No. 23-125

IN THE
Supreme Court of the United States

SEAVIEW TRADING, LLC, AGK INVESTMENTS, LLC,
TAX MATTERS PARTNER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

NTUF has provided expertise in filings to this Court before. *See*, *e.g.*, *Moore v. United States*, U.S. No. 22-800 (pending oral argument); *Boechler v. Comm'r Int. Rev.*, 596 U.S. ___, 142 S.Ct. 1493 (2022); *CIC Services, LLC v. Int. Rev. Serv.*, 593 U.S. ___, 141 S. Ct. 1582 (2021). NTUF therefore has an institutional interest in this Court's ruling on this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* further certifies timely notice to all parties of the intent to file this brief.

SUMMARY OF THE ARGUMENT

Seaview Trading, LLC, AGK Investments, LLC, Tax Matters Partner ("Seaview") is a partnership that filed its 2001 tax return late. Since missing the April 15, 2002 deadline, the partnership and individual involved in the venture have submitted a copy of the Tax Year 2001 Form 1065 return at least three times to various IRS officials over the years.

Yet, the IRS says Seaview has never officially "filed" its return because it was never received by the IRS Service Center in Ogden, Utah. Seaview says it did file to Ogden in 2002, but the IRS claims it did not receive it.

The IRS has thus redefined "filing" to mean not when the taxpayer submits a return, but when the IRS Ogden office records it internally as received (if it ever does). If it's lost in the mail or in the IRS's labyrinth, too bad for the taxpayer, even if the IRS has actually received the return in another way. The IRS can make this argument because the statutory framework is unclear about a partnership filing *late*. There are rules for *timely* filing and rules for when a taxpayer *fails* to file. But no statute, regulation, or case (until this one) outlines what happens when a filing is late to the service center but willingly supplied directly to IRS auditing and enforcement personnel, multiple times over the course of almost a decade.

This all matters because until the return is officially filed, the statute of limitations clock does not start. The IRS argues that the statute of limitations has not run without Ogden confirming it has received

Seaview's return — even though they acknowledge the return was in the hands of multiple IRS employees handling multiple audits. Therefore, the IRS believes it may make adjustments and impose penalties, in the absence of the statute of limitations trigger.

This situation is manifestly unfair, but the Ninth Circuit majority, over the zealous dissent of Judge Bumatay, agreed with the government's interpretation. The decision below demands that the taxpayer engage in "meticulous compliance" — essentially a duty to extract a confirmation of receipt from the IRS — if they wish to have any safe harbor from tax penalties. App. 10a. This is despite multiple public statements from the IRS that taxpayers should hand over their tax returns to reviewing personnel when asked, and directives to those employees to ensure that any received materials are forwarded to the correct service center. To the majority opinion below, these public statements do not carry the force of law, and taxpayers are left guessing about what they have to do.

This a regulatory "heads I win, tails you lose" situation. If a taxpayer disregards any of the IRS' various informal guidance documents — notices in the bulletin, private letter rulings, and the like — the IRS will move quickly to enforcement. But when these same documents are helpful for a taxpayer, the IRS sings a different tune. The Ninth Circuit approved this.

As Judge Bumatay rightly observed, the decision below puts *all* taxpayers at risk if they cannot prove they filed in their relevant IRS Service Center. The IRS has recently received approximately $80 billion in

new funding, mostly for enforcement. A well-funded staff aimed aggressively seeking tax penalties now has an *en banc* decision in hand saying the statute of limitations does not toll because the IRS never wrote a regulation on saying where to file a late return. This decision is therefore one of national importance, and this Court should grant certiorari.

ARGUMENT

How many times must a taxpayer give their return to the IRS before it's considered "filed"? In this case, three or four times was not enough. After Seaview's Tax Year 2001 Form 1065 filing was due in 2002, the IRS says it never got it.[2]

In 2004, one of Seaview's owners was audited in his individual capacity. App. 40a. When the IRS auditor asked for a copy of Seaview's 2001 Form 1065, the individual provided an unsigned copy to the agent. Pet. 11; App. 40a. In 2005 an IRS revenue agent "informed Seaview that the agency had no record of receiving the partnership's return for the 2001 tax year," and "asked Seaview to send him retained copies of any 2001 return that Seaview claimed to have filed as well as proof of mailing." App 7a–App. 8a. In 2007, Seaview itself was audited, and a different IRS employee asked for Seaview's tax return for 2001. App. 8a. Seaview's counsel complied.

Even setting aside the initial attempt to file in Ogden, Utah, the record now contains three instances of Seaview's 2001 tax return being provided to the IRS. But the IRS says because no one can prove receipt by the general IRS service center in Ogden, Utah, it as if Seaview never filed a return at all.

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[2] Seaview's accountant has a copy of the partnership's Form 1065 with a copy of certified mail receipt for an envelope that had been mailed to the Ogden Service Center in July 2002. App. 8a. The partnership conceded that it cannot prove that the missing Form 1065 was in that envelope. Pet. 11. One wonders how anyone can prove they filed their returns if a copy of the return and a certified mail slip is not enough.

The consequences are dire for not counting the delinquent 2001 return as filed. The IRS had three years to adjust a partnership's income and assess ensuing tax penalties. *See* 26 U.S.C. § 6229(a) (2000). That limitations period is the "later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such a return for such year." *Id*. If a taxpayer never "files," then the limitations period for adjustments and penalties never ends.

In this case, in 2010, the IRS issued a Final Partnership Administrative Adjustment notice to Seaview for Tax Year 2001, saying the 2001 tax return was never filed. App. 8a. As a result, the IRS disallowed a $35.5 million reported loss against Seaview's (and the partners') tax liability. App. 8a; App. 33a. A lot of money is at stake, but the principles can apply to any taxpayer — from the delinquent partnership all the way down to an individual citizen with no way of proving actual receipt by the IRS Ogden office.

I. THE NINTH CIRCUIT'S DECISION HURTS TAXPAYERS BY DEFERRING TO THE IRS.

Over the strong dissent of Judge Bumatay,[3] the *en banc* Ninth Circuit approved an Internal Revenue Service's "heads I win, tails you lose" argument. The statute and Treasury regulations neglect to spell out

[3] Judge Bumatay wrote the panel decision that was overturned by the *en banc* slate of judges in the Ninth Circuit. App.17a; App. 35a; Ninth Cir. R. 35-3 ("The en banc court… shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.").

how to file untimely returns, particularly if IRS staff actually ask for and receive those documents. A reasonable person would expect they have then "filed" if they answered an IRS auditor's demand for the document. Public documents tell taxpayers to do just that. But the IRS now takes the position that *only* taxpayers officially mailing the document to the service center will stop the clock on penalties and adjustments.

The fundamental problem is that the statutory framework is unclear when a partnership files late. There are rules for *timely* filing. 26 U.S.C. § 6230(i) (2000) (return "shall be filed or made at such time, in such manner, and at such place as may be prescribed in regulations"); 26 C.F.R. § 1.6031(a)-1(e) (2001) (regulations mandating filing by April 15 at the IRS service center).[4] There are rules for a taxpayer not filing at all: the taxes can be "assessed at any time." 26 U.S.C. § 6229(c)(3) (2000). But no statute, regulation, or case (until this one) outlines what happens when a filing is late to the service center but willingly supplied directly to IRS auditing and enforcement personnel when asked.

The decision by the court below establishes a standard of "meticulous compliance by the taxpayer" if they wish to have any safe harbor from building tax penalties. App. 10a (quoting *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930)). But it is not as if the

[4] As noted by the Petition, the relevant statutory and regulatory sections changed somewhat after 2015. Pet. 7. Nonetheless, as discussed, *infra*, the holding of the Ninth Circuit is not at all cabined to the now-defunct framework and the principles will likely be applied to other taxpayers in the future.

partnership simply did not try to file its return: the record is replete with multiple attempts, evidence of actual receipt by the IRS of the return, and a willingness to cooperate with the IRS agents handling audits of the partnership and its individual owners. To the Ninth Circuit, only the taxpayer providing that Ogden got the return is enough.

More to the point, there are no Treasury Regulations on how to file delinquent returns. App. 18a (Bumatay, J., dissenting) (noting same). That is, despite Congress authorizing the IRS to write a rule, it has failed to do so.

But there *are* public statements that say that the IRS will accept late filings to an IRS employee who asks for them. The Service says, "*All delinquent returns* submitted by a taxpayer, whether upon his/her own initiative or at the request of a Service representative, will be accepted." IRS Policy Statement 5-133, § 1.2.1.6.18(2), Delinquent returns — enforcement of filing requirements (Aug. 4, 2006) https://www.irs.gov/irm/part1/irm_01-002-001 (emphasis added). Furthermore, typically delinquency enforcement will not go beyond six years. *See id.* § 1.2.1.6.18(5). The IRS is supposed to take into account various mitigating factors, including voluntary compliance. *See id.* § 1.2.1.6.18(4). Seaview, like any other taxpayer, relied upon these statements. And the partnership (and the individual owners) promptly complied with each IRS agent request for the 2001 partnership tax return. Despite this attempted compliance, the IRS assessed penalties *ten years later* against Seaview. This is a situation of good faith met with a "maximum penalty" mindset from the IRS, contra to the IRS's own policy statement.

The IRS Chief Counsel's Office also tells taxpayers that "Revenue officers have the authority to request and receive hand-carried, delinquent returns." IRS Office of Chief Counsel, Chief Counsel Advice No. 199933039, *Filing Delinquent Returns Directly With Revenue Officers* at 1 (Aug. 20, 1999) https://www.irs.gov/pub/irs-sca/9933039.pdf. That is because "[r]evenue officers may request taxpayers *to file delinquent returns directly with the revenue officer*." *Id.* (emphasis added). The Chief Counsel's memorandum discusses natural person filers, not business entities, and describes hand-filing not faxing as Seaview did, but it still reflects the IRS's previously stated willingness of the IRS to allow taxpayers to submit late returns directly to the IRS employees auditing them.

The Ninth Circuit's *en banc* decision rejected this evidence as mere informal statements not having the force of law. *See* App. 15a (discussing *Fargo v. Comm'r Int. Rev.*, 447 F.3d 706, 713 (9th Cir. 2006)); *cf. Dixon v. United States*, 381 U.S. 68, 73 (1965) ("The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law."). But informal guidance is all taxpayers have when the IRS neglects to engage in proper APA notice-and-comment regulations on this subject.

Notably, the IRS acts as if its informal guidance has the force of law when it is to their advantage. For example, the IRS retroactively made *informal* guidance part of the Treasury regulations by incorporating the guidance by reference. *See*, *e.g.*, 26 C.F.R. § 1.6662-3(b)(2) ("The term 'rules or regulations' includes…revenue rulings or notices

(other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin."). This Court's decision in *CIC Services* resulted from a challenge to an IRS "informal" notice that they were seeking penalties for non-compliance. *See CIC Services*, 141 S.Ct. at 1587. When informal guidance maximizes penalties, the IRS says its informal guidance controls. But when informal guidance may benefit a taxpayer acting in good faith, the IRS (and now the Ninth Circuit) says no one may rely upon it. This is manifestly unfair, especially since Congress authorized the IRS to write formal rules for this precise situation but the bureau has neglected to do so. All taxpayers can do is rely on informal guidance at that point.

That the Ninth Circuit, *en banc*, has blessed this posture is dangerous to taxpayers. The Tax Court and District Courts across the country will find an *en banc* opinion particularly persuasive.

II. THE QUESTION PRESENTED IN THIS CASE IS IMPORTANT TO EVERY TAXPAYER.

This case presents a quintessential issue of national importance that needs clarity from this Court. *See* Sup. Ct. R. 10(c). Taxpayers everywhere need to know when they have "filed" a late return to start the statute of limitations. The tax code and the IRS prescribe the time, place, and method of *timely* returns but are silent when a tax return is late. This gives the bureau maximum flexibility to maximize penalties on delinquent filers — even when they have delivered missing returns directly to IRS enforcement

personnel. The decision of the court below, in blessing this system, was so anti-taxpayer as to cause concern for every filer in America.

Taxes are scary to the average person. Tax law is complex and its impact is in nearly every area of a person's public life. Worse, the taxpayer must present their entire financial life to the IRS. But if they need to pay the government, *every* taxpayer needs assurance on when their liability will end. If the IRS had been clear on what it counted as "filing" when it asked Seaview for copies, Seaview very likely would have re-sent its return to Ogden much earlier. The IRS proposes to perpetuate this lack of clarity, with the Ninth Circuit's blessing.

April 15 produces a secular ritual of offering up one's personal and/or business records for approval of the tax agency. Businesses send employees W2 forms and send the government W3 forms on withholdings (the very forms at issue in this case). Banks track how much interest income an account generates and sends form 1099-INT. Independent contractors get form 1099. Charities and churches send out donation reports. Paper flies around the country as everyone prepares to file their taxes. Sometimes, as here, simple clerical mistakes — by either the taxpayer or the IRS staff — mean things get lost or arrive incomplete.

And to be sure, the IRS processing centers are overwhelmed. Last year the *Washington Post* covered the backlog of 21.3 *million* paper tax returns, many of which were sitting on cafeteria tables in the very same Ogden facility. Jeff Stein, *IRS has backlog of 21.3 million paper tax returns, watchdog says*,

WASHINGTON POST (June. 22, 2022) https://www.washingtonpost.com/us-policy/2022/06/22/irs-refunds-taxpayers-returns/. For two years, dozens of tractor trailers full of paper submissions surrounded the Ogden facility, and the IRS lost the ability to track where submissions were in their process. *See* Joseph Bishop-Henchman, *Transforming the Internal Revenue Service*, Cato Institute (Apr. 11, 2023), https://www.cato.org/policy-analysis/transforming-internal-revenue-service. The Treasury Inspector General for Tax Administration (TIGTA) expects backlogs to continue, despite IRS efforts to speed up processing. TIGTA, *Backlogs of Tax Returns and Other Account Work will Continue Into the 2023 Filing Season* Report No. 2023-46-007 (Dec. 20, 2022) https://www.tigta.gov/sites/default/files/reports/2022-12/202346007fr.pdf. Perhaps Seaview's tax return from 2002 is still sitting on an IRS desk somewhere.

The IRS has at its disposal a variety of options to compel payment. Audits are a perennial fear of the taxpayer. Criminal and civil penalties are of course on the table for enforcement. When a person owes $59,000 in tax debt, the IRS can ask the State Department to revoke the person's passport. *See* 26 U.S.C. § 7345.[5] Even the right to travel can be suspended in the name of tax enforcement. Certainly

[5] By 2018, 436,400 taxpayers were subjected to passport revocation under § 7345. Nat'l Taxpayer Advocate, Objectives Report to Congress, FY 2019, vol. 1, at 80 https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC19_Volume1.pdf.

about the tolling the accrual of penalties and adjustments is vital for taxpayers.

The recent enactment of the Inflation Reduction Act of 2022 ("IRA") included $80 billion for the IRS. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169 § 10301, 136 Stat. 1818, 1831 (2022). It is a large check that will pay for 87,000 new employees, mostly for new and greater enforcement. The great majority of the IRS spending — $45.6 billion — is slated for enforcement. *See id*. at 1832. Only $3 billion was dedicated to improve taxpayer services, like answer the phones, reply to letters, and taxpayer assistance. *See id*. The funding shows the priorities of the IRS going forward. *See*, Statement of Pete Sepp, President, National Taxpayers Union, Comm. on Finance, U.S. Senate, 7 (May 16, 2023) https://www.ntu.org/library/doclib/2023/05/051623-Pete-Sepp-Testimony.pdf.

Enforcement can drain taxpayer funds (and nerves) as audits and reviews can take a decade or more. *See*, *e.g.*, Molly Moses, *Retired Transfer Pricing Attorney Bemoans Long Delays In Cases*, LAW360 TAX AUTHORITY (Jun. 21, 2021) https://www.law360.com/tax-authority/federal/articles/1404919/retired-transfer-pricing-attorney-bemoans-long-delays-in-cases ("'When people would ask what I do, I would say I'm an historian, working on tax controversy matters that are quite old,' he joked, adding: 'When we tried the Amazon case in 2014, it dealt with a 2005 transaction; when we tried the Coke case in 2018, it involved the tax years 2007 through 2009.'"). Years of litigation is punishment enough, and the *en banc* decision below only exacerbates the problem by adding a requirement to

prove that the proper processing center got the delinquent paperwork to stop the tolling of late filing penalties. That undermines the whole purpose of the statute of limitations, to stop how long the enforcement process could drag on.

The specter of tax enforcement, combined with tax law's complexity, garners a visceral reaction in ordinary citizens and businesses. Any ambiguity on where to file *delinquent* returns should favor the taxpayer — especially one who repeatedly sent the IRS copies of the missing tax return.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant a writ of certiorari and reverse the decision below.

Respectfully submitted,

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