (Pet. 32-33) that, even if they did not file a timely notice of appeal, the Ninth Circuit had authority to determine whether the Tax Court's ruling was procured through fraud on that court. Petitioners' cursory and unsubstantiated allegation of fraud is baseless. And none of the cases that petitioners cite (Pet. 33) supports the proposition that a litigant can obtain appellate vacatur of a lower-court decision, based on an alleged fraud on the court whose decision the litigant seeks to challenge, without filing a timely notice of appeal. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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this case pending resolution of *Baldwin* and then dispose of the petition in this case as appropriate.