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No. 11-139

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

HOME CONCRETE & SUPPLY, LLC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* BAUSCH & LOMB INCORPORATED IN SUPPORT OF RESPONDENTS

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae Bausch & Lomb Incorporated

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* BAUSCH & LOMB INCORPORATED IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Bausch & Lomb Incorporated ("B&L") is an eye health company. Founded in 1853, it is one of the oldest, best known, and most respected healthcare

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

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brands in the world. B&L has a substantial financial interest in the resolution of this case and a unique perspective on the potential breadth of the government's arguments.

B&L has a related case pending in the Second Circuit where the IRS seeks to assess taxes in an amount that exceeds the *combined* amount at issue in *all* of the cases cited in the government's brief involving Son-of-BOSS tax shelters. *See Wilmington Partners L.P. v. Comm'r*, No. 10-4183 (2d Cir. argued Aug. 26, 2011). While the government's brief in the present case invokes the need to combat those tax shelters, B&L's case involves neither a Son-of-BOSS transaction nor an abusive tax evasion scheme. *See Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 650 F.3d 691, 699 (D.C. Cir. 2011) (recognizing that B&L's case involves "no Son of Boss tax shelter allegation"), *petition for cert. filed* (U.S. Nov. 16, 2011) (No. 11-663); U.S. Cert. Reply at 4 (similar).

If the taxpayer prevails here, B&L will prevail in the Second Circuit. The case before the Court presents the question of whether under 26 U.S.C. § 6501(e)(1)(A) (2000) an overstatement of basis on a tax return constitutes an omission from the *taxpayer's* gross income, giving the IRS an extended six-year limitations period to assess any tax. B&L's case presents the same question under 26 U.S.C. § 6229(c)(2) (2000) with respect to partnerships, *i.e.*, whether an overstatement of basis is an omission from the *partnership's* gross income, triggering an extended six-year limitations period for an IRS assessment.

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In B&L's case, the IRS seeks to assess hundreds of millions of dollars in taxes, penalties, and interest against B&L based on an alleged $550 million overstatement of basis on a partnership's return. The IRS relies on Section 6229(c)(2) to extend the limitations period to six years because the IRS failed to assess any tax or give notice of an assessment within three years after the partnership's return was filed. Although B&L's case involves Section 6229(c)(2) and not 6501(e)(1)(A), B&L has a direct interest in the case before the Court because the IRS erroneously equates the two statutes in arguing that an overstatement of basis is an omission from gross income.

B&L's case also underscores the far-reaching and adverse implications of the government's position. The government advocates a lenient limitations period purportedly based on the need to combat "manipulati[ve]" tax evasion schemes. U.S. Br. 11-12. But B&L's case does not involve such a transaction. To the contrary, B&L's case arises from the IRS's inexplicable delay in examining the tax consequences of a series of legitimate business transactions.

B&L has a long history and informed perspective on the questions before the Court. B&L has filed *amicus* briefs in six circuits in cases involving both Sections 6501 and 6229.[2] The government has

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[2] *See Home Concrete & Supply, LLC v. United States*, 634 F.3d 249 (4th Cir. 2011); *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011), *petition for cert. filed* (U.S. Aug. 11, 2011) (No. 11-178); *Reynolds Props., L.P. v. Comm'r*, Nos. 10-72406, 10-73376 (9th Cir. argued Oct. 13, 2011); *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929 (10th Cir. 2011), *petition for cert. filed* (U.S. Nov. 7, 2011) (No. 11-582); *UTAM, Ltd. v. Comm'r*, 645

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acknowledged B&L's history with the issues before this Court. *See* U.S. Br. 29, 39. And B&L filed an *amicus* brief at the certiorari stage in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The tax liability asserted in B&L's pending case in the Second Circuit dwarfs the asserted liability in this case. Whereas this case involves an alleged $6 million overstatement of basis, Pet. App. 28a-29a, B&L's case involves an alleged *half billion* dollar overstatement of basis and, according to the government, more than that amount in taxes, penalties, and interest. Indeed, the IRS erroneously seeks to extend the limitations period to assess an amount against B&L that exceeds the *combined* amount at stake in *all* of the Son-of-BOSS tax shelter cases discussed in the government's merits brief. And B&L's case does not involve an alleged abusive tax shelter.

Although B&L's case involves the different statute of limitations under 26 U.S.C. § 6229(c)(2) (2000) and not Section 6501(e)(1)(A), the IRS erroneously equates the two statutes in seeking to expand the statute of limitations set by Congress for omissions from gross income. Accordingly, the IRS in B&L's case makes the same arguments as those presented here and similarly attempts to invoke a regulation that the IRS promulgated to overturn its losses in litigation.

F.3d 415 (D.C. Cir. 2011), *petition for cert. filed* (U.S. Dec. 14, 2011) (No. 11-747); *Intermountain*, 650 F.3d 691 (D.C. Cir. 2011); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011), *petition for cert. filed* (U.S. Aug. 5, 2011) (No. 11-163).

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B&L fully agrees with respondents that an overstatement of basis is not an omission from the taxpayer's gross income under Section 6501(e)(1)(A). *See* Resp. Br. 22-36. B&L also agrees that the IRS regulations on their face do not open settled tax years and, in any event, are invalid. *See id.* at 36-50. But regardless of the outcome under Section 6501(e)(1)(A), the statutory text, structure, and history of Section 6229(c)(2) confirm that an overstatement of basis is not an omission from a partnership's gross income.

Section 6229(c)(2) contains *exactly the same* statutory language that this Court construed in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958). *Colony* held that an overstatement of basis is not an omission from gross income within the meaning of former Section 275(c). Congress enacted Section 6229(c)(2) in 1982, nearly a quarter century after *Colony* and against the backdrop of that decision. In light of Congress's reenactment of the same statutory language, *Colony* controls the meaning of Section 6229(c)(2).

Further, Section 6229 does not contain either of the "adjacent provisions" from Section 6501(e) on which the government places all but dispositive weight to overrule *Colony* as applied to Section 6501(e)(1)(A). U.S. Br. 20-24. B&L agrees with respondents that the government's reliance on those adjacent provisions is seriously misplaced. *See* Resp. Br. 30-33, 35 n.14. But the more the government relies on the provisions, the more the government's arguments demonstrate that the taxpayer would prevail under Section 6229(c)(2). At a minimum, if the government prevails in this case, the Court's opinion should make clear that the interpretation of Section

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6501(e)(1)(A) does not control the meaning of Section 6229(c)(2).

II. The government's policy arguments with respect to both Sections 6501(e)(1)(A) and 6229(c)(2) also are fundamentally unsound. The government advocates an expansive view of the limitations period for tax assessments purportedly based on the need to combat "manipulati[ve]" "tax-avoidance schemes." U.S. Br. 11-12, 25. Limitations periods, however, "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

The general limitations periods under Sections 6501 and 6229 apply to abusive tax evasion schemes and legitimate business transactions alike. B&L's pending case reflects that the government's position could unjustifiably excuse the government's dilatory conduct for countless good faith disputes over legitimate business transactions.

In any event, in 2004 Congress amended the Tax Code and effectively gave the IRS an open-ended statute of limitations for abusive tax shelters or so-called "listed transactions." 26 U.S.C. § 6501(c)(10). The government's theory therefore would serve only to excuse the IRS's belated assessments in cases, such as B&L's, involving transactions that are not listed tax shelters. Indeed, citing B&L's case, the government at the certiorari stage advised the Court that the issues in this case can "arise in cases that do not involve Son-of-BOSS shelters or any other type of 'listed transaction.'" U.S. Cert. Reply at 4.

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ARGUMENT

I. REGARDLESS OF HOW THE COURT INTERPRETS SECTION 6501(e)(1)(A), THE TAXPAYER WOULD PREVAIL UNDER SECTION 6229(c)(2)

B&L fully agrees with respondents that under Section 6501(e)(1)(A) an alleged overstatement of basis is not an omission from the taxpayer's gross income. *See* Resp. Br. 22-36. Respondents also are correct that the regulations do not open settled tax years and in all events fly in the face of *Colony*'s holding that Congress did not intend an omission from gross income to encompass an overstatement of basis. *Id.* at 36-50. A ruling by this Court in the taxpayer's favor on either ground advanced by respondents would conclusively resolve the dispute in B&L's favor with respect to Section 6229(c)(2).

But even if the Court were to hold that the government may overrule this Court's decision in *Colony* and apply that result retroactively to closed tax years, the government would still be unjustified in extending its view under Section 6229(c)(2). The statutory text, structure, and history of Section 6229(c)(2) establish that an alleged overstatement of basis is not an omission from a *partnership's* gross income.

The IRS regulations at issue in this case erroneously equate Sections 6501(e)(1)(A) and 6229(c)(2) and assert that, under both statutes, an overstatement of basis is an omission from gross income. Treas. Reg. §§ 301.6229(c)(2)-1(a), 301.6501(e)-1(a) (2010); *see also* Temp. Treas. Reg. §§ 301.6229(c)(2)-1T(a), 301.6501(e)-1T(a) (2009). This Court thus should make clear that regardless of Section 6501(e)(1)(A),

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the taxpayer would prevail under Section 6229(c)(2). At a minimum, if the government were to prevail in this case, the Court should recognize that Section 6501(e)(1)(A) does not control the meaning of Section 6229(c)(2).

A. Sections 6501(e)(1)(A) and 6229(c)(2) Extend the Limitations Period for Tax Assessments in Different Circumstances

1. The provision at issue in this case, Section 6501(e)(1)(A), is part of a chapter in the Tax Code titled "Limitations." 26 U.S.C. ch. 66. Section 6501(a) establishes a general rule that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed." Section 6501(e)(1)(A) provides an extended six-year limitations period "[i]f the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return."

For example, if a taxpayer with $100 of gross income omits a specific receipt or item like a dividend on the taxpayer's return, Section 6501(e)(1)(A) gives the IRS six years to assess tax on the dividend only if the dividend exceeds $25, *i.e.*, 25% of the taxpayer's reported gross income. If the dividend is less than $25, Section 6501(e)(1)(A) does not apply, and Section 6501(a) gives the IRS only three years to assess any tax.

Partnerships do not pay federal income tax, but they are required to file informational returns each year reporting "partnership items"—*i.e.*, income, gains, deductions, and credits that are passed through to partners. *See* 26 U.S.C. §§ 701, 6031,

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6231(a)(3). The partners also report their respective shares of partnership items on their returns. *See* 26 U.S.C. §§ 701-704. The IRS assesses any unpaid taxes against partners, and not against the partnership.

In a subchapter titled "Tax Treatment of Partnership Items," 26 U.S.C. ch. 63, subch. C, Section 6229 sets forth a limitations period for the IRS to assess any tax attributable to a partnership item. Section 6229(a) establishes a general rule that the IRS must assess such a tax within three years after the date the partnership's return was filed or the last day for filing such return, whichever is later. Section 6229(c)(2) extends that limitations period to six years if the partnership "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in its return."

For example, if a partnership with $100 of gross income omits a partnership item on the partnership's return, Section 6229(c)(2) gives the IRS six years to assess tax attributable to that item only if the item exceeds $25. If the omitted item is less than $25, Section 6229(c)(2) does not apply, and Section 6229(a) gives the IRS only three years to assess any tax attributable to the item.

The IRS may file a timely assessment or notice attributable to a partnership item by satisfying either the general statute of limitations under Section 6501 or the alternative partnership-specific statute of limitations under Section 6229. *See Rhone-Poulenc Surfactants & Specialties L.P. v. Comm'r*, 114 T.C. 533, 541 (2000) (en banc) ("Section 6229 and Section 6501 contain alternative periods of limitation.");

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Curr-Spec Partners, L.P. v. Comm'r, 579 F.3d 391, 396-97 (5th Cir. 2009) (collecting cases).

Although both Sections 6501 and 6229 provide three- and six-year statutes of limitations, the applicable limitations period varies under each statute depending on two factors. First, the limitations period under Section 6501 commences on the date the *taxpayer's* return is filed, whereas the period under Section 6229 commences on the date the *partnership's* return is filed. Second, the extended six-year period under Section 6501 applies only if an omission exceeds 25% of the *taxpayer's* gross income, whereas the six-year period under Section 6229 applies where an omission exceeds 25% of the *partnership's* gross income.

Home Concrete and B&L's case illustrate the distinction between the two statutes of limitations. In *Home Concrete*, the alleged omission exceeds 25% of the taxpayers' gross income. The government thus has relied solely on Section 6501(e)(1)(A) and has disclaimed reliance on Section 6229. *See* Resp. Br. 19 n.6. By contrast, in B&L's case, the IRS asserts that an alleged omission on a partnership's return exceeds 25% of the partnership's gross income. The alleged omission, however, is less than 25% of the gross income of the partners, which include several B&L subsidiaries. The IRS thus relies exclusively on Section 6229(c)(2) to justify the issuance of an otherwise untimely notice outside of the three-year limitations period, and Section 6501(e)(1)(A) indisputably does not apply. *Wilmington Partners L.P. v. Comm'r*, No. 10-4183 (2d Cir. argued Aug. 26, 2011).

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2. Beyond their differences in operation, Congress enacted Sections 6501 and 6229 nearly three decades apart and with different language. Congress enacted Section 6501(e)(1)(A) in 1954 as the successor to Section 275(c) of the 1939 Code. *See Colony, Inc. v. Comm'r*, 357 U.S. 28, 37 (1958). Section 275(c) likewise provided an extended limitations period to assess tax where a taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return." 26 U.S.C. § 275(c) (1940). In *Colony*, this Court held that under Section 275(c) an overstatement of basis is not an "omission" from the taxpayer's gross income. 357 U.S. at 36.

Section 6501(e)(1)(A) carries forward the language of Section 275(c) with the addition of two sub-paragraphs on which the government now places almost dispositive weight. *See* U.S. Br. 20-24, 49-50. Subparagraph (i) specifies that, in the case of a trade or business, "gross income" does not include an offset for the cost of goods or services. Subparagraph (ii) provides that any items adequately disclosed on a return do not count in calculating "the amount omitted from gross income."

Congress enacted Section 6229(c)(2) in 1982 as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 402(a), 96 Stat. 324, 659. At all times relevant to B&L's case, Section 6229(c)(2) was identical in all material respects to Section 275(c). *Compare* 26 U.S.C. § 275(c) (1940) (extending the limitations period "[i]f the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return"), *with* 26 U.S.C. § 6229(c)(2) (2000) (extending the

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limitations period "[i]f any partnership omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in its return"). Section 6229(c)(2) did not contain either of the subparagraphs from Section 6501(e)(1)(A).[3]

In 2009 and 2010, the IRS issued temporary and final regulations providing that, outside the trade or business context, an overstatement of basis on a return is an omission from gross income. Treas. Reg. § 301.6501(e)-1(a) (2010); Temp. Treas. Reg. § 301.6501(e)-1T(a) (2009). The regulations thus have the effect of overruling *Colony*'s holding that an overstatement of basis is not an omission from gross income. To justify this result, the IRS relied heavily on Congress's addition in 1954 of Section 6501(e)(1)(A)(i), which, as described above, provides a special definition of "gross income" for sales of goods or services in the trade or business context. T.D. 9466, 2009-43 I.R.B. 551, *reprinted in* 74 Fed. Reg. 49,321 (Sept. 28, 2009); T.D. 9511, 2011-1 C.B. 455, *reprinted in* 75 Fed. Reg. 78,897 (Dec. 17, 2010).

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[3] Unless otherwise indicated, all references in this brief to Section 6229(c)(2) relate to the version of that provision before Congress in 2010 amended the statute. In 2010, Congress amended Section 6229(c)(2) to cross-reference the subparagraphs under former Section 6501(e)(1)(A) (which were renumbered as Sections 6501(e)(1)(B)(i) and (ii)). *See* Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 513(a)(2)(B), 124 Stat. 71, 112 (2010). Nothing in the history of the 2010 amendment suggests that Congress was overruling *Colony* as applied to alleged omissions from a partnership's gross income. In all events, by its own terms, the amended provision does not apply to the tax years at issue in B&L's case. *Id*.

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Although Section 6229(c)(2) contains no such subparagraph, the IRS nonetheless concluded that Sections 6501(e)(1)(A) and 6229(c)(2) have "identical meaning." 74 Fed. Reg. at 49,321. According to the preamble to the regulations, subparagraph (i) of Section 6501(e)(1)(A) "defines an omission from gross income both for purposes of section 6501 and . . . section 6229." *Id.* The IRS thus essentially cut-and-pasted subparagraph (i) from Section 6501(e)(1)(A) into the regulation interpreting Section 6229(c)(2), as if that subparagraph were part of Section 6229(c)(2), even though it is not. The regulations provide that, outside the trade or business context, an overstatement of basis is an omission from a partnership's gross income. Treas. Reg. § 301.6229(c)(2)-1(a) (2010); Temp. Treas. Reg. § 301.6229(c)(2)-1T(a) (2009).

B. *Colony* Controls the Meaning of Section 6229(c)(2)

1. As discussed, Section 6229(c)(2) is identical in all relevant respects to the limitations provision this Court interpreted in *Colony*. *See supra* pp. 11-12. Congress is presumed to be aware of this Court's precedents. *See, e.g.*, *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009); *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993); *Cannon v. Univ. of Chicago,* 441 U.S. 677, 696-97 (1979). Because Congress enacted Section 6229(c)(2) against the backdrop of *Colony*, the statute must be given the same meaning that *Colony* ascribed to former Section 275(c) in 1958.

When Congress reenacts statutory language that has been given a settled interpretation by the courts, Congress is presumed to adopt that interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). This Court has "often observed that when 'judicial interpretations have settled the meaning of an

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existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010) (alteration in original) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

Congress enacted Section 6229(c)(2) in 1982 more than two decades after *Colony* resolved the meaning of identical language in Section 275(c). Congress's reenactment of the same statutory language in 1982 after this Court conclusively resolved its meaning shows that Section 6229(c)(2) incorporates the meaning settled by *Colony*. At that time, no one—not even the IRS—had yet suggested that the Court's interpretation in *Colony* of when an overstatement of basis constitutes an omission from gross income was rendered obsolete by Congress's addition of the subparagraphs in Section 6501(e)(1)(A). Indeed, in 1976, the IRS recognized *Colony* as the "landmark" case on the meaning of Section 6501(e). I.R.S. Gen. Counsel Mem. 36,856 (Sept. 21, 1976). It is thus implausible that Congress in enacting Section 6229(c)(2) intended to depart from this Court's interpretation of the same text a quarter-century earlier in *Colony*.

Moreover, from 1982 to 2010, the critical statutory language remained untouched through substantive amendments to Section 6229 and Congress's reenactment of the Internal Revenue Code in 1986. *See* Pub. L. No. 99-514, § 1875(d)(1), 100 Stat. 2085, 2896 (1986); Pub. L. No. 100-647, § 1018(o)(3), 102 Stat. 3342, 3585 (1988); Pub. L. No. 105-34, §§ 1233, 1235(a), 111 Stat. 788, 1023-25 (1997). Thus, as in

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Colony, under Section 6229(c)(2), an overstatement of basis is not an omission from gross income.

In light of Section 6229(c)(2)'s unambiguous meaning, the IRS's 2009 and 2010 regulations purporting to assign the opposite meaning are invalid and entitled to no deference. By reenacting the precise language that *Colony* authoritatively construed and thereby adopting *Colony*'s holding, Congress in 1982 "directly addressed the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In other words, even if the meaning of Section 275(c) were somehow ambiguous when the Court first construed the language in *Colony*—and it manifestly was not, *see* Resp. Br. 36-39—the meaning of the statutory text had long been resolved by 1982 when Congress enacted Section 6229(c)(2).

2. The government's two arguments for casting aside *Colony* with respect to Section 6501(e)(1)(A) are wrong. *See* Resp. Br. 33-35. In any event, those arguments are inapplicable to Section 6229(c)(2) and only reinforce that *Colony* controls the meaning of Section 6229(c)(2).

First, the government argues that Section 6501(e)(1)(A) is not controlled by *Colony* because of two "adjacent provisions"—Sections 6501(e)(1)(A)(i) and 6501(e)(2)—that "were not part of the statutory scheme before the Court in *Colony*." U.S. Br. 20, 49. Although the government's reasoning is wrong, *see* Resp. Br. 29-36, the government's all but dispositive reliance on these adjacent provisions fatally undermines its position under Section 6229(c)(2).

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Section 6501(e)(1)(A)(i) provides that in the context of sales of "goods or services" by a "trade or business," the term "gross income" means the taxpayer's total receipts *before* deducting its costs. The government argues that, in all other contexts, gross income must mean receipts *after* deducting basis, and thus an overstatement of basis would lead to an omission from gross income. *See* U.S. Br. 20-23. As respondents explain, however, subparagraph (i) supports *Colony*'s holding, and giving effect to the *Colony* rule does not strip subparagraph (i) of independent meaning or practical significance (as the government itself acknowledges, *see* U.S. Br. 22-23).

Section 6501(e)(2), which applies to gift and estate taxes, provides an extended six-year limitations period if the taxpayer omits "items includable in such gross estate or such total gifts." The government attributes meaning to Congress's use of the word "items" in Section 6501(e)(2) versus the word "amount" in Section 6501(e)(1)(A). According to the government, an overstatement of basis understates the "amount" of gross income, even though it does not omit any "item." U.S. Br. 23-24. Again, the government's reliance on that provision is dubious. *See* Resp. Br. 35 n.14.

But the government's arguments fatally undermine its position in B&L's case because Congress enacted Section 6229(c)(2) *without* these provisions, and the legislature instead employed language identical in all relevant respects to the statute before the Court in *Colony*. If it is so significant that these provisions did not appear in the statute the Court confronted in *Colony*, then it is equally significant that they do not appear in Section 6229. In other words, the more that the government relies on Sections

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6501(e)(1)(A)(i) and 6501(e)(2) to support its interpretation of Section 6501(e)(1)(A), the more the government erodes any basis for its interpretation of Section 6229(c)(2).

The government cannot have its cake and eat it too. If *Colony* does not govern Section 6501(e)(1)(A) because Congress added these adjacent provisions, then Congress's omission of those provisions from Section 6229(c)(2) confirms that Congress intended *Colony* to control the meaning of an omission from a partnership's gross income.

Second, the government argues that *Colony* does not control the meaning of Section 6501(e)(1)(A) because the IRS was free to reinterpret the meaning of the statute by regulation. Because *Colony* observed that the language of Section 275(c) was ambiguous, the government argues that the IRS in 2009 could properly re-interpret the same language in Section 6501(e)(1)(A), which was enacted four years *before Colony*. *See* U.S. Br. 13-14. That too is incorrect. *See* Resp. Br. 36-39.

Regardless, Congress enacted Section 6229(c)(2) two decades *after Colony*. Insofar as Section 6229(c)(2) is concerned, *Colony* was clearly decided at *Chevron* step one, definitively resolving the interpretive question and removing any regulatory discretion from the IRS. Congress's enactment of Section 6229(c)(2) after *Colony* thus bars the government from relying on *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), as the government attempts to do with Section 6501(e)(1)(A). Even if the government could stretch *Brand X* in that respect for Section

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6501(e)(1)(A), *Brand X* would not help the government with respect to Section 6229(c)(2).[4]

3. In any event, the regulations' stated justifications for equating Sections 6501(e)(1)(A) and 6229(c)(2) are meritless. In the preamble to its temporary regulations, the IRS asserted that Congress presumptively intended "to give the language in section 6229, which is identical to language in section 6501, identical meaning." 74 Fed. Reg. at 49,321. As described above, however, Section 6229(c)(2) is not identical to Section 6501(e)(1)(A)—Section 6229(c)(2) at all relevant times did not contain the "adjacent provisions" (U.S. Br. 20) from Section 6501(e) on which the government now places near-dispositive weight.

The absence of such provisions thus triggers the opposite presumption that statutes with different text have different meanings. "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language. *Russello v. United States*, 464 U.S. 16, 23 (1983). "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered

[4] No court of appeals has directly addressed these distinctions between Sections 6501(e)(1)(A) and 6229(c)(2). In *Intermountain*, the taxpayer at oral argument asserted, for the first time, that "this case is not about [section] 6501 but only section 6229 given the Tax Court's observation that where, as here, the Commissioner has adjusted only partnership items, only section 6229(c)(2) applies." 650 F.3d at 699 (internal quotation marks omitted). The D.C. Circuit, however, refused to consider this argument and "treat[ed] as forfeited any argument that the two sections might have different meanings outside the trade or business context, focusing our analysis, as have the parties themselves, on the earlier enacted section 6501(e)(1)(A)." *Id.*

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simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 (1997).

Again, if the government were right that Congress's enactment of Sections 6501(e)(1)(A)(i) and 6501(e)(2) changed the meaning of the language previously codified as Section 275(c), then Congress's enactment of the identical language in Section 6229(c)(2) without those adjacent provisions removes any basis for distinguishing *Colony*. The IRS itself previously recognized that Congress "was aware of" Section 6501(e)(1)(A)'s subparagraphs when it enacted Section 6229(c)(2), yet Congress "consciously left out" those subparagraphs. I.R.S. F.S.A. 1591, 1995 FSA LEXIS 354 (May 10, 1995).

The regulations also assert that because Section 6501(e)(1)(A)(i) defines "gross income" in the trade or business context, there is no need for Congress to "redefine the same phrase" in Section 6229(c)(2). 74 Fed. Reg. at 49,321. The statutory text flatly contradicts this argument. The definition of "gross income" in Section 6501(e)(1)(A)(i) expressly applies only "[f]or purposes of *this subparagraph*," and therefore does not apply to the separate statutory provision of Section 6229(c)(2). (Emphasis added).

The regulations further cite Section 6501(n)(2), which merely states that "[f]or extension of period in the case of partnership items . . . see section 6229." 26 U.S.C. § 6501(n)(2). Nothing in that language remotely suggests that Congress incorporated subparagraphs (i) and (ii) from Section 6501(e)(1)(A) into Section 6229(c)(2). In all events, the limitations period under Section 6501(e)(1)(A) has no relevance in cases such as B&L's where the alleged omission is less than 25% of the taxpayer's gross income. In

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such cases, Section 6229 does not "extend" Section 6501(e)(1)(A), because the IRS cannot meet the 25% threshold for application of Section 6501(e)(1)(A).

The IRS, moreover, has argued that it would be incongruent to treat a transaction differently for limitations purposes "based on the happenstance of whether the transaction is reported on a partnership return rather than a partner's return." 74 Fed. Reg. at 49,321. But the IRS itself is the source of any unwarranted disparate treatment, based on its strained claim that, contrary to the holding of *Colony*, an overstatement of basis on a taxpayer's return can trigger the extended limitations period under Section 6501(e)(1)(A). If the IRS believes it is important for Sections 6501(e)(1)(A) and 6229(c)(2) to be read in harmony, the proper course is to follow *Colony* with respect to both statutes, and not to compound one error of statutory interpretation with another.

It only makes sense to say that Sections 6229(c)(2) and 6501(e)(1)(A) have the "identical meaning" if that meaning is the one that this Court recognized in *Colony*. But if, as the government contends, the addition of subparagraph (i) *changed* the meaning of the general rule set forth in Section 6501(e)(1)(A), then Congress's *omission* of subparagraph (i) in Section 6229(c)(2) must be viewed as an act of great significance when it comes to the meaning of Section 6229(c)(2). The government cannot have it both ways.

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II. THE GOVERNMENT'S POSITION WOULD APPLY TO LEGITIMATE BUSINESS TRANSACTIONS; AND IT IS UNNECESSARY TO COMBAT ABUSIVE TAX SHELTERS

The government asserts that a six-year limitations period is necessary to ferret out "Son-of-BOSS tax shelters" and other illegitimate "tax-avoidance schemes." U.S. Br. 6 n.2, 25. The government's brief mentions "Son-of-BOSS" transactions no less than a dozen times. U.S. Br. 3, 4, 5, 6, 8, 25. The IRS likewise has based its interpretation of Section 6229(c)(2) on the purported need to combat Son-of-BOSS transactions and other abusive tax shelters. 74 Fed. Reg. at 49,321. But the government's interpretation of Sections 6501 and 6229 would apply to legitimate transactions and abusive tax evasion schemes alike.

In any event, the government does not need to stretch the language of the Internal Revenue Code and overrule the half-century-old precedent of *Colony* to combat transactions the IRS deems to be abusive. Congress in 2004 added to the Code an open-ended limitations period to address such schemes. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 814(a), 118 Stat. 1418, 1581 (codified at 26 U.S.C. § 6501(c)(10)). The Court should not excuse the government from its own negligence or oversight in waiting more than three years to question an item on a tax return.

A. Limitations periods "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *accord Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 264 n.20 (1995)

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(Stevens, J., dissenting) (quoting same); *In re Becker*, 407 F.3d 89, 104 (2d Cir. 2005) (same). The government thus cannot justify its strained interpretation of the IRS limitations periods simply because having more time would help the IRS fight abusive tax shelters.

The general statutes of limitations under Sections 6501 and 6229 on their face are not restricted to illegitimate tax-avoidance schemes. Those limitations periods govern tax assessments arising from legitimate business transactions and abusive tax shelters alike. For example, B&L's case does not involve a Son-of-BOSS scheme or any other listed transaction, and the IRS has never contended otherwise. *See Intermountain*, 650 F.3d at 699 (recognizing that B&L's case involves "no Son of Boss tax shelter allegation"); U.S. Cert. Reply at 4 (similar).

Rather, B&L's dispute with the IRS concerns the proper characterization of a series of legitimate business transactions for purposes of determining a partnership's basis in a $550 million Note (and a partner's corresponding basis in its partnership interest). Nevertheless, the IRS relies on an extended limitations period to justify its untimely assessment of hundreds of millions of dollars in taxes, penalties, and interest based on those transactions.

In 1993, B&L and unrelated parties created a partnership, Wilmington Partners L.P. ("Wilmington"), as part of a business transaction to raise capital. B&L's partnership contribution included several operating businesses and a $550 million Note, made by one B&L affiliate and payable to another. On its 1993 partnership return, Wilmington took a basis of $550 million in the Note—its face amount and

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undisputed fair market value. After conducting an extensive audit of Wilmington's 1993 return, the IRS notified Wilmington in 2000 that it would make "no adjustments." Brief for the Appellant at 8, *Wilmington Partners*, No. 10-4183 (2d Cir.).

In 1999, the partners restructured Wilmington and again took a basis of $550 million in the Note on its partnership returns that year. In 2004, more than three years after Wilmington filed its 1999 returns, the IRS commenced an audit. In 2006, the IRS purported to reduce Wilmington's basis in the 1993 Note from $550 million to zero. Based on this change, the IRS has suggested that B&L owes hundreds of millions of dollars in taxes, penalties, and interest. B&L's case thus illustrates that the IRS is attempting to apply a six-year limitations period outside the context of abusive tax shelters. Indeed, citing B&L's case, the government at the certiorari stage advised this Court that the issues in this case can "arise in cases that do not involve Son-of-BOSS shelters." U.S. Cert. Reply at 4.

B. Going forward, disputes over legitimate transactions likely are the *only* types of cases that will be governed by the general statutes of limitations for tax assessments. Congress in 2004 amended Section 6501 to provide a forgiving limitations period for any assessment arising from a "listed transaction." American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 814, 118 Stat. 1418 (codified at 26 U.S.C. § 6501(c)(10)). A listed transaction is a "transaction which is the same as, or substantially similar to, a transaction specifically identified by the [IRS] as a tax avoidance transaction." 26 U.S.C. § 6707A(c)(2).

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The Code requires any taxpayer who engages in a listed transaction to make detailed disclosures to the IRS regarding the transaction. 26 U.S.C. § 6011. Under the 2004 amendment to Section 6501, "[i]f a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction . . . which is required . . . to be included with such return or statement, the time for assessment of any tax . . . with respect to such transaction shall not expire" until one year after the taxpayer makes the required disclosure. 26 U.S.C. § 6501(c)(10); *see also* Elliot Pisem & Jason K. Binder, Blak *Affirms the Necessity of Raising S/L Defenses Early in TEFRA Partnership Proceedings*, 112 J. Tax'n 222, 222 (2010) (noting that Section 6501(c)(10) can "operate to extend the period of limitations . . . indefinitely"); Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 Tax L. Rev. 539, 573-74 (2009) ("[I]n cases where a [taxpayer] does not disclose its participation in a listed transaction, the statute of limitations may never expire.").

The tolling feature of Section 6501(c)(10) permits the IRS to assess any additional tax for abusive tax shelters without resort to the extended limitations periods at issue in this case and B&L's case. And where applicable, the IRS may invoke exceptions to the general limitations periods that allow the IRS "at any time" to assess any tax stemming from a "false or fraudulent" return or "willful" evasion. 26 U.S.C. §§ 6229(c)(1), 6501(c)(1), (2).

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By contrast, in cases that do not involve any fraud or willful evasion, and where the taxpayer has disclosed the disputed item in its return, the IRS is not entitled to an open-ended limitations period to assess taxes. The government asserts that "a basis overstatement will typically be as difficult to detect as an understatement of sale price." U.S. Br. 11. But the same is true of an overstated deduction, which indisputably does not trigger an extended limitations period under Section 6501 or 6229. *See* Resp. Br. 24-25.

The government's position thus would create the very "patent incongruity" that this Court specifically avoided in *Colony*—whereby an overstatement of basis would give the IRS extra time, but an "overstated deduction" on the same return would not. *Colony*, 357 U.S. at 36. Congress could not plausibly have intended such an inconsistent approach to the limitations periods for IRS tax assessments.

C. This Court should apply to the IRS the same principle that the IRS seeks to apply to taxpayers: speak now or forever hold your peace. "From the beginning of [the nation's] history, the United States has insisted upon a prompt claim for refund as a condition of refunding taxes that have been improperly collected." Brief for United States at 16, *United States v. Brockamp*, 519 U.S. 347 (1997) (No. 95-1225). Adopting the government's position here would create a one-way-ratchet wherein taxpayers are held to rigid compliance with limitations periods, but the IRS is not.

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The government's approach would excuse the IRS from its own lethargy and failures and would deprive taxpayers of certainty and finality concerning their tax obligations arising from legitimate business transactions. As the United States has advised this Court, "[t]here is manifestly an imperative need for predictability and certainty in the processes" for resolving tax disputes. *Id.* at 25. Yet here the government makes a mockery out of that principle by promulgating regulations to upset decades of settled expectations surrounding the rule of *Colony*.

B&L's case is a particularly egregious example of the government's overreaching. There, the IRS had two separate opportunities to investigate the basis of the Note in reviewing Wilmington's 1993 and 1999 partnership returns. In 1993, the IRS conducted a timely audit and concluded that "no adjustments" were necessary. For the 1999 return, the IRS waited more than three years before even commencing an audit.

Moreover, Wilmington filed two 1999 partnership returns, and while the IRS timely obtained an extension of the limitations period for one return, it inexplicably failed to request an extension for the other, forcing the IRS to rely on an extended statute of limitations. Had the shoe been on the other foot, the IRS surely would have argued that the taxpayer was out of luck. Finality should be a two-way street.

Yet, after losing its argument in the Tax Court, the IRS took the extraordinary step of trying to extend retroactively the statute of limitations and overrule *Colony* by regulation, for purposes of both Sections 6501 and 6229. This Court should reject the government's overreaching as to respondents, B&L, and taxpayers generally.

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CONCLUSION

For the reasons explained by respondents, the Court should affirm the decision below. If the Court disagrees, however, it should make clear that its decision does not endorse the government's reading of the limitations period under Section 6229(c)(2).

Respectfully submitted,

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae
Bausch & Lomb Incorporated

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