No. 21-1721

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GEORGE P. BROWN, RUTH HUNT-BROWN,

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS No. 19-848T; SENIOR JUDGE LOREN A. SMITH

[CORRECTED] BRIEF FOR THE APPELLEE

DAVID A. HUBBERT
Acting Assistant Attorney General

BRUCE R. ELLISEN **(202) 514-2929**
ISAAC B. ROSENBERG **(202) 514-2426**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

July 16, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Statutes:

Statutes (continued): **Page(s)**

Miscellaneous:

Miscellaneous (continued): **Page(s)**

STATEMENT OF RELATED CASES

No prior appeal in or from this action in the Court of Federal Claims has been before this Court or any other appellate court. Counsel for the United States are unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

GLOSSARY

Abbreviation	Definition
Appx	Joint appendix
Br.	Appellants' opening brief
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
IRS	Internal Revenue Service
RCFC	Rules of the United States Court of Federal Claims
Treas. Reg.	Treasury Regulation (26 C.F.R.)

JURISDICTIONAL STATEMENT

George P. Brown and Ruth Hunt-Brown filed a tax refund suit in the Court of Federal Claims, invoking the Tucker Act, 28 U.S.C. §§ 1346(a)(1) & 1491(a)(1), and section 7422(a) of the Internal Revenue Code. (*See* Appx36, Appx44-45 (second amended complaint).) In December 2020, the trial court dismissed the Browns' suit for lack of subject-matter jurisdiction. (Appx2, Appx8.) The Browns contest that jurisdictional ruling.

The trial court entered final judgment pursuant to RCFC 58 on January 7, 2021. (Appx9.) The Browns timely filed their notice of appeal on March 1, 2021. (Appx465.) This Court has jurisdiction. *See* Fed. R. App. P. 4(a)(1)(B); 28 U.S.C. §§ 1295(a)(3), 2107(b)(1), 2522.

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Case No. 21-1721

GEORGE P. BROWN, RUTH HUNT-BROWN,

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS No. 19-848T; SENIOR JUDGE LOREN A. SMITH

[CORRECTED] BRIEF FOR THE APPELLEE

INTRODUCTION

The Internal Revenue Code of 1986 requires individual taxpayers to sign and verify their own income tax refund claims under penalties of perjury. *See* 26 U.S.C. (I.R.C.) §§ 6012(a)(1), 6061(a), 6065. To enforce these statutory mandates, the Secretary of the Treasury has promulgated regulations that forbid an agent from executing an individual's refund claim unless the taxpayer submits a valid power of

attorney along with the claim. *See* 26 C.F.R. (Treas. Reg.) § 301.6402-2(e).

In this case, the IRS received income tax refund claims for George P. Brown and Ruth Hunt-Brown. The Browns did not sign the claims; their tax preparer did. They also included no powers of attorney.

Despite these defects, the Browns filed a refund suit in the Court of Federal Claims. They admitted that they did not comply with the taxpayer signature and verification requirements. They nonetheless argued that the IRS must have waived these requirements by processing their refund claims.

The trial court rejected the Browns' waiver theory and dismissed their suit, concluding that the defects in their claims were statutory (Appx6-7); that those statutory defects could not be waived (Appx7); and, thus, that the Browns had not "duly filed" their claims "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof" (Appx8 (quoting I.R.C. § 7422(a)).

The Browns now resuscitate their waiver argument. It remains unavailing. The waiver doctrine never applies to statutory

requirements, including those involved here. The doctrine also does not apply to the regulations implementing the statutory signature and verification requirements. And even if waiver were available to the IRS *in theory*, the Browns still have not met their heavy burden of showing a clear and unmistakable waiver of these requirements *in this case*. The trial court correctly dismissed the Browns' suit, and this Court should affirm.

STATEMENT OF THE ISSUES

1. Whether the Browns "duly filed" their administrative refund claims with the IRS before suing, I.R.C. § 7422(a), despite not personally signing and verifying their claims or else providing powers of attorney.

2. Whether, by processing the Browns' refund claims, the IRS waived the statutory requirements that individual taxpayers sign and verify their own refund claims.

3. Whether the trial court erroneously dismissed the Browns' refund suit for lack of jurisdiction under RCFC 12(b)(1), rather than for failure to state a claim under RCFC 12(b)(6).

STATEMENT OF THE CASE

A. Legal framework

Before taxpayers may sue for a tax refund, they must "duly file[]" an administrative refund claim with the IRS "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." I.R.C. § 7422(a). When a refund claim involves income taxes, taxpayers must include their claim in "the appropriate income tax return." Treas. Reg. § 301.6402-3(a)(1); *see also id.* §§ 301.6402-2(c), 301.6402-3(a)(5). For individual taxpayers, that means in a Form 1040 or a Form 1040X (if the taxpayer has already filed an original return). *Id.* § 301.6402-3(a)(2).

All refund claims and all returns must "be signed in accordance with forms or regulations prescribed by the Secretary." I.R.C. § 6061(a); *see also* Treas. Reg. § 1.6061-1(a). These documents must also be "verified by a written declaration that [they are] made under the penalties of perjury." I.R.C. § 6065; *see also* Treas. Reg. §§ 1.6065-1(a), 301.6065-1 (returns); *id.* § 301.6402-2(b)(1) (refund claims).

By default, individual taxpayers must personally sign and verify their own returns and refund claims. *See* I.R.C. §§ 6012(a)(1)(A),

6061(a), 6065; Treas. Reg. §§ 1.6061-1(a), 1.6065-1(a).[1] Limited exceptions apply. For instance, a taxpayer may sometimes authorize an agent to sign a return on his behalf. *See* Treas. Reg. §§ 1.6061-1(a), 1.6012-1(a)(5). In such cases, the return "must be accompanied by a power of attorney . . . authorizing [the agent] to represent [the taxpayer] in making, executing, or filing the return." *Id.* § 1.6012-1(a)(5). Refund claims may also "be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim." *Id.* § 301.6402-2(e). The power of attorney must directly authorize the agent to sign the claim on the taxpayer's behalf. *See id.* § 601.504(a)(6). "A form 2848, when properly completed, is sufficient" for these purposes. *Id.* § 1.6012-1(a)(5).

[1] Different signature rules apply to corporations and partnerships. *See* I.R.C. §§ 6062, 6063; Treas. Reg. §§ 1.6062-1, 1.6063-1. Those rules are irrelevant to this appeal.

B. Factual background[2]

1. The Browns file returns for 2015 and 2017

The Browns are U.S. citizens and husband and wife. (Appx36-37, ¶¶ 3-4; Appx125; Appx157.) In the relevant tax years, they lived in Australia, where Mr. Brown worked for Raytheon Company at Joint Defense Facility Pine Gap. (Appx37, ¶ 5; Appx42, ¶ 27; Appx125, Appx154, Appx157, Appx181.)

The Browns filed joint income tax returns for 2015 and 2017. (Appx125, Appx157.) In neither year did they claim the Foreign Earned Income Exclusion, I.R.C. § 911. (Appx127, Appx159; *see also* Appx42, ¶ 31.) In 2014, the Browns had signed a closing agreement (as a condition of Mr. Brown's employment) that waived their right to claim this exclusion. (Appx40-41, ¶¶ 19, 22; *see also* Appx350.) *See generally* I.R.C. § 7121; Treas. Reg. § 601.202.

---

[2] These facts generally derive from the Browns' second amended complaint (Appx36-46). *See Meidinger v. United States*, 989 F.3d 1353, 1357 (Fed. Cir. 2021). When that pleading's allegations are contradicted by documents integral to the Browns' claims or have jurisdictional significance, these facts derive from the evidence adduced by the parties below. *See Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993).

2. The IRS receives amended returns for the Browns for 2015 and 2017, seeking tax refunds

In October 2018, the IRS received amended returns for the Browns for 2015 and 2017. (Appx43, ¶ 32; Appx184, Appx297.) These returns were prepared by John Anthony Castro and purported to be signed by the Browns personally. (Appx185; Appx298.) In reality, the Browns had not signed the returns; Mr. Castro had. (*See* Appx354, Appx360-361; Appx368, ¶¶ 7-9; Appx371, ¶¶ 7-9.) These amended returns did not append any powers of attorney. (*See* Appx354, Appx361; Appx368, ¶¶ 7-9; Appx371, ¶¶ 7-9.)[3]

In January 2019, the Browns submitted a second amended return for 2015. (Appx43, ¶ 34; Appx243.) Like their first amended return for that year, this return was prepared by Mr. Castro (Appx244, Appx247)

---

[3] The IRS belatedly received a Form 2848 for Mr. Brown, which designated Mr. Castro and two of his associates as Mr. Brown's agents. (Appx345-346.) That form did not authorize Mr. Castro or his associates to "[s]ign a return" for Mr. Brown or to perform any acts related to amending his returns for 2015 and 2017. (Appx345 (listing only Forms "1040, 1040A, 1040EZ, 1040NR" in box 3 and leaving box 5a blank).) Moreover, while the form purported to be signed by Mr. Brown personally (Appx346), it too was apparently signed by one of Mr. Castro's associates. (*Compare id.* (box 7), *with id.* (Part II, designation "a").) In any event, the IRS never received a Form 2848 for Mrs. Brown (Appx3 n.1), whose signature was essential to the Browns' joint amended return. *See* I.R.C. § 6013(a); Treas. Reg. § 1.6013-1(a)(2).

and purported to be signed by the Browns. (Appx247.) But, again, Mr. Castro had signed the return for them. (*See* Appx354, Appx360-361; Appx368, ¶¶ 7-9; Appx371, ¶¶ 7-9.) This return also did not append any powers of attorney. (*See* Appx354, Appx361; Appx368, ¶¶ 7-9; Appx371, ¶¶ 7-9.)

Each of the Browns' three amended returns claimed the Foreign Earned Income Exclusion. (Appx186, Appx196-198, Appx203-204, Appx216, Appx220-223, Appx226, Appx231-233 (first amended return for 2015); Appx245, Appx255-257, Appx262-263, Appx274, Appx278-281, Appx284, Appx289-291 (second amended return for 2015); Appx299, Appx311-313, Appx317-318, Appx331-333, Appx336-338 (amended return for 2017); *see also* Appx42, ¶ 31.) To that end, the Browns disputed the validity of the closing agreement that they had signed in 2014, waiving their right to claim the exclusion. (Appx186, Appx245, Appx299.) Based chiefly on the exclusion, the Browns sought refunds of $7,636 for 2015 and $5,061 for 2017. (*See* Appx43, ¶ 34; Appx184, Appx243, Appx297.)[4]

[4] The Browns also claimed that Australia could not tax their income because Mr. Brown's employment with Raytheon was "de facto (continued…)

3. The IRS processes the Browns' refund claims, and the Browns then sue in the Court of Federal Claims

In April 2019, the IRS proposed to disallow the Browns' refund claims for 2015 and 2017. (Appx348-350; *see also* Appx43, ¶ 35 (referencing this IRS letter).) In a letter to the Browns, the IRS explained that its records "show[ed] that, as an employee of Raytheon . . . living and working in Australia, [Mr. Brown] may have entered into a closing agreement . . . irrevocably waiving [the Browns'] rights to claim the Foreign Earned Income [Exclusion] under [I.R.C.] section 911(a)." (Appx350.) The Browns then filed this refund suit in the Court of Federal Claims. (Appx11.)[5]

---

government service" that gave "the United States . . . exclusive taxing rights to this income." (Appx245 (capitalization omitted); *see also* Appx189, Appx221, Appx302.)

[5] The Browns initially sued for 2015 alone. (*See* Appx3.) They later amended their complaint to add a claim for 2017. (*See* Appx3, Appx44-45.) This amendment also added a claim for 2016 (Appx45, ¶ 46), which likewise hinged on the Foreign Earned Income Exclusion, and which the IRS had proposed to disallow after the Browns sued. (*See* Appx43, ¶ 36; Appx100-101.) The Browns later stipulated to the dismissal of their 2016 claim, before the trial court dismissed the balance of their case. (Appx3 n.3, Appx416.) The substance of the 2016 claim is now before the Tax Court, *Brown v. Commissioner*, No. 5386-20 (Tax Ct.), where the Browns again assert their entitlement to the

(continued…)

The Government filed an answer and then moved to dismiss the suit for lack of subject-matter jurisdiction. (*See* Appx14-15.) The Government showed that, contrary to section 7422(a)'s mandate, the Browns had not duly filed their administrative refund claims for 2015 and 2017 because they had not personally signed and verified their amended returns under penalties of perjury or properly authorized an agent to execute their claims. (Appx110-111, Appx116-122.)

In their response, the Browns agreed that section 7422(a)'s "duly filed" requirement is jurisdictional. (Appx356, Appx360, Appx363.) They admitted that they "did not personally sign" their amended returns or "attach IRS Form 2848, power of attorney to [their amended returns]." (Appx368, ¶¶ 7-9; Appx371, ¶¶ 7-9; *see also* Appx360-361.) And they confessed that Mr. Castro had signed their amended returns for them, even though they had not "executed a power of attorney authorizing such signature and attached it to the amended returns." (Appx361.)

Foreign Earned Income Exclusion by disputing the validity of their 2014 closing agreement.

The Browns nonetheless argued that the IRS had waived the taxpayer signature and verification requirements by processing their refund claims, despite their defects. (Appx361.) They contended that these requirements are mere regulatory conditions, which the Supreme Court has deemed waivable. (Appx357-363 (discussing *Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945)).) According to the Browns, they satisfied section 7422(a) by filing what amounted to informal refund claims, which the trial court had jurisdiction to review. (Appx363-365.)

In reply, the Government showed that *Angelus Milling*'s waiver doctrine does not apply here because statutes require taxpayers to sign and verify their own refund claims. (Appx384, Appx387-392.) The Government also showed that the doctrine, when it applies, does not extend to the regulations about taxpayer signature and verification. (Appx385, Appx392-396.) And the Government showed that, if waiver were available, the IRS did not unmistakably dispense with the signature and verification requirements in the Browns' case. (Appx385, Appx396-403.)

4. The Court of Federal Claims dismisses the Browns' suit for lack of jurisdiction

After a hearing on the Government's motion (*see* Appx4), the trial court agreed with the Government and dismissed the Browns' suit for lack of subject-matter jurisdiction. (Appx2, Appx8.) The court held that section 7422(a)'s "duly filed" requirement is jurisdictional. (Appx5 (citing *Waltner v. United States*, 679 F.3d 1329, 1333 (Fed. Cir. 2012)).) The court also held that a refund claim is not duly filed unless it is either (i) "verified by a written declaration that it is made under the penalties of perjury" (Appx5 (quoting Treas. Reg. § 301.6402-2(b)(1)), or else (ii) "certifie[d]" by the taxpayer's "legal representative" under a "valid power of attorney" attached to the claim. (Appx5 (internal quotation marks omitted) (discussing Treas. Reg. § 301.6402-2(e)).) The court found that the Browns' claims met neither requirement. (Appx5.)

The trial court also rejected the Browns' waiver argument. (Appx5-8.) The court held that *Angelus Milling*'s waiver doctrine does not apply to statutory requirements and that several statutes require individual taxpayers to sign and verify their own refund claims. (Appx6-7.) The court emphasized that permitting taxpayers to submit improperly executed claims would limit the IRS's ability "to enforce

directly against a rogue taxpayer." (Appx8 (internal quotation marks omitted).) And given its other holdings, the court did not address "whether the elements of waiver ha[d] been met," even if the doctrine did apply. (Appx8.)

SUMMARY OF ARGUMENT

1. Without a valid power of attorney, an income tax refund claim that is signed and verified by a taxpayer's agent is invalid. *See* I.R.C. §§ 6012(a), 6061(a), 6065; Treas. Reg. §§ 1.6012-1(a)(5), 1.6061-1(a), 301.6402-2(e). The Browns' refund claims admittedly violated the taxpayer signature and verification requirements. Consequently, the Browns' refund claims were not "duly filed" with the IRS before the Browns sued. I.R.C. § 7422(a).

2. The IRS had no authority to waive the taxpayer signature and verification requirements, and it did not purport to waive them here. The Browns invoke a judge-made waiver doctrine that does not apply to statutory commands, *see Angelus Milling*, 325 U.S. at 297, yet they ignore that statutes imposed the signature and verification requirements involved here. The Browns then strain to apply the waiver doctrine to the regulations implementing these statutory

requirements—an effort that is inapt, unprecedented, and antithetical to good tax administration. Regardless, the waiver doctrine would not save the Browns' case even if it applied here: The Browns have utterly failed to show that the IRS knew about the defects in their refund claims and then decided to excuse those defects.

3. The Browns, supported by an *amicus*, now second-guess whether section 7422(a) prescribes a jurisdictional requirement. The trial court correctly agreed with the Government (and the Browns below) that section 7422(a) is a jurisdictional statute, but it does not matter in this case how the statute is characterized. Either way, the Browns did not "duly file[]" their refund claims before suing. The Government timely asserted its objection, and the trial court's alleged error in dismissing on jurisdictional grounds was harmless. So, even if the Browns and their *amicus* were right about section 7422(a), this Court may simply convert the trial court's dismissal under RCFC 12(b)(1) into a dismissal under RCFC 12(b)(6) and then affirm for the reasons above. The Court should therefore decline to reexamine its longstanding precedent treating the requirements of section 7422(a) as jurisdictional.

ARGUMENT

The trial court correctly dismissed the Browns' refund suit because they did not "duly file" their refund claims before suing

Standard of review

The Court reviews *de novo* whether the trial court had subject-matter jurisdiction over a tax refund suit. *See Waltner*, 679 F.3d at 1333. Although the Court is generally "obligated to assume all factual allegations [in the complaint] to be true and to draw all reasonable inferences in [a] plaintiff's favor," *Meidinger*, 989 F.3d at 1356 (internal quotation marks omitted), the Court may "review evidence extrinsic to the pleadings" when jurisdictional facts are disputed. *Cedars-Sinai Med. Ctr.*, 11 F.3d at 1584.

A. The Browns did not duly file their refund claims because they did not properly sign and verify them

Under I.R.C. § 7422(a), no tax refund suit or proceeding "shall be maintained in any court . . . until a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." The Browns concede that individual taxpayers must personally sign and verify their administrative refund

claims or else supply a valid power of attorney authorizing their agent's signature. (Br. 7-8.) *See* I.R.C. §§ 6012(a), 6061(a), 6065; Treas. Reg. § 301.6402-2(e). The Browns also admit that they neither signed their refund claims nor tendered powers of attorney to permit their tax preparer to sign the claims for them. (Br. 4.) That should be the end of the matter. As the trial court correctly held, the defects in the Browns' refund claims meant that they were not "duly filed" with the IRS. (Appx8 (quoting I.R.C. § 7422(a).)

The Browns nonetheless insist that their case must survive dismissal because the IRS did not reject their refund claims as defective. They are wrong for several reasons. *First*, the taxpayer signature and verification requirements derive from statutes and thus cannot be waived. *Second*, the Browns rely on a narrow waiver doctrine that does not extend to the regulations implementing these statutory requirements. *Third*, even if waiver were available, the Browns have not made a clear, unmistakable showing that the IRS knowingly waived their claims' defects.

At base, the Browns' theory distorts the plain language of several statutes; relies on inapposite caselaw; strips relevant caselaw of its

essential context; and ignores the record evidence concerning the execution and processing of their refund claims. The Court should therefore reject their theory.

1. The IRS may sometimes waive regulatory requirements but never statutory ones

The Supreme Court has held that the IRS may "choose[] not to stand on [its] own formal or detailed [regulatory] requirements" and "investigate[] the merits of a claim and take[] action upon it." *Angelus Milling*, 325 U.S. at 297. Congress, after all, "has given the Treasury . . . rule-making power for self-protection and not for self-imprisonment[.]" *Id.* Because "Treasury Regulations are calculated to avoid dilatory, careless, and wasteful fiscal administration by barring incomplete or confusing claims," mere "technical objections" should not generally "preclude considerations of fairness" in tax administration. *Id.*

In *Angelus Milling*, for instance, the taxpayer company sought a refund of an agricultural tax but "failed to give the information required by the form and the regulations." 325 U.S. at 295. The IRS disallowed the claim on its merits, despite its technical defects. *See id.* Later, however, the IRS persuaded the Tax Court to dismiss the company's

refund suit because the administrative refund claim had deviated from certain regulatory requirements. *See id.* at 296. The Supreme Court ultimately affirmed the dismissal of the refund suit, but only because the company had "failed to sustain [its] burden of showing that the Commissioner . . . [had] dispensed with the exactions of the regulations" by "determin[ing] the merits" of the administrative claim. *Id.* at 299; *see also id.* at 298.[6]

Yet the Court reaffirmed in *Angelus Milling* that the IRS cannot waive "explicit statutory requirements[.]" 325 U.S. at 296 (citations omitted). Congressional mandates, unlike regulations, "must be observed and are beyond the dispensing power of Treasury officials." *Id.*; *see, e.g.*, *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533 (1938) ("The [waiver] argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury Regulations."); *Diebold, Inc. v. United States*, 891 F.2d 1579, 1584 (Fed. Cir. 1989) (finding it "dubious" that

[6] The Seventh Circuit has since questioned whether intervening developments in administrative law have eroded *Angelus Milling*'s regulatory waiver doctrine. *See BCS Fin. Corp. v. United States*, 118 F.3d 522, 525-26 (7th Cir. 1997).

the IRS had implicitly waived "the technical requirement of filing a Form 3115" because a statute expressly required the Commissioner's advanced consent (citing *Angelus Milling*, 325 U.S. at 296)); *see also U.S. Pipe & Foundry Co. v. United States*, 155 F. Supp. 231, 233 (Ct. Cl. 1957) ("[T]he Commissioner does not have the authority to waive statutory impositions."); *Melchior v. United States*, 145 F. Supp. 193, 194 (Ct. Cl. 1956) (holding that a statutory "defect" in the taxpayers' refund claim was "not cured by the fact that the Commissioner considered [their] claim on the merits" and was not "subject to a waiver on the part of the Commissioner").

2. Because statutes require individual taxpayers to sign and verify their refund claims, the IRS cannot waive those requirements

a. By statute, individual taxpayers must generally sign and verify their own income tax refund claims. *See* pp. 4-5, *supra*. Section 6061(a) commands that "any return . . . or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary." Section 6065 similarly mandates that "any return . . . or other document required to be made under any

provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

An income tax refund claim triggers these statutory commands because it is simultaneously a "return" and a "document required to be made under . . . the internal revenue laws or regulations." An income tax refund claim must be part of "the appropriate income tax return," Treas. Reg. § 301.6402-3(a)(1), and individual taxpayers must make their own returns. *See* I.R.C. § 6012(a)(1)(A). Moreover, taxpayers seeking refunds must submit claims to the IRS, and they must do so in writing. *See* I.R.C. § 6511(a) ("Claim for credit or refund . . . shall be *filed*" (emphasis added)); *id.* § 7422(a) ("duly *filed*" (emphasis added)); Treas. Reg. § 301.6402-2(a)-(b); *Disabled Am. Veterans v. United States*, 650 F.2d 1178, 1180 (Ct. Cl. 1981) (per curiam) (reaffirming that only "a definite instrument," and not "an oral claim," will "meet the statutory requirements").[7]

[7] Non-income tax refund claims generally do not take the form of a return, but they must still be filed in writing. *See* Treas. Reg. § 301.6402-2(c); IRS Form 843 (Aug. 2011) ("Claim for Refund and Request for Abatement"), *available at* https://www.irs.gov/pub/irs-pdf/f843.pdf [https://perma.cc/7WRM-JQL3].

Sections 6061(a) and 6065 thus impose a default rule that individual taxpayers must personally sign and verify their income tax refund claims. Otherwise, the documents are invalid. *See Diamond v. United States*, 107 Fed. Cl. 702, 705 (2012) ("[T]o constitute a valid claim for refund, . . . the taxpayer must execute the return by signing it under penalty of perjury."), *aff'd on other grounds*, 530 F. App'x 943 (Fed. Cir. 2013) (per curiam); *accord Selgas v. Commissioner*, 475 F.3d 697, 700-01 (5th Cir. 2007) ("[T]he fact that [the returns] were unsigned deprives them of legal effect." (applying I.R.C. §§ 6061(a) & 6065)); *Olpin v. Commissioner*, 270 F.3d 1297, 1300 (10th Cir. 2001) ("The general rule when a tax return is unsigned is that it is invalid." (applying I.R.C. §§ 6061(a) & 6065)); *Mohamed v. Commissioner*, 106 T.C.M. 537, 2013 WL 5988943, at *5 (Nov. 12, 2013) (similar).[8]

To be sure, section 6061(a) gives the Secretary of the Treasury the authority to prescribe *how* individual taxpayers may satisfy the statute's signature requirement. Section 6065 also gives the Secretary

[8] The statutes concerning joint returns confirm this default rule, inasmuch as they sometimes allow one spouse to avoid joint and several liability for unpaid taxes despite having "*sign*[*ed*] the return[.]" I.R.C. § 6015(b)(1)(C), (b)(2) (emphasis added); *see also id.* § 6015(c)(4).

discretion to suspend the verification requirement in classes of cases. *See* I.R.C. § 6065 ("Except as otherwise *provided* by the Secretary" (emphasis added)). But these statutes' implementing regulations echo the statutory default rule. *See* pp. 4-5, *supra*. They presumptively require individual taxpayers to execute their own refund claims and returns. *See* Treas. Reg. §§ 1.6012-1(a)(5), 301.6402-2(e). And, by regulation, the person who signs a return or other document must also verify it. *See id.* § 1.6065-1(a).

Although the implementing regulations sometimes allow taxpayers to designate an agent to sign their refund claims and returns, those regulatory exceptions are narrow, *see* Treas. Reg. §§ 1.6061-1(a), 1.6012-1(a)(5), 301.6402-2(e), and they do not *erase* the statutory default rule. The Secretary may prescribe how a taxpayer must sign and verify his refund claim, but that latitude does not transform the statutes' requirements into regulatory ones. Simply put, a taxpayer must satisfy the statutory default rule or else comply strictly with the implementing regulations. If he does neither, the document is effectively unsigned and unverified under sections 6061(a) and 6065, and the taxpayer has not "duly filed" the refund claim. I.R.C. § 7422(a).

b. The Court of Federal Claims has consistently held that the taxpayer signature and verification requirements are statutory and must be met to satisfy section 7422(a). In *Dixon v. United States*, for instance, the taxpayer's "amended returns were signed illegibly by Mr. Castro" and did not append a power of attorney. 147 Fed. Cl. 469, 472-73 (2020) (Hertling, J.), *appeal dismissed*, 2020 WL 8918515, at *1 (Fed. Cir. Sept. 21, 2020). The court therefore dismissed the taxpayer's refund suit because "[he] did not sign, and thus did not duly file, his 2013 and 2014 amended returns." 147 Fed. Cl. at 474. The court explained that "[t]he statutes at issue, 26 U.S.C. §§ 6011, 6061, 6065, 6402, and 7422, *require* . . . the taxpayer personally to sign every return or other document required to be filed with the IRS, unless a regulation allows otherwise." *Id.* at 476. And while the court recognized that the regulations "allow[] either the taxpayer or his or her representative, with a power of attorney, to sign a tax return," *id.* at 477, neither of the refund claims in *Dixon* "was accompanied by a power of attorney." *Id.* at 475.

Similarly, in *Gregory v. United States*, the court agreed that the taxpayers had not "'duly filed'" their income tax refund claim. 149 Fed.

Cl. 719, 724 (2020) (Tapp, J.). The court concluded that the taxpayers' amended return "did not contain a valid signature," *id.* at 725, because it had been "signed by . . . a tax preparer associated with Castro" and "was not accompanied by a Form 2848 authorizing [her] to sign amended returns on [their] behalf." *Id.* at 721. The court emphasized that "[t]he taxpayer signature requirement is statutory," thereby rejecting the taxpayers' view that "the . . . requirement is regulatory[.]" *Id.* at 724.

And in both *Quattrini v. United States* and *Mattson v. United States*, the court held that the taxpayers had "not 'duly filed' their tax refund claims" because they "ha[d] not complied with the signature verification requirement set forth in I.R.C. Sections 6061 and 6065, by either signing the tax returns . . . or providing a valid power of attorney[.]" *Quattrini v. United States*, 152 Fed. Cl. 759, 766 (2021) (Griggsby, J.) (quoting I.R.C. § 7422(a)), *reconsideration denied*, May 18, 2021; *accord Mattson v. United States*, No. 19-1113T, 2021 WL 1422819, at *8 (Fed. Cl. Apr. 15, 2021) (Griggsby, J.) (similar). In both cases, "an employee of Castro & Co. . . . [had] signed the amended tax returns on plaintiffs' behalf," and the taxpayers "did not include a power of

attorney authorizing [him or anyone else] . . . to sign their amended tax returns." *Quattrini*, 152 Fed. Cl. at 761; *accord Mattson*, 2021 WL 1422819, at *2; *see also Mills v. United States*, --- Fed. Cl. ----, No. 20-417T, 2021 WL 2944920, at *7 (Fed. Cl. July 14, 2021) (holding that the taxpayer's improperly signed refund claims did "not meet the requirement that his returns be signed" under section 6061(a) and also "verified" under section 6065 (internal quotation marks omitted)).[9]

c. Because the taxpayer signature and verification requirements derive from statute, the IRS cannot waive those requirements, *see Angelus Milling*, 325 U.S. at 296, and the IRS has no power to accept improperly executed refund claims. The Court of Federal Claims has reached this conclusion too, rejecting contrary arguments like the Browns'.

[9] In several other refund suits, including some still pending in the Court of Federal Claims, the Government has sought dismissal because the taxpayers' amended returns were improperly signed by Mr. Castro or one of his associates. *See, e.g.*, *Clark v. United States*, 149 Fed. Cl. 409, 411 (2020); *Hall v. United States*, 148 Fed. Cl. 371, 377 (2020); (Fed. Cl.); *Murray v. United States*, No. 19-1638T (Fed. Cl.); *see also Mills*, 2021 WL 2944920, at *2 (the taxpayer's first amended returns were improperly signed by a Castro associate, while the second amended returns were improperly signed electronically by the taxpayer).

In *Gregory*, for example, the court held that "[t]he taxpayer signature requirement is statutory in nature and thus the waiver doctrine is inapplicable." 149 Fed. Cl. at 724. The *Quattrini* court likewise held that "[t]he signature verification requirement is . . . a non-waivable statutory requirement," 152 Fed. Cl. at 765, as did the *Mattson* court. *See* 2021 WL 1422819, at *7. So, the trial court's conclusion here—"that the taxpayer signature requirement is statutory and, therefore, cannot be waived" (Appx7)—was no anomaly. And for the reasons above, its conclusion is sound.

Yes, in a handful of cases, the Court of Federal Claims has presumed that the waiver doctrine can apply to non-conforming refund claims. (*See* Br. 17-18 (discussing *Dixon*, *Hall*, *Clark*, and *Blue v. United States*, 108 Fed. Cl. 61, 69 (2012)).) But as the trial court correctly observed here, "the *applicability* of the doctrine of waiver was not before the Court in any of [those] cases." Appx7 n.5 (emphasis added). Because those decisions never grappled with the question, they offer no answers to it.[10]

[10] The opinions in *Hall*, *Clark*, and *Blue* did not mention sections 6061(a) and 6065, and the trial court in *Dixon* considered these (continued…)

d. Despite the plain language of sections 6061(a) and 6065, the Browns now contend that the IRS has *statutory* authority to "waive [the] signature requirement" altogether. (Br. 13; *see also id.* at 9-19.) The Browns did not raise this argument below (*see* Appx353-366) and cannot raise it for the first time on appeal. *See Cal. Ridge Wind Energy LLC v. United States*, 959 F.3d 1345, 1351 (Fed. Cir. 2020). In any event, their new theory fails for at least three reasons.

First, the Browns erroneously rely on a subsection of section 6061 dealing with electronic signatures, I.R.C. § 6061(b). (Br. 12-13.) Section 6061(b) provides that the Secretary "shall develop procedures for the acceptance of signatures in digital or other electronic form." The statute further provides that, "[u]ntil such time as such procedures are in place," the Secretary may "waive the requirement of a signature for . . . a particular type or class of return . . . or other document," or "[p]rovide for alternative methods of signing or subscribing" such

---

statutes when assessing the *validity* of the implementing regulation, Treas. Reg. § 301.6402-2. *See* 147 Fed. Cl. at 476-77. The Government made the statutory argument on appeal in *Dixon*, *see* Br. for Appellee at 20-25, *Dixon v. United States*, No. 20-1584 (Fed. Cir. June 29, 2020), but the taxpayer voluntarily dismissed his appeal shortly after the Government filed its brief.

documents. I.R.C. § 6061(b)(1). Far from supporting the Browns' theory, section 6061(b) belies it.

For starters, the Browns treat section 6061's narrow exception as though it were a general rule. It is not. Section 6061 articulates the general rule, expressed in subsection (a), and then provides a separate exception (subject to conditions) in subsection (b). When, as here, "Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended." *Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004). Because Congress has textually differentiated the statute's exception from its general rule, section 6061(b) cannot manifest a sprawling waiver "ideology" that applies to cases that fall outside subsection (b). (Br. 12; *see also id.* at 13.).

Indeed, section 6061(b)'s very existence confirms "the nondiscretionary nature of the signature requirement" under section 6061(a). *Mohamed*, 2013 WL 5988943, at *5 n.3. If the IRS had the power to waive the signature requirement under section 6061(a), then subsection (b)'s "express grant of [waiver] authority" would be "superfluous." *Id.* The Browns' reading of section 6061 thus defies the

rule that a statute should be read to avoid rendering superfluous any of its provisions. *See Bank of Am. Corp. v. United States*, 964 F.3d 1099, 1106 n.5 (Fed. Cir. 2020).

In any event, section 6061(b)'s waiver authority does not apply here. When that exceptional authority is available, it must be applied to "particular *type*[*s*] or *class*[*es*]" of returns and other required documents that are filed *electronically*. I.R.C. § 6061(b)(1)(A) (emphases added). Waiver authority under subsection (b) cannot be wielded *ad hoc* as to individual returns or claims, and it never applies to paper-filed documents (like the Browns' amended returns).[11] It is thus irrelevant how courts have dealt with electronically filed returns. (*See* Br. 15 (discussing *Ballantyne v. Commissioner*, 99 T.C.M. 1523, 2010 WL 2342416 (June 10, 2010))). *See also Olpin*, 270 F.3d at 1300 ("Because the [taxpayers] did not file electronically, the Code exception for electronically filed returns does not apply in this case.").

Second, the Browns infer sweeping waiver authority under section 6061(a) because the statutes governing corporate and

[11] The IRS did not allow individual taxpayers to file amended returns electronically until late 2020. *See* IR-2020-182, 2020 WL 4754999 (Aug. 17, 2020); *see also Mills*, 2021 WL 2944920, at *5 n.7.

partnership returns, I.R.C. §§ 6062, 6063, supposedly do "not allow the Secretary to issue regulations governing the manner of [signing]" those returns. (Br. 11.) That notion is simultaneously wrong and beside the point. All three statutes mandate signatures for returns and other compulsory documents; consequently, the IRS cannot waive any of these requirements. And while section 6061(a) alone mentions implementing forms and regulations, the power to implement all three signature requirements derives from a separate statute altogether. *See* I.R.C. § 7805(a) ("[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title[.]"); *Balestra v. United States*, 803 F.3d 1363, 1368 n.1 (Fed. Cir. 2015). The Secretary has exercised this rulemaking power to adopt forms and to promulgate regulations for all three contexts. *See, e.g.*, Treas. Reg. §§ 1.6061-1 to 1.6063-1, 301.6061-1 to 301.6063-1; *see generally* IRS Forms 1040, 1065, 1120.

The Browns wrongly rely on *Miller v. Commissioner*, 237 F.2d 830 (5th Cir. 1956), to "confirm[]" their second "rationale[.]" (Br. 11; *see also id.* at 14-15.) That case did not concern the meaning or scope of section 6061(a). In fact, Congress did not enact section 6061 until 1954,

years after the taxpayer in *Miller* had filed his disputed returns. *See Miller*, 237 F.2d at 835 & n.3 (interpreting 26 U.S.C. § 51(a) (1939)).[12] *Miller* also did not address the IRS's authority to waive a statutory signature requirement. Rather, the Commissioner in *Miller* had sought to enforce a signature-related *regulation*, which the Fifth Circuit ultimately found invalid. *See Miller*, 237 F.2d at 836-37; *cf. Brafman v. United States*, 384 F.2d 863, 868 (5th Cir. 1967) ("[C]ourts have not hesitated to enforce strictly the *Code* requirement that a taxpayer's returns must be signed to be effective." (emphasis added)).

Finally, the Browns draw meaningless comparisons between cases involving invalid signatures (like this one) and cases involving unsigned returns. (*See* Br. 16-17 (discussing *Olpin*, 270 F.3d at 1299-1300, and *Doll v. Commissioner*, 24 T.C.M. 995, 1965 WL 977 (July 14, 1965), *aff'd*, 358 F.2d 713 (3d Cir. 1966)).) None of the Browns' cited cases holds that an invalid signature can satisfy section 6061(a). Rather, they confirm that "*statutes* require that an individual return shall be

[12] Moreover, former section 51(a) prescribed only the making and verification of returns and thus was the predecessor to what are now sections 6012 and 6065—not section 6061(a). *See* Internal Revenue Code of 1954, 68A Stat. 1, 932 (1954) (linking former section 51(a) to sections "6001, 6012(a), 6065(b)").

signed by the taxpayer." *Doll*, 1965 WL 977, at *1 (emphasis added); *accord Olpin*, 270 F.3d at 1300.

3. The waiver doctrine does not apply to the Treasury regulations implementing the taxpayer signature and verification requirements

Even if the taxpayer signature and verification requirements were strictly "regulatory provisions," the Browns wrongly presume that *Angelus Milling* "waiver applies to [this] case." (Br. 19.) Decisions applying *Angelus Milling* have generally confined its waiver doctrine to the regulatory requirement that refund claims "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." *Computervision Corp. v. United States*, 445 F.3d 1355, 1365 (Fed. Cir. 2006) (quoting Treas. Reg. § 301.6402-2(b)(1)). Because this case does not involve the regulation's specificity requirement, *Angelus Milling*'s waiver doctrine does not apply.

a. *Angelus Milling* hinged on the taxpayer's "fail[ure] to give the information required by the form and regulations[.]" 325 U.S. at 295. "The applicable regulations provide[d] for the making of claims on prescribed forms, presentation of the grounds urged, and submission

of evidence," *id.* at 294, but "[t]he only information furnished in the[] claims [was] the name and address of the joint claimants, and a statement of the dates and amounts of the [disputed] tax payments[.]" *Id.* at 294 n.2. The Supreme Court thus examined whether "the Commissioner [had] understood the specific claim that was made even though there was a departure from form in its submission." *Id.* at 297-98.

This Court has since described *Angelus Milling*'s waiver doctrine as preserving a "timely formal claim [that] fails to include the specific claim for relief," so long as "the IRS considers that specific claim within the limitations period." *Computervision*, 445 F.3d at 1365; *see also Sicanoff Vegetable Oil Corp. v. United States*, 181 F. Supp. 265, 268 (Ct. Cl. 1960) ("[T]here might be a waiver by the Commissioner of a lack of specificity in a claim for refund, if he considered the claim on its merits." (citation omitted)). And consistent with this view, other courts of appeals have applied *Angelus Milling* in cases focused on the "specificity requirement[.]" *Harper v. United States*, 847 F. App'x 408, 410 (9th Cir. 2021); *accord Nick's Cigarette City, Inc. v. United States*, 531 F.3d 516, 521 (7th Cir. 2008); *Angle v. United States*, 996 F.2d 252,

255 (10th Cir. 1993); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 864 (4th Cir. 1990); *First Nat'l Bank of Fayetteville, Ark. v. United States*, 727 F.2d 741, 745 (8th Cir. 1984); *Mallette Bros. Constr. Co. v. United States*, 695 F.2d 145, 155 (5th Cir. 1983); *Dale Distrib. Co. v. Commissioner*, 269 F.2d 444, 445-48 (2d Cir. 1959); *United States v. E.L. Bruce Co.*, 180 F.2d 846, 849-50 (6th Cir. 1950).

b. The Browns do not cite a single appellate decision where a court has applied *Angelus Milling*'s waiver doctrine to a taxpayer signature or verification requirement. And, indeed, at least one court of appeals has refused to do just that.

In *Turks Head Club v. Broderick*, 166 F.2d 877 (1st Cir. 1948), a (now defunct) regulation required taxpayers to file their own refund claims or else provide "[a] power of attorney executed by each person in whose behalf the claim [was] filed[.]" *Id.* at 881 n.2 (internal quotation marks omitted).[13] Flouting this requirement, a private social club sought refunds of certain taxes on behalf of its members without submitting "powers of attorney in the form prescribed by the

[13] This regulation was promulgated in 1941, before Congress had enacted section 6061(a). *See Turks Head Club*, 166 F.2d at 881.

regulation." *Id.* at 881. The IRS denied the refund claim and, in the refund suit that followed, the club argued that the IRS had "'waived' the [power of attorney] requirement . . . by examining and rejecting the claim on the merits, without objecting on the score of the club's failure to file the powers of attorney." *Id.* at 882. The First Circuit disagreed:

> [W]e do not see how the Commissioner's action in rejecting the club's refund claim on the merits can have the effect of waiving the requirement, necessary for the government's protection, that the club must furnish proof of its agency to represent the members and collect the refund on their behalf. This is not the kind of formal defect in refund claims with respect to which the cases have recognized the possibility of a waiver by the Commissioner.

Id. So, despite *Angelus Milling*, the First Circuit held that the club had not "duly filed" its refund claim under the predecessor to section 7422(a) because the club had defied the regulation. The trial court here thus properly relied on *Turks Head Club* to reject the Browns' waiver argument. (Appx7.) *Accord Mattson*, 2021 WL 1422819, at *4, *8; *Quattrini*, 152 Fed. Cl. at 763, 766.

The Browns now urge this Court to reject *Turks Head Club* simply because the plaintiff in that case "was trying to collect a refund on behalf of the taxpayers." (Br. 16.) That is functionally no different from

what happened here.[14] It also misses the point: The Browns, like the social club in *Turks Head Club*, seek to expand the waiver doctrine far beyond the specificity requirement that spurred the doctrine over 75 years ago (and that has driven the doctrine's application ever since).

c. Finally, the Browns offer no good reason why *Angelus Milling*'s waiver doctrine should ever apply to the taxpayer signature and verification requirements. "The central purpose of the waiver doctrine is to prevent IRS agents from lulling taxpayers into missing the [limitations] deadline" whenever the IRS has determined an otherwise defective refund claim. *Computervision*, 445 F.3d at 1366-67 (internal quotation marks omitted). But, contrary to the Browns' assertion (Br. 22-25), that purpose is not implicated when taxpayers improperly execute their refund claims.

While the sufficiency of a refund claim may not always be apparent to a taxpayer, and can vary depending on the "peculiar set of

---

[14] If the IRS had allowed the Browns' refund claims, it would have mailed paper checks to Mr. Castro rather than deposit the Browns' funds directly into their bank account (as they had requested in their original returns). (*Compare* Appx127 (box 76), *and* Appx159 (box 76), *with* Appx246-247 ("Home address" box and box 76), *and* Appx300-301 ("Home address" box and box 76); *see also* Appx240, Appx342 (change-of-address forms).)

facts" in a given case, *Kuehn v. United* States, 480 F.2d 1319, 1320 (Ct. Cl. 1973), there are no gray areas when it comes to the taxpayer's signature and verification. An individual taxpayer either signs the form himself, in the appropriate box and under penalties of perjury, or he does not. *Cf. Olpin*, 270 F.3d at 1301 (observing that Form 1040's signature field is unambiguous "on its face"). And the taxpayer—not the IRS—is in the best position to know whether he has personally signed and verified his document or if someone else has done it. The IRS does not lull taxpayers into violating these requirements by determining a refund claim *after* it has been improperly executed. *Cf. Doll*, 1965 WL 977, at *1 (rejecting the taxpayers' "complaint that the [IRS] could have informed them of the failure to sign and could have requested their signatures [within the limitations period]").

Moreover, extending the waiver doctrine to the signature and verification requirements would frustrate tax administration. As the First Circuit explained in *Turks Head Club*, requiring taxpayers to execute their own refund claims or else provide a valid power of attorney "is designed to obviate the payment by the government of a refund to a person not the taxpayer without satisfactory written

evidence of the [claimant's] authority . . . to receive payment on behalf of those entitled" and to avoid "double liability[.]" 166 F.2d at 881. The trial court here also rightly worried that allowing waiver of the signature and verification requirements could hobble the IRS's enforcement efforts. (Appx8.)

By signing a return or other compulsory document under the penalties of perjury, "the taxpayer attests to the accuracy of [his] reported data." *United States v. Davis*, 603 F.3d 303, 306 (5th Cir. 2010). "Without the certification, the IRS cannot assess the substantial correctness of [the taxpayer's] self-assessment." *Id.* (internal quotation marks omitted); *accord Hettig v. United States*, 845 F.2d 794, 795 (8th Cir. 1988). And the "requirement that taxpayers sign under penalties of perjury enables the IRS to enforce directly against a rogue taxpayer." (Appx8 (internal quotation marks omitted).)

As the trial court emphasized, "[t]he perjury charge based on a false return [is] one of the principal sanctions available to assure that honest returns are filed." (Appx8 (quoting *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985) (per curiam)).) Yet tax preparers, like Mr. Castro, will rarely face a perjury charge because they "only

have the information given to them by the taxpayer." *Dixon*, 147 Fed. Cl. at 476 n.5; *accord Gregory*, 149 Fed. Cl. at 724-25; *see also Loving v. I.R.S.*, 742 F.3d 1013, 1017 (D.C. Cir. 2014) ("[Tax preparers] cannot legally bind the taxpayer by acting on the taxpayer's behalf.").

4. Even if the IRS could have waived the taxpayer signature and verification requirements, it did not unmistakably do so here

Even if the Browns persuaded the Court to expand *Angelus Milling* in unprecedented ways, the waiver doctrine still would not save their case. The Supreme Court has warned against "unduly help[ing] disobedient refund claimants" and, to that end, requires taxpayers to make an "unmistakable" showing of waiver. *Angelus Milling*, 325 U.S. at 297. To meet their "extremely heavy burden," *Mallette Bros.*, 695 F.2d at 156, the Browns must satisfy all three of the doctrine's prongs. They do not. And because the Browns so plainly falter on prong three, the Court could affirm on that basis alone.[15]

---

[15] The trial court did not decide "whether the elements of waiver have been met" (Appx8), but the question was fully briefed below, and this Court may resolve the issue "for the first time on appeal." *Am. Bankers Ass'n v. United States*, 932 F.3d 1375, 1385 n.7 (Fed. Cir. 2019); *see also Safeguard Base Operations, LLC v. United States*, 989 F.3d 1326, 1348 (Fed. Cir. 2021) ("The court may affirm on any (continued…)

a. The waiver doctrine does not apply unless the IRS has (i) "investigated the merits of [a refund] claim," (ii) "taken action upon [the claim]," and (iii) "unmistakabl[y] . . . seen fit to dispense with [its] formal requirements" in order to "examine the merits of the claim." *Angelus Milling*, 325 U.S. at 297. "[W]aiver [cannot] be found" unless "[t]he evidence is clear[.]" *Computervision*, 445 F.3d at 1366 (quoting *Angelus Milling*, 325 U.S. at 297).

Of course, "waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege." *Hall*, 148 Fed. Cl. at 378 (emphasis in original; quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). So, at minimum, "the IRS must . . . be aware a [regulatory] violation has occurred before it can intentionally dispense with its own regulations." *Id.*; *accord Clark*, 149 Fed. Cl. at 414.

By claiming that the IRS waived the taxpayer signature and verification requirements here, the Browns must now clearly show that "the IRS knew—or even should have known at the time it [processed

---

basis supported by the record."). By focusing here on *Angelus Milling*'s third prong, the Government does not now concede that the Browns met the first two prongs, which the Government disputed below. (*See* Appx396-401.)

their claims]—that the [Browns] had not personally signed their amended forms or verified their accuracy under penalty of perjury." *Clark*, 149 Fed. Cl. at 414. The Browns do no such thing.

b. The Browns offer just one reason why the IRS supposedly knew they had not signed and verified their refund claims: the April 2019 letter from the IRS, proposing to disallow their claims, which made passing reference to the "Form 1040X or . . . *informal claim* for refund" that the IRS had received months earlier. (Br. 21 (emphasis added by the Browns; quoting Appx98).) That ambivalent statement does not reflect any official determination that the Browns had improperly executed their amended returns (and thereby filed "informal" claims). The statement merely acknowledges that the IRS had received some sort of refund claim. *See* I.R.M. § 21.5.3.2(1) (Oct. 1, 2018) (defining refund claims to comprise either "[f]ormal claims . . . submitted on amended returns" or "[i]nformal claims" submitted via "letter or other document").

Critically, the April 2019 letter suggests no reason *why* the IRS might have treated the Browns' improperly executed returns as informal refund claims. The Browns make no effort to fill that gap (*see*

Br. 21), let alone marshal clear, unmistakable proof that the IRS had recognized their claims' defects and then decided to excuse them.

c. The record sharply undercuts any notion that the IRS had knowingly and intentionally waived the signature and verification requirements here. Although the signatures on the Browns' amended returns were illegible, the IRS was "entitled to rely on the fact that *someone* had signed the return under penalty of perjury," *Hall*, 148 Fed. Cl. at 378-79, because a statute directs the IRS to presume that a "return . . . or other document was actually signed by [the taxpayer]" whenever his "named is signed to [it]." I.R.C. § 6064. "The IRS was [also] under no obligation . . . to verify that [the signatures] belonged to the [Browns]." *Clark*, 149 Fed. Cl. at 414. Nor is there record evidence that the IRS tried to do so—and rightly not.

Nothing about the Browns' refund claims even hinted that someone else had executed them or invited more scrutiny on that score. The claims included no power of attorney to "alert[] the IRS to the fact that the [Browns] had not signed [their refund claims]." *Id.*; *accord Hall*, 148 Fed. Cl. at 379. The illegibility of Mr. Castro's signature on the taxpayer signature lines effectively obscured the names being

signed. The same illegible signatures appeared on the change-of-address forms submitted with the Browns' claims (lending an air of consistency). (Appx240, Appx342.) And when prompted to provide his own signature on the paid preparer's signature line, Mr. Castro repeatedly typed his name instead. (Appx185, Appx188; Appx244, Appx247; Appx298, Appx301.) *See also* p. 7 n.3, *supra* (discussing the belated Form 2848 power of attorney (Appx345-346) that also purported to be signed by Mr. Brown). In sum, the Browns have utterly failed to show that the IRS knew about the defects in their refund claims and then decided to excuse those defects.

B. The trial court correctly dismissed the Browns' suit even if the "duly filed" requirement were not jurisdictional

1. The Browns now contend that section 7422(a)'s "duly filed" requirement is not jurisdictional and, consequently, that their admitted "failure to comply with the formal claim filing requirements cannot result in a dismissal." (Br. 25.) The Browns did not make this "alternative" (*id.*) argument in the trial court and have therefore forfeited it. *See California Ridge*, 959 F.3d at 1351. Indeed, the Browns invited the trial court's alleged error by asserting that section 7422(a) is

jurisdictional. (Appx356, Appx360, Appx363.) *See Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1259 (Fed. Cir. 2005) (discussing the invited error doctrine). And while "any party may *challenge* . . . subject matter jurisdiction at any time," *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1346 (Fed. Cir. 2008) (emphasis added), the Browns are now attempting the opposite.

2. Even if the Browns and their *amicus* were correct that section 7422(a) prescribes a mandatory claims processing rule rather than a jurisdictional requirement—and they are wrong about that, *see* pp. 47-48, *infra*—the result here would be unchanged. No matter how section 7422(a) is characterized, the Browns did not duly file their refund claims before suing, and they do not explain why their suit should have survived if section 7422(a) were not jurisdictional.

So even if "the Government should have brought its motion under RCFC 12(b)(6)," this Court "need not resolve the issue, as . . . consideration of the [appeal's] merits does not turn on whether [the Court] consider[s] the Government's motion as one filed under RCFC 12(b)(1) as opposed to RCFC 12(b)(6)." *Creative Mgmt. Servs., LLC v. United States*, 989 F.3d 955, 961 (Fed. Cir. 2021); *see, e.g.*,

Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010) (declining to remand when "nothing in the analysis of the courts below turned on the mistake, [and] a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion").

"Since the trial court reached the correct result, [any] mis-steps in . . . arriving there are harmless errors." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1376 (Fed. Cir. 1999). This Court may simply "convert the [trial] court's Rule 12(b)(1) dismissal into a Rule 12(b)(6) dismissal," given the trial court's "thorough analysis" of the undisputed facts. *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1342 (Fed. Cir. 2021); *see, e.g.*, *Walby v. United States*, 957 F.3d 1295, 1299-1301 (Fed. Cir. 2020) (affirming the trial court's dismissal of a refund claim "because [the taxpayer] did not meet the prerequisite for bringing such a claim" under section 7422(a), even if "the [trial] court likely did not lack subject matter jurisdiction over th[e] claim").

3. The Browns also surmise that the Government waived its "Section 7422(a) argument by filing an Answer" before raising the "duly filed" problem. (Br. 29.) That is incorrect. The Government timely

raised its objection, which is dispositive of the Browns' suit no matter how that objection was framed.

"[L]imitations on subject-matter jurisdiction are not waivable" and "'can be raised at any time[.]'" *St. Bernard Parish Gov't v. United States*, 916 F.3d 987, 993 (Fed. Cir. 2019) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)); *see also* RCFC 12(h)(3). Moreover, a plaintiff's "[f]ailure to state a claim upon which relief can be granted . . . may be raised" at any time up to and including "a trial." RCFC 12(h)(2)(C); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 507 (2006). When a defendant challenges the sufficiency of the complaint "after the answer," courts "routinely construe[] [the] motion . . . as [one] for judgment on the pleadings," *Clear Creek Cmty. Servs. Dist. v. United States*, 132 Fed. Cl. 223, 244 (2017), which is governed by the same legal standards as an RCFC 12(b)(6) motion. *See Cary v. United Sates*, 552 F.3d 1373, 1376 (Fed. Cir. 2009); *see also Dimare Fresh*, 808 F.3d at 1306 (explaining when the court may consider materials outside the four corners of the complaint under RCFC 12(b)(6)). This is not an appeal that hinges on a statute's jurisdictional characterization because

the statutory objection was first raised after trial. *See, e.g.*, *Arbaugh*, 546 U.S. at 508.

4. Finally, the Government maintains that the requirements of section 7422(a) are jurisdictional. The Supreme Court interpreted section 7422(a) as a jurisdictional limitation in *United States v. Dalm*, 494 U.S. 596, 609-10 (1990). The Court reaffirmed *Dalm* in *United States v. Clintwood Elkhorn Mining Company*, 553 U.S. 1, 4-5 (2008). *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (including *Dalm* in a list of cases involving statutes that serve "broader system related" goals and that are therefore jurisdictional). Those decisions remain binding unless and until the Supreme Court overturns them, "regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

Although this Court has recently expressed doubts whether section 7422(a) is a jurisdictional statute, *see Walby*, 957 F.3d at 1300-01, the Court concurrently acknowledged its own published decisions treating section 7422(a) as jurisdictional, *id.* at 1299 (citing *Stephens v. United States*, 884 F.3d 1151, 1156 (Fed. Cir. 2018)). *See also, e.g.*, *Chi.*

Milwaukee Corp. v. United States, 40 F.3d 373, 374-75 (Fed. Cir. 1994) ("Section 7422(a) thus imposes, as a jurisdictional prerequisite to a refund suit, filing a refund claim with the IRS that complies with IRS regulations."). This Court has also continued to treat the statute as jurisdictional. *See, e.g.*, *Schallmo v. United States*, 825 F. App'x 826, 828-29 (Fed. Cir. 2020). And other courts of appeals have reaffirmed that view. *See, e.g.*, *Stauffer v. I.R.S.*, 939 F.3d 1, 5-6 (1st Cir. 2019); *Schaeffler v. United* States, 889 F.3d 238, 242-43 (5th Cir. 2018); *Worldwide Equip. of TN, Inc. v. United States*, 876 F.3d 172, 175-76 (6th Cir. 2017); *Hassen v. Gov't of Virgin Islands*, 861 F.3d 108, 114 (3d Cir. 2017).

But, again, the result here would not change if section 7422(a) were deemed a non-jurisdictional statute. And because it makes no difference how the Court views the statute's "duly filed" requirement, the Court should not now revisit its longstanding precedent treating that requirement as jurisdictional. *See Sacco v. Dep't of Justice*, 317 F.3d 1384, 1386 (Fed. Cir. 2003) ("A panel of this court is bound by prior precedential decisions unless and until overturned *en banc*.").

CONCLUSION

The Court should affirm the trial court's judgment.

Respectfully submitted,

DAVID A. HUBBERT
Acting Assistant Attorney General

/s/ Isaac B. Rosenberg

BRUCE R. ELLISEN (202) 514-2929
ISAAC B. ROSENBERG (202) 514-2426
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

July 16, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 21-1721

Short Case Caption: Brown v. United States

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

☑ the filing has been prepared using a proportionally-spaced typeface and includes 9,628 words.

☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.

☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 07/16/2021

Signature: /s/ Isaac B. Rosenberg

Name: Isaac B. Rosenberg