

No. 23-1037

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ISOBEL BERRY CULP AND DAVID R. CULP

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

REPLY BRIEF FOR THE PETITIONER

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The court of appeals in this case held that 26 U.S.C. 6213(a)'s time limit for petitioning the Tax Court for re-determination of a tax deficiency is not jurisdictional. As the government's petition explains (at 10-30), that decision is wrong; it conflicts with the decisions of other courts of appeals on a recurring issue of exceptional importance; and if allowed to stand, it would have the perverse effect of precluding taxpayers whose petitions are deemed untimely from challenging the amount of the deficiency in other proceedings. This Court should therefore grant the petition for a writ of certiorari.

Respondents attempt to minimize the need for this Court's review by pointing to *Boechler, P.C. v. Commissioner*, 596 U.S. 199 (2022), which deemed nonjurisdictional a different time limit in the Internal Revenue Code, *id.* at 202. But the time limit in this case is not like the time limit in *Boechler* (or in any other case in which the Court has deemed a deadline nonjurisdictional).

Among other differences, statutory text supplies what the Court found missing in *Boechler*: a “clear tie” between the time limit and the Tax Court’s jurisdiction. *Id.* at 207. *Boechler* therefore does not cast doubt on a century’s worth of precedent treating the time limit here as jurisdictional, see Pet. 17-23, or otherwise undermine the need for this Court’s review.

A. The Court Of Appeals’ Decision Is Wrong

1. Like the court of appeals, respondents view the outcome here as “all but dictated by” this Court’s decision in *Boechler*. Br. in Opp. 1; see Pet. App. 8a (“If [26 U.S.C. 6330(d)(1)’s] deadline in *Boechler* fell short of being jurisdictional, § 6213(a)’s limit must as well.”). But the statutory text here is different in several important ways, and those differences “plainly show that Congress imbued” Section 6213(a)’s time limit “with jurisdictional consequences.” *Harrow v. Department of Def.*, 144 S. Ct. 1178, 1183 (2024) (citation omitted).

a. First, the text of 26 U.S.C. 7459(d) expressly refers to “dismissal[s]” of deficiency proceedings “for lack of jurisdiction.” 26 U.S.C. 7459(d). When Congress amended the statutory framework by adding that language in 1928, see Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872, dismissals for lack of “jurisdiction” were understood to include dismissals for lack of timeliness (*i.e.*, for failure to comply with the deadline in the statutory precursor to Section 6213(a)). *Appeal of United Paper Co.*, 4 B.T.A. 257, 258 (1926); see *Appeal of Satovsky*, 1 B.T.A. 22, 24 (1924) (same); *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6, at 23-28 (2022) (discussing the relevant history). The text of Section 7459(d) thus provides the “clear tie” that was missing in *Boechler* between the statutory time limit and the Tax Court’s jurisdiction. 596 U.S. at 207.

Respondents contend (Br. in Opp. 20) that Section 7459(d) could not “possibly provide the needed clear statement” because Section 7459(d) does not *expressly* tie the time limit to the Tax Court’s jurisdiction. But the statute does not expressly tie *any* condition to the Tax Court’s jurisdiction. If an express tie were necessary, nothing would qualify as a jurisdictional prerequisite—meaning that Congress’s rule for “dismissal[s] * * * for lack of jurisdiction” would apply to a null set. 26 U.S.C. 7459(d). Respondents’ demand for such an express tie is therefore untenable because any plausible interpretation of Section 7459(d) should give effect to Congress’s addition of the words “dismissal * * * for lack of jurisdiction.” *Ibid.*; see *Polselli v. IRS*, 598 U.S. 432, 441 (2023) (recognizing that this Court “ordinarily aim[s] to ‘give effect to every clause and word of a statute’”) (brackets and citation omitted).

Here, the only principled way of giving effect to those words looks to how they were understood in 1928, when Congress enacted them. See *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (explaining that this Court normally interprets a statute in accord with the meaning of its terms “at the time Congress adopted them”). The history plainly shows that an untimely petition was understood to be a “jurisdiction[al]” basis for dismissal. 26 U.S.C. 7459(d); see Pet. 17-20. Indeed, respondents acknowledge that Congress added the reference to “dismissal[s] * * * for lack of jurisdiction,” 26 U.S.C. 7459(d), in response to the decision of the Board of Tax Appeals (the Tax Court’s predecessor) in *United Paper*. See Br. in Opp. 22-23. And the Board in that case dismissed a deficiency proceeding for lack of “jurisdiction” because the taxpayer’s petition had not been timely filed. *United Paper*, 4 B.T.A. at 258.

b. Second, the text of Section 7459(d) specifies that “[i]f a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary [of the Treasury].” 26 U.S.C. 7459(d). But Section 7459(d) excepts “dismissal[s] * * * for lack of jurisdiction” from that general rule. *Ibid.* If respondents were correct that the time limit is not jurisdictional, a dismissal for untimeliness would need to be treated as the Tax Court’s “decision that the deficiency is the amount determined by the Secretary,” *ibid.*, and that dismissal would then have the perverse effect of precluding the taxpayer from contesting that amount in the future, including in an administrative refund claim or in a refund suit. See *Sanders v. Commissioner*, 161 T.C. No. 8, at 14 (2023) (Buch, J., concurring); *Hallmark*, 159 T.C. No. 6, at 21. Thus, while the Court in *Boechler* emphasized the harsh consequences that would result from treating a time limit as jurisdictional, 596 U.S. at 203, the harshest consequences here would come from treating the time limit as *not* jurisdictional.

Respondents contend (Br. in Opp. 24) that Section 7459(d) has nothing to do with “preclusion.” But even the court of appeals did not accept that argument, and for good reason. See Pet. App. 9a. By generally requiring that a nonjurisdictional dismissal be considered a “decision that the deficiency is the amount determined by the Secretary,” 26 U.S.C. 7459(d), Section 7459(d) makes such a dismissal “the functional equivalent of a merits decision sustaining the determination of the deficiency,” with all the preclusive effects that accompany such a merits decision, *Hallmark*, 159 T.C. No. 6, at 19. Contrary to respondents’ contention (Br. in Opp. 24-25),

those preclusive effects would arise as a matter of res judicata, irrespective of the application of 26 U.S.C. 6512(a). See *Hallmark*, 159 T.C. No. 6, at 21. In contrast, treating Section 6213(a)'s time limit as jurisdictional would allow a dismissal for untimeliness to be recognized for what it is—a non-merits decision—which would accordingly “leave[] the taxpayer free to pay the tax and then pursue his refund remedies” without facing preclusion. *Ibid.*

c. Third, the text of Section 6213(a) reflects multiple amendments over the past century, each premised on the understanding that the time limit is jurisdictional. For example, Congress amended the text in 1926 to specify that Sundays should not be counted as the last day of the time period. Revenue Act of 1926, ch. 27, § 274(a), 44 Stat. 55. More recently, Congress amended the text in 1998 to provide that “[a]ny petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.” Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3463(b), 112 Stat. 767. On each of those occasions and on others in between, Congress could have rejected a jurisdictional understanding of the time limit. See Pet. 20, 23-24. But instead, Congress repeatedly amended the statute in ways that would have been unnecessary if the Tax Court (or its predecessor) was understood to have the power “to excuse [a] party’s non-compliance for equitable reasons.” *Harrow*, 144 S. Ct. at 1182. The statutory history of Section 6213(a) therefore reinforces the jurisdictional status of the time limit. See *United States v. Hansen*, 599 U.S. 762, 775 (2023) (“Statutory history is an important part of * * * context.”). No similar history existed in *Boechler*.

2. At a minimum, the Tax Court’s jurisdiction does not extend to cases, like this one, in which the Internal Revenue Service (IRS) had already validly assessed the tax pursuant to 26 U.S.C. 6213(c) by the time the taxpayer’s petition for redetermination was filed. See Pet. 25-27. While acknowledging that “[w]hat happens *before* the IRS sends a notice of deficiency may affect the taxpayer’s ability to petition the Tax Court,” respondents contend that “what happens *after* the IRS sends a notice of deficiency has no comparable impact.” Br. in Opp. 31. But the provision that respondents cite (*ibid.*)—26 U.S.C. 6213(b)(4)—cuts the other way. Section 6213(b)(4) provides that the post-notice assessment of an amount voluntarily paid “shall not deprive the Tax Court of jurisdiction over [the] deficiency.” 26 U.S.C. 6213(b)(4). In so specifying, Section 6213(b)(4) implies that a valid post-notice assessment could otherwise “deprive the Tax Court of jurisdiction.” *Ibid.* It therefore supports the conclusion that the post-notice assessment here—which was authorized by Section 6213(c) and which fell outside the scope of Section 6213(b)(4)—had precisely that effect, depriving the Tax Court of jurisdiction over respondents’ late-filed petition.

B. This Court’s Review Is Warranted

1. Respondents do not dispute that whether Section 6213(a)’s time limit is jurisdictional is an important and recurring question. See Pet. 28-30. Nor do respondents dispute that the decision below conflicts with the decisions of other courts of appeals. See Br. in Opp. 9-11. Instead, respondents attempt to minimize the need for this Court’s review by asserting (*id.* at 9) that the conflict is not “cognizable.” That assertion lacks merit.

a. As the government’s petition explains (at 27-28), the decision below conflicts with recent decisions of the

Seventh and Ninth Circuits holding that Section 6213(a)'s time limit is jurisdictional. Respondents contend (Br. in Opp. 10) that the conflict is not cognizable because “*Boechler* casts doubt on the[] reasoning” of the Seventh and Ninth Circuits. But “the clarity of ‘each statute must be evaluated on its own terms.’” *Department of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 52 (2024) (citation omitted). And, as described above, there are several key differences between the time limit here and the time limit in *Boechler*. See pp. 2-5, *supra*. Thus, as the Tax Court has concluded, *Boechler* does not undermine a century’s worth of precedent treating Section 6213(a)’s time limit as jurisdictional. See *Hallmark*, 159 T.C. No. 6, at 6 (“*Boechler* does not apply to the 90-day deadline of section 6213(a).”); see also *Sanders*, 161 T.C. No. 8, at 8 (finding “[n]othing” in the decision below to justify revisiting “the jurisdictional nature of the 90-day deficiency deadline”).

The actual reasoning of the Seventh and Ninth Circuits’ decisions underscores the point. As respondents acknowledge (Br. in Opp. 1), both circuits “considered the question under this Court’s modern jurisprudence” about what makes a provision jurisdictional. See *Tilden v. Commissioner*, 846 F.3d 882, 886 (7th Cir. 2017) (understanding this Court’s precedent to hold that “filing deadlines are presumptively not jurisdictional”); *Organic Cannabis Found., LLC v. Commissioner*, 962 F.3d 1082, 1093 (9th Cir. 2020) (reaffirming that Section 6213(a)’s time limit is jurisdictional under this Court’s “recent jurisprudence addressing when statutory deadlines should be deemed jurisdictional”), cert. denied, 141 S. Ct. 2596, and 141 S. Ct. 2598 (2021). *Boechler* applied that jurisprudence without purporting to alter it. See 596 U.S. 203-204. And *Boechler* did not address Section 7459(d),

a provision that the Ninth Circuit has viewed as “confirm[ing]” the jurisdictional status of Section 6213(a)’s time limit. *Organic Cannabis*, 962 F.3d at 1095. As the Ninth Circuit recognized, treating the deadline in Section 6213(a) as “non-jurisdictional” would cause dismissals for untimeliness to fall outside Section 7459(d)’s “safe-harbor denying preclusive effect to Tax Court dismissals ‘for lack of jurisdiction,’” “ironically yielding precisely the sort of ‘harsh consequence’ that [this] Court’s recent ‘jurisdictional’ jurisprudence has sought to avoid.” *Ibid.* (brackets and citation omitted); see pp. 4-5, *supra*. Because nothing in *Boechler* undermines that reasoning, awaiting further percolation would serve no purpose.

b. The decision below also conflicts with older decisions of several other circuits treating Section 6213(a)’s time limit as jurisdictional. See Pet. 20-23. Respondents characterize those decisions as “‘drive-by jurisdictional rulings’ that should be accorded ‘no precedential effect.’” Br. in Opp. 10 (citation omitted). But multiple decisions defy that characterization.

In *Lewis-Hall Iron Works v. Blair*, 23 F.2d 972, cert. denied, 277 U.S. 592 (1928), for example, the D.C. Circuit distinguished “jurisdictional” rules from “merely procedural” ones and placed the deadline at issue here in the former category. *Id.* at 974. The court then held that the Board of Tax Appeals lacked jurisdiction over an untimely petition for redetermination, even though no objection to the petition’s timeliness had been “presented or considered below.” *Id.* at 975. The court thus treated the time limit as a limitation on the Board’s subject-matter jurisdiction—*i.e.*, as a requirement that “cannot be waived or forfeited” and “must be raised by courts *sua sponte*.” *Boechler*, 596 U.S. at 203; see *Ed-*

wards v. Commissioner, 791 F.3d 1, 4 (D.C. Cir. 2015) (reiterating that the Tax Court “lacks jurisdiction if the taxpayer’s petition is not timely filed”); *DiViaio v. Commissioner*, 539 F.2d 231, 234 (D.C. Cir. 1976) (“[I]t has been decided time and time again that the statutory period is jurisdictional, and the duty to dismiss on failure to comply is mandatory.”) (citation omitted).

Likewise, in *Poynor v. Commissioner*, 81 F.2d 521, 522 (1936), the Fifth Circuit held that the Board of Tax Appeals lacked “power to consider a petition for a re-determination of a deficiency where such petition [wa]s filed with it after the expiration of the prescribed period.” *Id.* at 522. The court affirmed the Board’s dismissal of two petitions for redetermination as untimely, explaining that the Board “was without power to dispense on equitable grounds with the requirement of filing within the time allowed.” *Ibid.* The court thus understood the time limit as “‘mark[ing] the bounds’” of the Board’s “power”—*i.e.*, as a rule to which the Board “must adhere * * * ‘even if equitable considerations would support’ excusing its violation.” *Harrow*, 144 S. Ct. at 1183 (citations omitted); see *Keado v. United States*, 853 F.2d 1209, 1212 (5th Cir. 1988) (reaffirming that “the Tax Court lacks jurisdiction to consider the deficiency” when a taxpayer has failed to file a timely petition).

Respondents are therefore wrong to characterize such decisions as “drive-by jurisdictional rulings.” Br. in Opp. 10 (citation omitted). Those decisions “turned on” the courts’ view of the time limit as “technically jurisdictional.” *Wilkins v. United States*, 598 U.S. 152, 160 (2023) (brackets and citation omitted). And because those courts understood the time limit to be jurisdictional in the strict sense now used by this Court, their decisions should be counted as part of the conflict created by the decision

below. Contrary to respondents' contention (Br. in Opp. 9), that conflict is ripe for this Court's review.

2. As for the second question presented, respondents err in asserting (Br. in Opp. 28-29) that it was neither pressed nor passed upon. The court of appeals addressed the question when it held that "[t]he Tax Court retained jurisdiction over [respondents'] deficiency petition even though the IRS had already collected a portion of the deficiency via levy." Pet. App. 4a n.2. Assessment of the tax in this case necessarily preceded its collection. By holding that the Tax Court retained jurisdiction "even though the IRS had already collected," the court of appeals necessarily concluded that the assessment did not deprive the Tax Court of jurisdiction either. *Ibid.* And because the issue was addressed below, this Court may review it. See *United States v. Williams*, 504 U.S. 36, 41 (1992) (explaining that the Court may "permit[] review of an issue not pressed so long as it has been passed upon"). In any event, the issue was also raised in the government's rehearing petition. See C.A. Doc. 73, at 5-10 (Oct. 3, 2023). And regardless of whether the Court views the second question as worthy of its review, it should at least grant review on the first question, which can be resolved "without addressing the second." Br. in Opp. 30.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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