No. 19-402

# In the Supreme Court of the United States

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

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE CATO INSTITUTE AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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## QUESTIONS PRESENTED

*Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* held that an agency's "permissible reading" of a statute trumps circuit-court precedent if the prior court had interpreted a statute that was silent or ambiguous with respect to the specific issue. 545 U.S. 967, 984 (2005). In all other situations, *stare decisis* dictates that circuit panel opinions can be overruled only by *en banc* courts of appeals, this Court, or a properly enacted statute.

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

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

(1) Should *Brand X* be overruled?

(2) What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation?

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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal representation and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

This case interests *amici* because it concerns the proper delineation of the separation of powers. If the judicial branch is to "say what the law is" and the executive branch is to enforce law rather than make it, then this Court must clarify whether and how much deference judges should give to administrative agencies' purported overrulings of previous court rulings.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

**SUMMARY OF ARGUMENT**

By invoking deference doctrines, the IRS is trying to accomplish in a barebones rulemaking what it failed to win in multiple courts with hundreds of pages of briefing. Unless this Court steps in, other executive agencies are sure to follow this template for overcoming judicial precedent by "earning" the *Chevron* framework with an empty notice-and-comment process.

At issue is whether 26 U.S.C. § 7502 stops courts from employing a common-law evidentiary principle, known as the mailbox rule, in delineating the boundaries of the federal judiciary's subject-matter jurisdiction to hear taxpayer-refund suits. While the tax code does not speak to this question, the IRS long has interpreted the statute's silence as foreclosing the mailbox rule. Some courts agreed; others didn't. *See Phila. Marine Trade Ass'n v. Comm'r*, 523 F.3d 140, 148-52 (3d Cir. 2008) (describing lower-court split).

After decades of litigating the mailbox rule with mixed success, the IRS switched gears and tried an administrative shortcut. In a bid to have the judiciary defer to the agency interpretation, the IRS issued a five-page rulemaking to "clarify" that the statute meant what the IRS had argued. *See* Timely Mailing Treated as Timely Filing, 69 Fed. Reg. 56,377 (Sept. 21, 2004) (proposed rule); Timely Mailing Treated as Timely Filing, 76 Fed. Reg. 52,561 (Aug. 23, 2011) (final rule).

On its own terms, the "clarifying" rule fails to implicate agency expertise: it purports to deny courts access to a common-law principle developed by federal judges to police their own jurisdiction. Simply put, the agency's rule regulates the craft of judging, which is obviously outside of the IRS's bailiwick.

The IRS's lack of expertise explains why the agency's rulemaking said so little—because there was so little to say. Across the proposed and final rules, the agency provided a paltry nine paragraphs of conclusory reasoning. *Compare* 69 Fed. Reg. at 56,378 (Sept. 21, 2004) (giving two paragraphs to section titled "Explanation of Provisions) *with* 76 Fed. Reg. at 52,561–62 (Aug. 23, 2011) (spending seven paragraphs in final rule on section titled "Summary of Comments and Explanation of Provisions").

Having jumped through the minimum procedural hoops, the agency then felt entitled to the *Chevron* framework. The Ninth Circuit agreed. In the decision below, a three-judge panel applied an utterly cursory *Chevron* methodology, including its *Brand X* corollary, and thereby swept aside the circuit's precedential holding that the best reading of the tax code allows taxpayers to benefit from the mailbox rule. *See Baldwin v. United States*, 921 F.3d 836, 842–43 (9th Cir. 2019); s*ee also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005) (extending *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), such that it overcomes an Article III court's precedential statutory interpretation).

This Court cannot allow the decision below to escape further review, and not simply because the lower court "employs a reasoning so formulaic that it trivializes the art of judging." *Young v. Community Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting). If *Baldwin* stands and the IRS is permitted to wave away 50 years of adverse court decisions with a handful of pages in the Federal Register, then the Court's inaction would occasion a disconcerting disruption of

the constitutional balance between the separated powers. With the path blazed here, other agencies will become emboldened to aggrandize their power at the hands of the judiciary. The route is clear: all agencies must do is undergo a sham notice-and-comment processes to serve as an invitation to judicial deference.

Only this Court is constitutionally empowered to resolve a circuit split over a purely legal question such as this one. Ultimately, the IRS may prevail through persuasion, but the final decision must come from the judiciary. It simply can't be that the IRS possesses an implied statutory authority to regulate federal courts' usage of a judge-made concept. Even if this hidden power does exist—and it doesn't—it can't be permissibly invoked merely because the agency checked the requisite boxes for "earning" deference.

## ARGUMENT

### I. The Court Should Decide Whether an Agency Can Regulate the Judiciary with a Perfunctory Five-Page Rulemaking

Every year, taxpayers rely on the Postal Service to send millions of documents to the IRS. *See* Treasury Inspector General for Tax Administration, *Interim Results of the 2019 Filing Season* 5 (Apr. 2, 2019) (forecasting receipt of about 16 million paper individual tax returns in 2019). And every year, some documents get lost in the shuffle.

Of course, the Postal Service is comprised of fallible humans who make mistakes. *See, e.g.*, Jorge Fitz-Gibbon, *U.S. Postal Service Probes Somers Postal Worker over Dumped Mail*, Rockland Journal News, Oct. 20, 2018, https://bit.ly/32za48j (reporting on investigation

regarding "several boxes of mail [that] were found dumped in local woods"). The IRS, like the Postal Service, is a government entity composed of imperfect humans who sometimes mishandle documents. *See, e.g.*, *Carroll v. Comm'r*, 71 F.3d 1228, 1230 (6th Cir. 1995) ("When asked at the hearing if [tax documents] are ever lost at the service center, a representative of the IRS responded with an unqualified 'yes.'").

No matter how innocuous in intent, these inescapable human errors can cause real harm to taxpayers trying to recover property (overpayments) from the government. When documents get lost, taxpayers miss filing deadlines that implicate the IRS's statutory waiver of sovereign immunity for refund suits. *Compare* 26 U.S.C. § 7422(a) (requiring all suits "for the recovery of any internal revenue tax . . . erroneously or illegally . . . collected" to have been preceded by a "duly filed" refund claim) *with* 26 U.S.C. §§ 6511(a), (b)(1), (d)(2)(A) (establishing a three-year limitations period and applicable extensions for duly "filed" overpayment claims). A missed deadline may thus deprive taxpayers of their "day in court," even though fault lay entirely with a government bureaucracy. *Rich v. Comm'r*, 250 F.2d 170, 177 (5th Cir. 1957) (Brown, J., dissenting). *But see U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625, 1643 (2015) (Alito, J., dissenting) ("[I]n recent years, we have grown reluctant to affix the 'jurisdictional' label [to statutory filing deadlines].").

The tax code never has accounted for this unfairness, which has existed ever since Congress began taxing income. Faced with these unavoidable inequities, courts long ago turned to a common-law evidentiary principle. Under the "mailbox rule," proof of proper mailing 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. *Accord Crude Oil Corp. v. Comm'r*, 161 F.2d 809, 810 (10th Cir. 1947) ("When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.").

In 1954, as federal courts were developing the mailbox rule, Congress added 26 U.S.C. § 7502 to the tax code, to better protect taxpayers from the vagaries of postal delivery and IRS handling. Under § 7502(a), documents are considered "delivered" by the Postal Service (and thus "filed" with the IRS) on the date of the envelope's postmark. In addition, § 7502(c) allows taxpayers to use a receipt for registered mail to establish *prima facie* evidence that a tax document was "delivered" upon mailing. Crucially, however, § 7502 does not address the federal judiciary's common-law mailbox rule as it applies to regular mail, which is how most taxpayers send their documents.

Faced with this statutory silence, circuit courts have split on the continued viability of the judge-made mailbox rule after the 1954 tax amendments.

On one hand, the Second and Sixth Circuits reasoned that Congress specified the only available exceptions to timely physical delivery of tax documents, foreclosing the mailbox rule's evidentiary standard for regular mail. *See Carroll*, 71 F.3d at 1232 ("the only exceptions to the physical delivery rule . . . are the two set out in section 7502"); *Deutsch v. Comm'r*, 599 F.2d

44, 46 (2d Cir. 1979) (rejecting extrinsic proof of mailing because § 7502 evidences Congress's "penchant for an easily applied, objective standard").

On the other hand, the Third, Eighth, Ninth, and Tenth Circuits determined that § 7502 complements, rather than supplants, the mailbox rule. *See Phila. Marine Trade Ass'n v. Comm'r*, 523 F.3d at 141 (3d Cir. 2008); *Sorrentino v. Comm'r*, 383 F.3d 1187, 1194 (10th Cir. 2004); *Anderson v. U.S.*, 966 F.2d 487, 491 (9th Cir. 1992); *Estate of Wood v. Comm'r*, 909 F.2d 1155 (8th Cir. 1990). As a matter of statutory interpretation, these courts understood that "Section 7502's silence . . . is insufficient to entirely supplant the mailbox rule because 'it is a well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of the statute be clear and specific for this purpose.'" *Sorrentino*, 383 F.3d at 1193–94 (quoting *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983)). *See also Phila. Marine Trade Ass'n*, 523 F.3d at 149 (quoting same language); *Anderson*, 966 F.2d at 491 ("[A]bsent a clear manifestation of contrary intent, a newly-enacted statute is presumed to be harmonious with existing law and its judicial construction."); *Estate of Wood*, 909 F.2d at 1160 (abiding "[t]he normal rule of statutory construction . . . that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific").

In this latter view, Congress intended § 7502 to operate as a taxpayer "safe harbor" from harsh inequities engendered whenever the IRS or Postal Service misplaces or mishandles a tax document. *See Sorrentino*, 383 F.3d at 1192; *Estate of Wood*, 909 F. 2d at 1161.

While courts have split, the IRS steadfastly maintained an unforgiving interpretation of the tax code. No matter how grossly the inequities stack up against the taxpayer, the IRS invariably has argued that courts may not consider extrinsic evidence to establish timely mailing through regular mail. In *Carroll*, for example, the IRS argued against the court's subject matter jurisdiction, even after conceding both that the taxpayer document was mailed months before the deadline and that an arm of the government was culpable. *See* 71 F.3d at 1230; s*ee also Drake v. Comm'r*, 554 F.2d 736, 737–39 (5th Cir. 1977) (agreeing that courts lack jurisdiction despite IRS stipulation that Postal Service was entirely to blame for taxpayer's untimely filing); *Rich*, 250 F.2d at 173 (siding with the IRS in denying jurisdiction for untimely filing even though "[a]ll of the equities are with the appellant").

After waging this legal battle for a half-century with only mixed success, the IRS tried a different tack for prevailing upon federal courts the agency's preferred construction of the tax code. In 2004, it commenced a rulemaking that purported to resolve the circuit split simply by "clarifying" that § 7502 supplants the mailbox rule. *See* 69 Fed. Reg. at 56,378. The 2004 proposal took retroactive effect upon promulgation of the final rule seven years later. *See* 26 C.F.R. § 301.7502-1(g)(4) (backdating the rule's effect to 2004).[2]

[2] Because the Baldwins mailed their tax documents before the IRS promulgated the final rule, the petitioners are subject to the regulation only by virtue of its retroactive effect. Yet federal agencies are only entitled to the benefits of *Chevron* deference once they have completed the notice-and-comment process. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (emphasizing that only these rules "have the force and effect of law").

Importantly, the IRS's new rule didn't govern the agency, but instead regulated the courts' access to an evidentiary canon (the common-law mailbox rule).

During the 50 years leading up to the proposed new rule, thousands of pages of briefing informed hundreds of pages of jurisprudence across scores of cases, and all of it was borne of careful deliberation over the mailbox rule. *See generally* Kimberly C. Metzger, *Interpretation of the Section 7502 Timely-Mailing, Timely-Filing Requirements:* Carroll v. Commissioner *and the Liberal/Conservative Interpretation Dilemma*, 28 U. Tol. L. Rev. 767 (1997) (analyzing the mailbox rule's legal history). In stark contrast, the entire IRS rulemaking to overturn the mailbox rule occupied barely five pages in the Federal Register. Regarding the circuit split—the agency's avowed impetus for its rule—the IRS allotted exactly two sentences, which were reproduced nearly word-for-word in the proposed and final rules. *Compare* 69 Fed Reg. at 56,378 *with* 76 Fed. Reg. at 52,561. Instead of genuine public engagement, the purpose of the rulemaking seemed to be the achievement of the bare minimum administrative process necessary to "earn" *Chevron* deference.

Having jumped through those procedural hoops, the IRS argued for binding judicial respect. In siding with the IRS, the court below employed "the type of reflexive deference" that "trouble[s]" members of this Court. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

As a practical matter, the "trouble" emanates from the Ninth Circuit's cursory application of the famous *Chevron* framework. *See Chevron*, 467 U.S. at 842–43 (1984). At Step One's investigation into textual clarity,

the panel performed a brief and circular analysis. *See Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019) (reasoning that "§ 7502 is silent as to whether the statute displaces the common-law mailbox rule" because "the statute does not address" it). At Step Two's "reasonableness" query, the panel readily upheld the IRS interpretation, as is too typical. *Id.* at 843. *See also* Christopher J. Walker & Kent Barnett, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (finding that agencies win in 93.8% of cases at *Chevron* Step Two in circuit courts).

Again, the Ninth Circuit was among the courts in the circuit split that ruled against the IRS regarding the mailbox rule's availability. *See Anderson*, 966 F.2d at 491. In the normal course, circuit precedent can be changed exclusively by a ruling of this Court, a statute passed by Congress, or an *en banc* hearing. Here, however, deference doctrines did all the work. To overcome its precedent, the Ninth Circuit panel turned to the *Brand X* principle that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Baldwin*, 921 F.3d at 843 (citing *Brand X*, 545 U.S. at 982).

Because the Ninth Circuit's previous reading of § 7502 was merely its best exposition and not "the only reasonable interpretation," the agency was free to disagree, and the court felt it must yield. *Id.* "Quite literally then, after [the Ninth Circuit] declared the statute['s] meaning and issued a final decision, an executive agency was permitted to (and did) tell [the court] to reverse [its] decision like some sort of super court of

appeals." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

## II. The Court Should Review Whether the IRS's Perfunctory Rulemaking Implicates Agency Expertise and Thus *Chevron* Deference

*Chevron* deference "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Because "the resolution of ambiguity in a statutory text is often more a question of policy than of law," *id.*, this Court assumes that Congress intends for agencies, and not judges, to make these sorts of policy decisions. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996) (describing *Chevron* as a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency"). This presumption rests on the agency's "historical familiarity and policymaking expertise" with respect to its enabling statutes. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991).

Still, not all statutory ambiguities are amenable to the *Chevron* framework. "Some interpretive issues may fall more naturally into a judge's bailiwick." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (citing, as an example, "elucidation of a simple common-law property term"). Where "the agency has no comparative expertise," it follows that "Congress presumably would not grant it [interstitial lawmaking] authority," and deference becomes inappropriate. *Id.* For these sorts of questions, which exist outside an agency's competence,

it is incumbent on courts "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Discerning which branch—agencies or courts—gets interpretive primacy is a context-driven inquiry that depends on "the interstitial nature of the legal question" immediately at hand. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). In performing this case-by-case analysis, courts look foremost to whether the interpretive question "in some way implicate[s]" the agency's "substantive expertise." *Kisor*, 139 S. Ct. at 2417.

For some highly technical interpretations, administrative agencies are obviously more expert compared to courts. *See, e.g., id.* at 2413 (discussing "moiety"). Yet other interpretative questions, such as § 7502's relationship to the mailbox rule, are obviously suited for judiciary. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (discussing "pure question[s] of statutory construction for the courts to decide"). The mailbox-rule controversy, after all, centers on a judge-made evidentiary principle as it pertains to Article III jurisdiction. It is hard to imagine a more quintessentially judicial matter than the legal question at issue here.

Turning to the statute, there is no textual evidence that § 7502 carries an implied delegation for the IRS to regulate the judiciary by forbidding resort to the mailbox rule. Because the statute is "silent" on the matter, any such delegation would have to be read into existence. *See Baldwin*, 921 F.3d at 842 ("[W]e conclude that . . . § 7502 is silent as to whether the statute displaces the common-law mailbox rule."). But it's inconceivable that Congress would bestow such a power on the IRS without a word, given the background prin-

ciple that federal courts maintain an "independent obligation" under the Constitution to police their own jurisdiction. *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly.").

Remarkably, the IRS conceded that its statutory interpretation involves matters wholly outside its purview. During its halfhearted rulemaking to "clarify" § 7502, the agency disavowed any authority to adopt the common-law mailbox rule for regular mail. *See* 76 Fed. Reg. 52,561, 52,562 (Aug. 23, 2011) ("[W]ithout legislative action . . . the IRS cannot adopt regulations extending prima facie evidence of delivery [to regular mail]."). The rulemaking's only purpose was thus to deny courts access to the mailbox rule. So on the IRS's own terms, "the subject matter of the relevant provision" is "distan[t] from the agency's ordinary statutory duties [and falls] within the scope of another [institution's] authority." *City of Arlington v. FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring in judgment).

The IRS's perfunctory rulemaking, moreover, failed to demonstrate "an agency's authoritative, expertise-based, fair or considered judgment," which is another tell-tale sign that deference is unwarranted. *Kisor*, 139 S. Ct. at 2414 (cleaned up). In the entire rulemaking, the IRS offered a paltry nine paragraphs of explanation. According to the IRS, its rule was precipitated by a circuit split over the mailbox rule. And yet, other than identifying the split, the rulemaking did not discuss the differences of opinion.

Far from exhibiting expertise, the IRS's rulemaking failed to demonstrate any signs of deliberation at

all. Instead, the agency simply announced a circuit split and then claimed to resolve it with a conclusory interpretation. The IRS vacuously reasoned that "[t]he regulations are necessary to provide greater certainty on this issue and to provide specific guidance," without further elaboration. 69 Fed. Reg. at 56,378. Elsewhere, and with equal opacity, the IRS explained that its rule "merely clarif[ies] and confirm[s] current IRS practice under the existing regulations." *Id.* Nowhere did the agency discuss why it is trying to eliminate the mailbox rule. Is the new rule meant to engender administrative efficiencies? We don't know. Was the IRS motivated by revenue concerns? The regulation doesn't say. Such a transparently superficial exercise should not be rewarded with *Chevron* deference.

## CONCLUSION

The Court cannot allow the decision below to stand without further review, and not simply because the lower court evinces a too-sanguine application of deference doctrines. There is more at stake here than poor judicial methodology. Agencies cannot be allowed to overcome adverse judicial rulings merely by going through the motions of a *Chevron*-begging rulemaking.

Respectfully submitted,

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