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

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer may prove the timely filing of a tax-refund claim under 26 U.S.C. 7502 through evidence other than an actual postmarked envelope or a registered or certified mail receipt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 705 F.3d 225. The order of the district court (Pet. App. 24a-38a) is unreported but is available at 2011 WL 2469899.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2013. A petition for rehearing was denied on April 24, 2013 (Pet. App. 39a-40a). On July 12, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 22, 2013. On August 7, 2013, Justice Kagan further extended the time to August 29, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents the question whether petitioners timely filed their amended federal income-tax return for 2003 (which served as their claim for refund) on or before October 15, 2007. The district court concluded that the return was not timely filed, and it accordingly dismissed petitioners' refund suit for lack of jurisdiction. The court of appeals affirmed. Pet. App. 1a-23a.

1. Congress has provided a limited waiver of sovereign immunity for actions seeking recovery of any "tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 1346(a)(1). That waiver is restricted by 26 U.S.C. 7422(a), which provides that no refund suit may be maintained in any court "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard." See *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). To be "duly filed" for purposes of Section 7422(a), a refund claim must be filed with the IRS "within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a).

Whenever a particular document must be filed with the Internal Revenue Service (IRS) by a specific date, a taxpayer may establish timely filing in any of three ways. First, the filing will be timely if it was physically delivered to the IRS by the applicable deadline. Second, under 26 U.S.C. 7502(a), if the claim was "delivered by United States mail" to the IRS *after* the due date, it will be deemed timely if "the date of the United States postmark stamped on the cover" of the claim is on or before the due date. Third, under Section 7502(c) and accompanying regulations, if the

claim is sent by registered or certified mail, it will be timely if the date of registration or certification is on or before the due date. 26 U.S.C. 7502(c)(1) and (2); 26 C.F.R. 301.7502-1(c)(2). In such cases, the accompanying receipt will serve as "prima facie evidence" that the document was delivered to the IRS. *Ibid.*[1]

Because the terms of the United States' consent to be sued in court "define that court's jurisdiction to entertain the suit," *Dalm*, 494 U.S. at 608 (citation omitted), the timely filing of a refund claim under Section 6511 is a "jurisdictional prerequisite to bringing suit," *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996). A tax-refund suit that fails to satisfy that prerequisite must be dismissed for lack of jurisdiction.

2. Petitioners in this case are two taxpayers, Robert W. Stocker, II and his wife Laurel A. Stocker. After obtaining multiple extensions, petitioners filed their initial 2003 joint federal income-tax return on October 15, 2004. Pet. App. 3a. At some time in 2007, their accountant informed them that they had overpaid their 2003 taxes by $64,058, and the accountant prepared an amended 2003 return claiming a refund of that amount. *Id.* at 3a, 25a. The accountant also prepared an amended state income-tax return for 2003, as well as federal and state returns for 2006. *Id.* at 3a. Each of those returns was required to be filed on or before October 15, 2007. *Id.* at 3a-4a.

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[1] The regulations further provide that electronically filed documents are deemed filed on the date of the electronic postmark. 26 U.S.C. 7502(c)(2); 26 C.F.R. 301.7502-1(d). Under Section 7502(f), references to the "United States mail" are treated as including private delivery services designated by the Treasury Department, and references to the postmark are treated as including a marking or recording of a date by such a delivery service.

According to petitioners, the accountant's office prepared postage-prepaid, certified-mail envelopes for petitioners' amended 2003 federal and state returns, and ordinary postage-prepaid envelopes for their 2006 returns. Mr. Stocker drove to the accountant's office the afternoon of October 15, 2007, to sign the returns and take them to be mailed. He was advised that all four returns were due and had to be mailed that day. He testified that he then proceeded to the post office and mailed all four returns that same day. Mr. Stocker stated, however, that he was unable to obtain date-stamped certified-mail receipts for the 2003 federal and state returns from the post office because he had left his accountant's office without taking with him the receipts to be stamped. Pet. App. 4a.

The IRS received petitioners' amended 2003 return on October 25, 2007, ten days after the October 15, 2007, due date. Pet. App. 5a. When petitioners' return arrived, an IRS clerk contemporaneously examined the envelope and noted in agency records that it bore a postmark date of October 19, 2007, four days after the return was due. *Ibid.* Pursuant to established procedures, the clerk placed a date stamp of October 19, 2007, on the face of petitioners' 2003 amended return, with a notation that such date was the postmark date on the envelope. 09-cv-955 Docket entry No. 26-4 (W.D. Mich. Mar. 30, 2011); *id.* No. 28-3 (W.D. Mich. Mar. 31, 2011). The IRS did not retain the envelope in its files. Pet. App. 5a.

In November 2007, the IRS notified petitioners that it was disallowing the tax refund claimed on their amended 2003 return. Pet. App. 6a. The IRS explained that the return had been received after the October 15, 2007, deadline and had borne an untimely

postmark. *Ibid.* In September 2008, the IRS denied petitioners' request for reconsideration.

The IRS has acknowledged that petitioners' 2006 return—which was sent in a separate envelope from the 2003 return—was timely filed. Pet. App. 5a. The Michigan Department of Treasury has likewise treated petitioners' state returns as timely filed on or before October 15, 2007. *Ibid.*

3. In October 2009, petitioners filed this suit against the United States in federal district court, seeking a refund of the $64,058 overpayment claimed on their amended 2003 return. Pet. App. 6a, 24a. Petitioners contended that their amended return was timely filed on October 15, 2007, and sought summary judgment in their favor. *Id.* at 6a, 27a. In support of their summary-judgment motion, petitioners submitted evidence purporting to show that the return had been postmarked on October 15, 2007, as required by 26 U.S.C. 7502(a)(1). Their evidence included Mr. Stocker's deposition testimony and the fact that the IRS and the Michigan tax authorities had accepted the other federal and state returns allegedly mailed at the same time as being timely filed on October 15, 2007. Pet. App. 6a, 25a. Petitioners also asked the court to draw an inference of timely filing as a spoliation sanction against the government for the IRS's failure to retain the postmarked envelope containing their amended 2003 return. *Id.* at 7a.

The government opposed petitioners' motion for summary judgment and moved to dismiss the complaint. The government argued that the district court lacked jurisdiction, and that the suit was barred by sovereign immunity, because of petitioners' failure to file their claim for refund within the three-year period

set forth in 26 U.S.C. 6511(a). Pet. App. 7a, 27a. In support of that contention, the government argued that all of the extrinsic evidence petitioners had presented to establish the alleged October 15, 2007, postmark date was inadmissible under binding Sixth Circuit precedent. *Id.* at 29a.

The district court granted the government's motion to dismiss for lack of jurisdiction and denied petitioners' summary-judgment motion as moot. Pet. App. 37a. It agreed with the government that, under applicable circuit precedent, petitioners could establish the date on which their return was postmarked only by producing the actual envelope bearing the postmark, not through "extrinsic evidence" of the sort that petitioners had introduced. *Id.* at 31a-37a. The court further noted that in this case, the envelope in which petitioners' amended return was mailed had been lost or destroyed by the IRS. *Id.* at 31a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court stated that petitioners "cannot show that the envelope in which they mailed [their] amended return bore a postmark date of October 15, 2007 or earlier, as necessary to establish timely delivery under [26 U.S.C.] 7502(a)(1)." Pet. App. 11a. The court explained that "the IRS's records indicate that the envelope containing [petitioners'] amended return was postmarked October 19, 2007, four days after the due date." *Ibid.* The court also noted that petitioners were unable to prove that their refund claim was timely under Section 7502(c)(2) and 26 C.F.R. 301.7502-1(c)(2), because they had failed to secure a date-stamped receipt when transmitting the return to the IRS by certified mail. Pet. App. 11a.

The court of appeals relied heavily on its prior decisions in *Miller* v. *United States*, 784 F.2d 728 (6th Cir. 1986), and *Schentur* v. *United States*, No. 92-3605, 1993 WL 330640 (6th Cir. Aug. 30, 1993), which established that the methods set forth in 26 U.S.C. 7502(a) and (c) are the only valid means of proving timely filing in circumstances where the IRS has not physically received the return by the due date. Pet. App. 12a-17a. The court also held that petitioners could not satisfy the postmark requirement of Section 7502(a)(1) through extrinsic, circumstantial evidence that the return was mailed on October 15, 2007. *Ibid.* Rather, the court concluded, Section 7502(a)(1) requires direct evidence of the actual postmark—evidence that is unavailable here due to the loss or destruction of that postmark. *Id.* at 17a-18a. The court of appeals also noted that, "[i]n any event, * * * the extrinsic evidence put forward by [petitioners] does not purport to establish the fact of significance under § 7502(a)(1)—namely, the 'date of the United States postmark' on their amended 2003 return—but instead is directed at the separate factual question of when they presented this return to the post office for mailing." *Id.* at 18a-19a. The court thus held that petitioners' extrinsic evidence "had no role to play" in whether they could satisfy the requirements of Section 7502. *Id.* at 19a.

Finally, the court of appeals held that the district court had properly declined to draw an adverse inference of timely filing as a spoliation sanction for the IRS's failure to preserve the envelope in which petitioners had mailed their amended return. Pet. App. 19a-23a. The court noted the absence of any precedent for such a claim, and it emphasized that the rec-

ord showed no culpable conduct beyond a negligent failure to preserve the envelope in accordance with internal IRS policy. *Id.* at 22a. The court further observed that, even if petitioners' evidence concerning the circumstances of mailing were "fully credited," it would not prove that the IRS employee who opened the envelope containing their amended return had incorrectly recorded the postmark date, since the fault for any late postmark might lie instead with a Postal Service employee. *Ibid.*

ARGUMENT

It is undisputed that petitioners' refund claim was not received by the IRS until October 25, 2007, ten days after the October 15, 2007, deadline. It is also undisputed that, when the IRS received the claim, an IRS clerk recorded that the postmark date on the envelope was October 19, 2007—four days after the due date. Petitioners nonetheless argue that they established timely filing under 26 U.S.C. 7502(a)(1) by introducing extrinsic and circumstantial evidence showing that they mailed the refund claim on October 15, 2007. They ask this Court to grant certiorari to clarify what type of proof is admissible to satisfy the requirements of Section 7502.

Although the courts of appeals have divided over certain aspects of the timeliness inquiry under Section 7502, the only conflict that even arguably bears on this case concerns whether extrinsic evidence is admissible to establish the postmark date for purposes of Section 7502(a)(1). The government agrees with petitioners that extrinsic or circumstantial evidence is not categorically inadmissible for this purpose, and that the Sixth Circuit's holding to the contrary is incorrect. Petitioners identify no reason to believe, however,

that the Court's resolution of this question would affect the outcome of this case or any appreciable number of other cases. Further review is not warranted.

1. In discussing the proper application of 26 U.S.C. 7502, petitioners conflate several interrelated questions that have divided the courts of appeals. The first is whether that provision was intended to displace "other methods of proving timely mailing known to the common law," namely the common-law mailbox rule. Pet. 10. This case does not implicate the common-law mailbox rule, however, and a recent Treasury Department regulation has resolved any disagreement between the circuits over the issue.

a. Much of the petition addresses the extent to which Section 7502's methods for establishing whether a filing with the IRS is timely are "exclusive and complete," or whether "other methods of proving timely mailing known to the common law remain available to taxpayers." Pet. 10. The only such "other method[]" discussed in the petition is the common-law mailbox rule. Pet. 10, 12, 13-18, 28. Under that rule, it was traditionally presumed that a document placed in the mail would actually be received by the addressee after the period of time that it would normally take the Postal Service to deliver such mail. See, *e.g.*, *Hagner* v. *United States*, 285 U.S. 427, 430 (1932); *Maine Med. Ctr.* v. *United States*, 675 F.3d 110, 114 (1st Cir. 2012). Before the enactment of Section 7502, some courts allowed taxpayers to invoke the common-law mailbox rule to establish that a document they had mailed before a statutory filing deadline was received by the IRS in time to satisfy that deadline, even if the IRS lacked any evidence of actual delivery. See, *e.g.*,

Crude Oil Corp. of Am. v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947); see also *Arkansas Motor Coaches* v. *Commissioner*, 198 F.2d 189 (8th Cir. 1952).

As petitioners explain, the courts of appeals have long disagreed with one another over whether (and if so, to what extent) Section 7502 precludes taxpayers from relying on the common-law mailbox rule to establish that a document sent to the IRS was timely delivered. See generally Pet. 10-21 (discussing circuit split on this and other issues). Some courts—including the Third, Eighth, and Ninth Circuits—have held that the common-law mailbox rule can still be used to establish delivery in certain circumstances.[2] Other courts—including the Second and Sixth Circuits—have held that the common-law mailbox rule is no longer available to taxpayers.[3] The government has acknowledged the split of authority on this issue in prior filings with this Court.[4]

b. The Court's intervention is not necessary to address any disagreement about Section 7502's relationship to the common-law mailbox rule. The Treasury Department resolved the circuit split in 2011, when it adopted a regulation making clear that the rule is no

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[2] See, *e.g.*, *Philadelphia Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund* v. *Commissioner*, 523 F.3d 140, 141 (3d Cir. 2008); *Anderson* v. *United States*, 966 F.2d 487, 489 (9th Cir. 1992); *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1160 (8th Cir. 1990).

[3] See, *e.g.*, *Miller* v. *United States*, 784 F.2d 728, 730-731 (6th Cir. 1986); *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

[4] See, *e.g.*, U.S. Br. in Opp. at 4, *Sorrentino* v. *United States*, 546 U.S. 812 (2005) (No. 04-1396); U.S. Br. in Opp. at 6-7, *Carroll* v. *Commissioner*, 518 U.S. 1017 (1996) (No. 95-1601).

longer available to taxpayers. The regulation declares that "[o]ther than direct proof of actual delivery, proof of proper use of registered or certified mail[] * * * [is] the exclusive means to establish prima facie evidence of delivery of a document to the [IRS]," and "[n]o 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).[5]

The new regulation was intended to resolve the circuit split over whether Section 7502 was the exclusive means of establishing a "presumption of delivery" in cases where the taxpayer cannot show that the document was actually received by the IRS. See 69 Fed. Reg. 56,378 (Sept. 21, 2004). As several courts have recognized, the regulation establishes that the common-law mailbox rule is no longer available to establish a presumption of delivery. See *Maine Med. Ctr.*, 675 F.3d at 118; *Philadelphia Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund* v. *Commissioner*, 523 F.3d 140, 152 n.14 (3d Cir. 2008). The regulation was promulgated under the Treasury Department's general rulemaking authority (set forth in 26 U.S.C. 7805(a)), and it is entitled to *Chevron* deference. See *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711-714 (2011).

Petitioners neither question the validity of the regulation nor assert any circuit split with respect to the way it has been applied. In any event, petitioners

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[5] The regulation was originally proposed in September 2004, and both the proposed and final versions of the regulation make clear that it applies to all documents mailed after September 21, 2004. See 26 C.F.R. 301.7502-1(g)(4); 69 Fed. Reg. 56,379 (Sept. 21, 2004); *Maine Med. Ctr.*, 675 F.3d at 118 n.14.

repeatedly and expressly disavowed any reliance on the common-law mailbox rule below,[6] and the rule has no bearing on the proper disposition of this case. The common-law rule was historically used *both* to establish actual delivery (in cases where the purported addressee had no record of receipt) *and* to show that the mailing was delivered by a particular date. Because the IRS acknowledges that it received petitioners' amended return (on October 25, 2007), use of the common-law rule for the first of those purposes (*i.e.*, to establish a "presumption of delivery") would be superfluous here.

On the facts of this case, the common-law mailbox rule likewise would not serve the second of its traditional purposes, *i.e.*, to show that petitioners' amended return was delivered by the applicable filing deadline. Under the common-law rule, a properly mailed and addressed document was presumed to have been de-

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[6] See Pet. C.A. Br. 15 ("[T]he Stockers do not rely on the common-law mailbox rule * * * , but rather upon a portion of the *statutory* mailbox rule set forth in § 7502(a)(1)."); *id.* at 26 (arguing that Sixth Circuit cases holding that Section 7502 "eviscerated the common-law mailbox rule" were irrelevant because petitioners "have never attempted to avail themselves of the common-law mailbox rule" and instead invoked only Section 7502(a)(1)); Pet. C.A. Reply Br. 2-3 ("[T]he Stockers have never attempted to (and in fact do not need to) avail themselves of the common-law mailbox rule."); *id.* at 4 ("The Stockers have never attempted to avail themselves of the *common-law* mailbox rule. The Stockers sought only to take advantage of the rights granted them by the *statutory* mailbox rule set forth in section 7502(a)(1)."); *id.* at 6 ("The Stockers did not attempt to submit evidence of timely mailing via the common-law mailbox rule, but rather sought to introduce evidence of a timely postmark in order to avail themselves of the statutory right provided by the statutory mailbox rule set forth in section 7502(a)(1).").

livered to the addressee within the customary delivery time after being mailed, which is normally two to three days. See, *e.g.*, *Hagner*, 285 U.S. at 430; *Philadelphia Marine*, 523 F.3d at 147; *Sorrentino* v. *IRS*, 383 F.3d 1187, 1189 (10th Cir. 2004), cert. denied, 546 U.S. 812 (2005); *Carroll* v. *Commissioner*, 71 F.3d 1228, 1230 (6th Cir. 1995), cert. denied, 518 U.S. 1017 (1996). As a result, the rule typically did *not* authorize any presumption that the document was delivered on the same day it was mailed. As the First Circuit has explained, "unless same-day delivery was in fact the norm, receipt by the addressee was not deemed to have occurred on the same day as the mailing." *Maine Med. Ctr.*, 675 F.3d at 114 (citation omitted).

Here, petitioners assert that Mr. Stocker took the 2003 refund claim to the post office and mailed it to the IRS on the afternoon of October 15, 2007, the deadline for its filing. They do not claim, nor is there any evidence to suggest, that petitioners had arranged for same-day delivery. Even under the common-law mailbox rule, petitioners' return therefore would have presumptively been received *after* the October 15, 2007 deadline, and it thus would have been untimely unless petitioners could show that the envelope was postmarked on October 15. As in *Maine Medical Center*, "there is no way the refund request could have arrived by the filing deadline (the same day it was mailed) in the ordinary course of post office business." 675 F.3d at 114. The common-law mailbox rule therefore would not be "available to [petitioners] as a means of proving timely filing of the refund request." *Ibid.*

2. Petitioners also highlight a second circuit split over whether extrinsic evidence—*i.e.*, evidence other

than the actual envelope used to mail the refund claim—can be admitted to establish the postmark date for purposes of Section 7502(a)(1). Pet. 10, 14-16, 19-20. As to this issue, the government agrees with petitioners that relevant extrinsic evidence is not categorically inadmissible to establish a postmark date under Section 7502(a)(1). Further review is not warranted, however, because petitioners identify no sound reason to believe that the choice between the competing evidentiary rules would affect the outcome of this case or of any significant number of other cases.

a. Petitioners assert that the circuits are divided over the type of evidence that is admissible for proving the postmark date of a return under Section 7502(a)(1). Pet. 10, 14-16, 19-20. In particular, they contend that the First, Second, and Sixth Circuits allow taxpayers to establish a timely postmark only by producing "the actual postmarked envelope," whereas the Third, Eighth, Ninth, and Tenth Circuits have allowed extrinsic or circumstantial evidence to establish the postmark date. See Pet. 12, 14-18 (citing cases). Petitioners argue that the Sixth Circuit's rule—which both lower courts applied in this case—imposes an unjustified restriction that is at odds with standard evidentiary rules and with the text, purpose, and history of Section 7502(a)(1). Pet. 23-31.

The United States agrees with petitioners that the circuits have adopted inconsistent approaches to the admissibility of extrinsic or circumstantial evidence to establish the postmark date of an envelope for purposes of Section 7502(a)(1). The Sixth Circuit has unambiguously rejected the use of extrinsic or circumstantial evidence to satisfy Section 7502(a)(1), explaining that the only evidence that counts is the

actual envelope bearing the postmark.[7] The Eighth Circuit has accepted extrinsic evidence to determine the postmark date under Section 7502(a)(1), but only if such evidence constitutes "direct proof" of the postmark date.[8] The Ninth Circuit has gone a step further, allowing indirect and circumstantial evidence of the postmark date to satisfy Section 7502(a)(1).[9] And the Third Circuit has allowed extrinsic evidence when necessary to establish the date of an illegible postmark.[10] The other circuits cited by petitioners in support of the alleged split do not appear to have definitively answered the precise question discussed here, which is whether extrinsic or circumstantial evidence of a postmark is sufficient to establish the postmark date for purposes of Section 7502(a)(1).[11]

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[7] See Pet. App. 17a-19a (relying on *Miller*, *supra*, and *Schentur* v. *United States*, No. 92-3605, 1993 WL 330640, at *4 (6th Cir. Aug. 30, 1993), and holding that petitioners' extrinsic evidence "had no role to play in determining whether they could satisfy [Section 7502]").

[8] See *Estate of Wood*, 909 F.2d at 1160-1161 (relying on testimony of post office employee who personally affixed postmark on envelope).

[9] See *Lewis* v. *United States,* 144 F.3d 1220 (9th Cir. 1998) (relying on taxpayer testimony and corroborating evidence of mailing); see also *Anderson*, 966 F.2d at 491 (relying on taxpayer testimony).

[10] See *Skolski* v. *Commissioner*, 351 F.2d 485, 487-488 (3d Cir. 1965).

[11] See, *e.g.*, *Maine Med. Ctr.*, 675 F.3d at 116-118 (rejecting taxpayer's claim without expressly deciding admissibility of extrinsic evidence to prove date of postmark under Section 7502(a)(1)); *Philadelphia Marine*, 523 F.3d at 149-150 (holding that common-law mailbox rule remains valid, without addressing evidentiary requirements for satisfying Section 7502(a)(1); *Washton* v. *United States*, 13 F.3d 49, 50 (2d Cir. 1993) (rejecting extrinsic evidence of

In this case, the United States urged the courts below to apply Sixth Circuit precedents that categorically bar the use of extrinsic and circumstantial evidence to establish a postmark date under Section 7502(a)(1). See Pet. App. 29a. In cases outside the Sixth Circuit, however, the United States has not typically advocated this categorical rule as the correct interpretation of Section 7502(a)(1). Rather, the government has recognized that in certain circumstances, extrinsic evidence *is* admissible under the statute.[12] And one of the Treasury Department regulations implementing Section 7502(a)(1) clearly contemplates the use of extrinsic evidence to determine the postmark date when the actual postmark is illegible. See 26 C.F.R. 301.7502-1(c)(1)(iii) (requiring taxpayer to "prov[e] the

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mailing for purpose of proving that document was delivered to IRS); *Deutsch*, 599 F.2d at 46 (rejecting use of extrinsic evidence to establish timely filing when Section 7502 "does not apply").

[12] See, *e.g.*, U.S. Br. at 54, *Maine Med. Ctr.*, *supra* (No. 11-1426) (implying that certain types of extrinsic evidence would be capable of proving the postmark date); U.S. Br. at 15, *Chandler* v. *Commissioner*, 327 Fed. Appx. 763 (10th Cir. 2009) (No. 08-9010) (advocating use of extrinsic evidence to establish timely postmark under Section 7502); U.S. Br. at 14, *Sebastian* v. *Commissioner*, 298 Fed. Appx. 351 (5th Cir. 2008) (No. 07-60804) (noting taxpayer's right to introduce extrinsic evidence of timely mailing to establish date of illegible postmark); U.S. Br. at 8-9, *Huff* v. *Commissioner*, 86 T.C.M. (CCH) 328, 2003 WL 22000287 (T.C. 2003) (No. 9102-02) (stating that taxpayer may use extrinsic evidence to prove postmark date where IRS misplaced envelope in which return was filed); U.S. Br. at 17, *Lewis* v. *United States,* 144 F.3d 1220 (9th Cir. 1998) (No. 97-15987) (arguing that Eighth Circuit's *Estate of Wood* decision "correctly" held that "direct proof" of a postmark date, apart from the envelope itself, can be sufficient to satisfy Section 7502).

date that the postmark was made" if the postmark appearing on the envelope is illegible).

b. The Sixth Circuit's categorical rule is erroneous. Although Section 7502(a)(1) makes the timeliness of certain submissions turn on "the date of the United States postmark stamped on the cover," it does not limit the type of proof that can be used to establish the postmark date. Federal Rule of Evidence 1004 provides that in certain circumstances where an original writing is lost, destroyed, or unavailable, "other evidence" apart from that original writing *is* admissible to prove the content of the document. This Court has repeatedly emphasized, moreover, that a party to civil litigation typically "may prove his case by direct or circumstantial evidence." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983); see also *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 99-101 (2003). Thus, although timeliness under Section 7502(a)(1) depends on the date a submission was postmarked, and not on the date it was placed in the mail, neither Section 7502(a)(1) nor applicable evidentiary rules treat the envelope itself as the *only* form of proof that may be used to establish the postmark date.

Of course, the fact that alternative forms of evidence are *admissible* does not mean that they will be *persuasive*. Courts will rightly look with great skepticism at taxpayers who rely on their own self-serving testimony to establish that their filings were timely. If the only available evidence establishes merely that a document was placed in the United States mail before a certain deadline, such evidence will be insufficient to establish the postmark date under Section 7502(a)(1). See generally *Estate of Wood* v. *Commis-*

sioner, 909 F.2d 1155, 1161 (8th Cir. 1990) ("The act of mailing is not significant for purposes of the statute[,] but placement of a postmark is.")

Nonetheless, in rare cases extrinsic evidence *can* help a taxpayer establish the postmark date. For example, if IRS records contain a notation that a taxpayer's return bore a timely postmark, this extrinsic evidence will typically be sufficient to satisfy Section 7502(a)(1) if the IRS no longer possesses the actual envelope. Similarly, if the postal employee who personally affixed the postmark on the envelope testifies that the postmark was timely, this too could qualify as sufficient evidence of the postmark date for purposes of Section 7502(a)(1). See *Estate of Wood*, 909 F.2d at 1161. Because extrinsic or circumstantial evidence may shed light on a postmark date in some cases, such evidence should not be categorically excluded as inadmissible under Section 7502(a)(1).

c. Despite the court of appeals' invocation of an erroneous evidentiary rule, the question presented in this case does not warrant this Court's review. Although the court of appeals treated petitioners' extrinsic evidence as inadmissible under Sixth Circuit precedent, it did not suggest that the evidence if considered would have altered the court's decision. To the contrary, the court observed that, "[i]n any event, it bears emphasis that the extrinsic evidence put forward by [petitioners] does not purport to establish the fact of significance under § 7502(a)(1)—namely, the 'date of the United States postmark' on their amended 2003 return—but instead is directed at the separate factual question of when they presented this return to the post office for mailing." Pet. App. 18a-19a; see *Estate of Wood*, 909 F.2d at 1161 ("The act of mailing

is not significant for purposes of [Section 7502(a)(1)] but placement of the postmark is.").

The only extrinsic evidence directly bearing on the postmark date is the contemporaneous record made by the IRS clerk responsible for opening and sorting petitioners' return. That record noted that the postmark date on petitioners' envelope was October 19, 2007. Pet. App. 5a, 11a, 22a. Petitioners' extrinsic evidence consists of "self-serving testimony of a taxpayer who claims that a document was timely mailed," *Estate of Wood*, 909 F.2d at 1161, and none of the evidence directly addresses the actual postmark date, which is the only relevant fact for purposes of Section 7502(a)(1). "[E]ven if fully credited," petitioners' evidence therefore "does not definitively establish that the IRS employee who received and opened the Stockers' amended 2003 return incorrectly recorded the postmark date on the envelope as October 19, 2007." Pet. App. 22a. Rather, "it is possible that this notation in the IRS record was accurate, and that the fault for the late postmark date lies with a postal worker." *Ibid.*

Petitioners cite no decision from any circuit in which a court has examined analogous extrinsic evidence and concluded that a taxpayer's postmark was timely for purposes of Section 7502(a)(1). Petitioners rely in part on *Lewis* v. *United States*, 144 F.3d 1220 (1998), in which the Ninth Circuit determined that a taxpayer's request for an extension was timely, based on (1) his own testimony that he had mailed the request on the due date, and (2) the fact that a state extension request allegedly mailed at the same time was received the day after the deadline. *Id.* at 1221; Pet. 14-15. Petitioners assert that *Lewis* is "virtually

indistinguishable" from their own case. Pet. 14. But here, unlike in *Lewis*, a contemporaneous IRS record states that the postmark date was untimely. The Ninth Circuit in *Lewis* recognized that the IRS "does not have to take a taxpayer's unsupported word" that a filing was mailed on time, and it ruled for the taxpayer only because the IRS had produced no "evidence as to when [the relevant documents] were mailed." 144 F.3d at 1222-1223.

The other decisions petitioners cite are similarly distinguishable. In *Estate of Wood*, the Eighth Circuit concluded that a postmark was timely based on live testimony from the postal employee who had affixed that postmark. 909 F.2d at 1157, 1161. In *Anderson* v. *United States*, 966 F.2d 487 (1992), the Ninth Circuit held that a taxpayer had proved a timely postmark through undisputed testimony that he had personally witnessed the postal clerk apply a postmark to her tax return when she mailed it to the IRS more than a year before the deadline. *Id.* at 488, 491. Unlike the taxpayers in these two cases, petitioners presented no "direct proof of postmark," and instead offered "mere evidence of mailing." *Estate of Wood*, 909 F.2d at 1161. And neither *Anderson* nor *Estate of Wood* involved countervailing evidence that an IRS official had directly observed the postmark date and concluded that it was untimely. There is consequently no reason to believe that any other circuit would have ruled in petitioners' favor on these facts, or that the court below would have done so if it had not been constrained by Sixth Circuit precedent. Further review is not warranted.

d. Nor is there any reason to suppose that the choice between the Sixth Circuit's evidentiary rule

and the approaches taken by other circuits will affect the outcome of any significant number of future cases. In most of the cases cited in the petition, the IRS had no record that the taxpayer's filing was ever delivered *at all*. In those cases, extrinsic evidence concerning the circumstances of mailing was used both to create a presumption of actual delivery, and to show that the document was timely filed under Section 7502(a)(1). As petitioners appear to concede, however, the Treasury Department's new regulation precludes use of the common-law mailbox rule to prove actual delivery of a document to the IRS. Pet. 25-26 n.6; 26 C.F.R. 301.7502-1(e)(2). And Section 7502(a)(1)'s postmark rule applies only if the taxpayer establishes through some other appropriate means that the document was "delivered by United States mail to the" IRS after the applicable filing deadline. 26 U.S.C. 7502(a)(1). Thus, in the sorts of cases where extrinsic evidence of mailing has most typically been used in the past, the taxpayer's inability to prove actual delivery to the IRS will provide an independent ground for dismissal of his refund suit. The recent regulatory abrogation of the common-law mailbox rule in this context therefore further reduces the ongoing practical significance of the question presented in this case.

The Sixth Circuit's evidentiary rule, which categorically bars the use of extrinsic evidence to prove a timely postmark under Section 7502(a)(1), will come into play in a very small category of future cases. It will potentially make a difference only in circumstances where (1) a taxpayer chooses not to file his return using registered or certified mail, as authorized by 26 U.S.C. 7502(c); (2) the taxpayer establishes by means other than the common-law mailbox rule that the IRS

received the filing; *and* (3) the IRS has inadvertently lost or destroyed the envelope containing the taxpayer's filing. And even in those cases, the IRS will treat the return as timely if its own official's contemporaneous notation indicates that the envelope was timely postmarked, thus obviating the need for judicial inquiry into the timeliness of the filing. The practical effect of the Sixth Circuit's rule is to bar consideration of a taxpayer's extrinsic evidence when, as in this case, the IRS's own records indicate that the postmark was untimely. But even if extrinsic evidence is treated as *admissible* in circumstances like these, courts are unlikely to find such evidence *persuasive* in any meaningful number of cases.

e. Congress has provided taxpayers in Section 7502 with a simple method for protecting themselves from the uncertainties of the mail-delivery system. By using certified or registered mail to send a document to the IRS, and obtaining a date-stamped sender's receipt from the postal employee to whom the document is presented, taxpayers can fully protect themselves from both the risk that the document will not be timely postmarked, and the risk that the document will not be delivered by the Postal Service to the IRS in a timely fashion. 26 U.S.C. 7502(c)(1) and (2); 26 C.F.R. 301.7502-1(c)(2). Petitioners could have avoided their current predicament if they had availed themselves of these mechanisms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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