

No. 25-12719

**In the United States Court of Appeals
for the Eleventh Circuit**

SCOTT L. SHLEIFER AND ELENA SHLEIFER,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida
No. 24-cv-80713-RLR (Hon. Robin L. Rosenberg)

**BRIEF OF AMICUS CURIAE AMERICAN COLLEGE OF TAX COUNSEL
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1(a) and 29(a)(4)(A) and 11TH CIR. R. 26.1-1, 26.1-2, and 26.1-3, the American College of Tax Counsel certifies that it does not have a parent corporation and no publicly traded corporation owns 10 percent or more of its stock.

The following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10 percent or more of the party's stock, and other identifiable legal entities related to a party that were not otherwise identified in the certificate of interested parties filed with Appellants' opening brief:

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2. Book, Leslie (Counsel for Amicus Curiae, Center for Taxpayer Rights)
3. Briggs, Melissa (Counsel for Amicus Curiae, American College of Tax Counsel)

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4. Center for Taxpayer Rights (Amicus Curiae in support of Plaintiffs-Appellants)
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The undersigned counsel is not aware of any publicly traded company or corporation that has an interest in the outcome of this case or appeal. Pursuant to 11TH CIR. R. 26.1-2(b), this certificate of interested persons supplements and incorporates the certificate of interested persons filed with Appellants' opening brief.

Dated: October 23, 2025

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The American College of Tax Counsel (“College”) respectfully submits this brief as Amicus Curiae in support of Plaintiffs-Appellants Scott L. Shleifer and Elena Shleifer (herein, “Appellants”). Pursuant to FED. R. APP. P. 29(a)(2), this brief is filed with the consent of all parties.¹

IDENTITY AND STATEMENT OF INTEREST OF AMICUS CURIAE

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in the Government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are to:

1. Foster and recognize the excellence of its members and to elevate standards in the practice and the profession of tax law;
2. Stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
3. Provide additional mechanisms for input by tax professionals in the development of tax laws and policy; and

¹ Pursuant to FED. R. APP. P. 29(a)(4)(E), counsel for Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and none of its Fellows, its counsel, or any person other than Amicus Curiae made a monetary contribution to fund the preparation or submission of this brief.

4. Facilitate scholarly discussion and examination of tax policy issues.

The College includes approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College and the last retiring President of the College.

This brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are Government employees.

This case involves an important issue concerning the appropriate scope, purpose, and application of the substantial variance doctrine. That doctrine provides that the grounds and facts relied on by taxpayers in an administrative claim for refund of overpaid taxes may not substantially vary from the grounds and facts relied upon in a later suit for refund. The District Court's decision demands that taxpayers set out their claims with greater specificity than is required by statute, regulation, or caselaw. It also ignores the fundamental principles of fairness, which are integral to the substantial variance doctrine by failing to appropriately consider the entire course of conduct during the administrative proceedings, which courts have uniformly recognized as a key factor in application of the substantial variance doctrine. The College agrees with the positions taken

by Appellants in their opening brief regarding the substantial variance doctrine and submits this brief to inform the Court of the significant adverse tax administration and policy implications of the District Court's decision. The College takes no position as to the merits of Appellants' claim for refund.

STATEMENT OF THE ISSUE

Does the substantial variance doctrine preclude the District Court from considering the merits of Appellants' tax refund suit?

SUMMARY OF THE ARGUMENT

The District Court's decision requires that taxpayers seeking refunds of taxes set out their claims with greater specificity than is required by statute, regulation, or caselaw. Here, Appellants' claim for refund contained all the essential elements required by this Court's precedent. The District Court failed to properly consider principles of fairness and the entire course of conduct during the administrative proceedings. This Court should reverse the District Court's decision to the extent it holds that Appellants' suit for refund was barred because it varied from their refund claim.

INTRODUCTION

This past filing season, more than 143 million original individual income tax returns were filed with the Internal Revenue Service (IRS), more than 93 million of

which claimed refunds of overpaid taxes.² The United States Treasury refunded \$274 billion to taxpayers, with the average taxpayer receiving about \$2,900. Those returns show only limited information, such as lines for income, total deductions, taxes paid, and taxes due. The IRS accepts and processes most of those returns, which are automatically treated as refund claims. *See* Treasury Regulation (26 C.F.R.) § 301.6402-3(a)(1).

Claims for refund may also arise when a taxpayer determines that an error was made on his or her originally filed federal income tax return and that tax was overpaid. In those situations, most taxpayers will prepare an amended return, such as Form 1040-X. A Form 1040-X requests summary information: (a) the original amount of the item; (b) the net change to the item; and (c) the correct amount. In a small box, the form requests that the taxpayer “tell us why you are filing Form 1040-X.” Amended U.S. Individual Income Tax Return, Form 1040-X (2024), Part II.³ Nowhere on the form or in the instructions is the taxpayer advised to include the detailed grounds or facts underlying the requested refund.⁴ And, while

² Filing season statistics for week ending May 9, 2025, available at <https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-may-9-2025>.

³ Available at <https://www.irs.gov/pub/irs-pdf/f1040x.pdf>.

⁴ The only guidance the IRS provides to taxpayers in the instructions is as follows:

The IRS needs to know why you are filing Form 1040-X.

For example, you:

- Received another Form W-2 after you filed your return,

audits may commonly be thought of as exercises that increase the amount of tax due, audits of tax returns also sometimes result in refunds.⁵

Sophistication of taxpayers filing federal tax refund claims spans an incredibly wide spectrum, from the high school student filing his or her first return reporting wages from an afterschool job, to the most complex multinational corporations in the world. These refund claims are all subject to the same set of rules. Therefore, it is crucial that this Court articulate a standard for refund claim sufficiency that can be applied by all taxpayers, regardless of wealth or sophistication. Here, the District Court's decision misapplies the Supreme Court's and this Court's precedent regarding the particularity required for a claim for refund and fails to consider the entire course of conduct, creating a trap for unwary taxpayers.

-
- Forgot to claim the child tax credit or the credit for other dependents,
 - Changed your filing status from qualifying surviving spouse (or, if amending a 2021 or earlier return, qualifying widow(er)) to head of household,
 - Are carrying a credit to an earlier year, or
 - Are claiming a tax benefit from recently enacted legislation for disaster relief.

Instructions for Form 1040-X at 10.

⁵ For example, in fiscal year 2024, the IRS completed 813 audits of corporate tax returns resulting in more than \$6 billion of recommended refunds. IRS Data Book, Table 20 available at <https://www.irs.gov/statistics/compliance-presence>.

ARGUMENT

I. The District Court Misapplied the Substantial Variance Doctrine by Demanding More Specificity in Tax Refund Claims Than this Court's Jurisprudence Requires

The substantial variance doctrine developed from the principle, grounded in fairness, that the United States should not be compelled to defend a suit for refund of taxes unless the taxpayer bringing suit has first filed an administrative claim for refund with the IRS. Here, the District Court misapplied the doctrine by requiring a level of specificity in refund claims beyond what is required by the statute, regulation, and caselaw. Its decision is at odds with the original purpose of the doctrine.

A. The substantial variance doctrine is a judicially-created interpretation of I.R.C. § 7422(a) and its implementing regulation

Congress requires taxpayers to first file an administrative claim for refund with the IRS before bringing suit against the United States for a refund of taxes. Specifically, in waiving the Government's sovereign immunity, Congress enacted 26 U.S.C. (Internal Revenue Code or I.R.C.) § 7422(a) which provides that:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

The plain language of the Internal Revenue Code thus requires only that a taxpayer seeking a refund must make an administrative claim within an allowed statutory

time period and that the claim be “duly filed” according to regulations promulgated by the Secretary of the Treasury. The corresponding Treasury Regulation, 26 C.F.R. § 301.6402-2(b)(1), requires that “[t]he claim must 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.” Taken together, the statute and regulation require that a taxpayer must file a timely claim for refund stating the grounds and facts supporting its claim before it may file a suit.⁶

After the filing of a claim for refund, a taxpayer may bring suit against the United States after six months if the IRS does not act on the claim within that time. Alternatively, a taxpayer may wait for the IRS to process its claim and bring suit within two years after the IRS notifies the taxpayer that it is denying the claim. *See* I.R.C. § 6532. There is no requirement that the IRS review or act on a claim

⁶ In the light of recent Supreme Court precedent, the Federal Circuit has held that the requirement that an administrative claim provide adequate facts and grounds for a requested tax refund is not jurisdictional. *Brown v. United States*, 22 F.4th 1008, 1012 (Fed. Cir. 2022) (holding that the “duly filed” requirements of an administrative claim are “claims-processing rules”). To the extent this Court is inclined to revisit its prior precedent holding that I.R.C. § 7422(a) is jurisdictional, it should also consider the Government’s conduct in this case in determining whether it waived its variance argument in the District Court. Specifically, the Government’s decision not to assert variance at the motion-to-dismiss stage (where such arguments are typically raised), but instead at summary judgment, after the taxpayers had likely incurred significant discovery costs, could be viewed as a waiver of any variance argument. *See, e.g., Tucker v. Alexander*, 275 U.S. 228, 230–31 (1927).

for refund before a taxpayer is permitted to bring suit in a district court or the Court of Federal Claims.

For more than 150 years, the Supreme Court has balanced the statutory and regulatory requirement that a taxpayer file a proper claim for refund prior to bringing a refund suit with fundamental principles of fairness. The judicially created rules applying these statutory and regulatory requirements commonly are referred to as the variance or substantial variance doctrine. *See* 15 MERTENS LAW OF FEDERAL INCOME TAXATION § 58A:17; Michael I. Saltzman & Leslie Book, IRS PRACTICE AND PROCEDURE ¶ 11.07[4]. The Supreme Court’s substantial variance doctrine jurisprudence is grounded in the purpose of the statute and regulation—to provide the Government an opportunity to resolve a claim for refund prior to being forced to litigate the claim. As the Supreme Court explained in *Tucker*:

The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.

Tucker, 275 U.S. at 231.

But the Supreme Court has also long recognized that compliance with the requirements of the statute and regulation for bringing a refund claim “may be dispensed with by waiver, as an administrative act.” *See United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931); *see also Bonwit Teller & Co. v.*

United States, 283 U.S. 258, 265 (1931) (holding that the Commissioner waived requirements as to the form of a claim by treating a letter that did not meet all of the requirements of the regulations as a claim for refund). Likewise, the Supreme Court has long held that taxpayers should not be barred from bringing a suit for refund when technically deficient refund claims were corrected by amendment and considered by the IRS on the merits. *See United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 71 (1933) (explaining that amendment of an administrative refund claim, even after the running of the period of limitations, may cure what would otherwise be defects in form of a claim for refund that would otherwise preclude a suit for refund, particularly if it has been heard on the merits).

In *Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945), the Supreme Court opined on the purpose of the substantial variance doctrine and the considerations of fairness it encompasses. Rooting its analysis in the purpose of the regulations, it determined that the Government cannot invoke variance as a roadblock to suit when the IRS has, in fact, investigated the merits of a claim:

Treasury Regulations are calculated to avoid dilatory, careless, and wasteful fiscal administration by barring incomplete or confusing claims. But Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness.

Angelus Milling, 325 U.S. at 297 (citations omitted). In sum, the Government cannot invoke the substantial variance doctrine as a “gotcha” to prevent the adjudication of issues in a refund suit when the IRS, in fact, understood and considered administratively the merits of the claim.

Likewise, this Court and its predecessor have interpreted the statute and the corresponding Treasury Regulation to require the taxpayer to include the amount claimed, substantial grounds for the claim, and the general facts supporting the claim “so that they may be fully investigated.” *Snead v. Elmore*, 59 F.2d 312, 314 (5th Cir. 1932). But this Court has also long held that there is no requirement that “the claim for refund must have contained all the evidence or argument that is offered in the suit.” *Id.* The Fifth Circuit explained that the purpose of the rule “is to permit the Commissioner to correct claimed errors in the first instance and, if disagreement persists, to limit the litigation to the issues which have been re-examined by the Commissioner and which he is prepared to defend.” *Carmack v. Scofield*, 201 F.2d 360, 362 (5th Cir. 1953). “Although crystal clarity and exact precision are not demanded, at a minimum the taxpayer must identify in its refund claim the ‘essential requirements’ of each and every refund demand.” *Charter Co. v. United States*, 971 F.2d 1576, 1580 (11th Cir. 1992) (citations omitted).

B. The District Court’s preclusion of Appellants’ claim based on perceived variance does not comport with this Court’s precedent

Appellants’ Form 1040-X was filed “to claim a depreciation deduction for a business asset purchased and placed in service in 2014” and included a Form 4562 that reported depreciation for a private jet. Doc. 56 at 2. The parties agreed that the amount of the depreciation deduction was correctly computed. *Id.* The depreciation deduction was reported on Schedule C of the Form 1040-X. The IRS’s Depreciation Lead Sheet (a type of workpaper created by an IRS agent during an examination) noted that “[d]epreciation and operating expenses of the airplane may be deductible as expenses related to partnership investment on Sch[edule] E, much the same as they have been deducted in 2015 and subsequent tax years.” Doc. 44-1 at 2.

The IRS examining agent spoke with Appellants’ accountant, John Ablamsky (“Ablamsky”), who

orally advised the IRS agent that the depreciation deduction was reported as an unreimbursed partnership expense in the 2015 tax year as well as in subsequent tax return filings. He further explained that such a deduction should have been reported on a Schedule E, rather than a Schedule C, in the amended return. In fact, the amount of Plaintiffs’ depreciation deduction related to the private jet would have been the same whether the deduction was reported on a Schedule E or Schedule C. After that conversation, the IRS agent noted in his Examining Officer’s Activity Record that “[e]xamination found Depreciation Expense is an investment expense that can be deducted against Flow-thru income on Sch. E.”

Doc. 56 at 3 (citations omitted).

The District Court held that since Appellants did not make a written request or submit documentary substantiation of the deduction on Schedule E, there was a substantial variance between the claim for refund and the ground raised in the suit, and therefore, Appellants were barred from claiming that they were entitled to deduction of depreciation as an unreimbursed partnership expense. According to the District Court, “mere notice is insufficient to evade preclusion by the variance doctrine.” Doc. 56 at 14. This misapplied the Supreme Court’s and this Court’s substantial variance doctrine jurisprudence and misstated the facts surrounding the claim review process.

A taxpayer may not “advance one ground for refund in his claim filed with the Commissioner and thereafter rely upon an *entirely different ground* in a subsequent suit for refund.” *Carmack*, 201 F.2d at 362 (emphasis added). The ground for refund set out in Appellants’ Form 1040-X was that they were entitled to a depreciation deduction for a private jet placed in service in 2014. This was the same ground upon which they sought a refund in their refund suit. Whether it was better reported on Schedule C or on Schedule E is an issue concerning IRS form preference, not one involving the substantive “grounds” or “facts” giving rise to the refund requested in the claim.

The Fifth Circuit's decision in *Burrell v. Fahs*, 232 F.2d 163 (5th Cir. 1956), illustrates the level of detail required in a claim for refund. In that case, the taxpayers sold a citrus grove and equipment and reported the excess of sale price over basis as capital gain. The IRS determined that part of the sale price was allocable to the value of green fruit and should be treated as ordinary income. The taxpayers paid a deficiency and filed a refund claim stating that the IRS had erroneously determined that part of the sale price represented ordinary income from sale of fruit on trees in the grove. The district court entered summary judgment in favor of the Government because the sole ground in the taxpayers' refund claim was that the gain from the sale was capital gain and thus the taxpayers could not raise the issue of whether there was a proper allocation of the sale price between the grove and the green fruit. The Fifth Circuit reversed and remanded, stating:

The statute and the regulation . . . impose no such burden. It is the basis of the claim that must be stated with exactitude. The claim asserts that the determination of the Commissioner was erroneous; wholly so, and not merely in part. Whether the fruit had any value which should, under *Watson v. Commissioner* . . . [,] be treated as ordinary income, and if so, whether that value be less than determined by the Commissioner are questions of fact to be established by proofs. The taxpayers should be given an opportunity to submit their proof.

Id. at 166.

Other decisions of the Fifth Circuit similarly conclude that refund claims should be viewed expansively. The taxpayer in *Hartley v. United States*, 252 F.2d

262, 263 (5th Cir. 1958), filed a claim for refund of manufacturer's excise tax stating that the tax does not apply to subsequent sales by him of new automobile parts purchased from other manufacturers that were combined with old parts he machined. In the complaint he alleged he was not liable for the tax because he was not a manufacturer or dealer. After a bench trial, the district court entered judgment in favor of the Government. The Fifth Circuit reversed, holding that the refund claim "comprehended, embraced, and included the issue tendered by [the] taxpayer in his complaint." *Id.* at 266.

The Fifth Circuit similarly found that a refund claim was broad enough to encompass a ground set out in an amended complaint in *United States v. Henderson Clay Products*, 324 F.2d 7 (5th Cir. 1963). In that case, the taxpayer mined clay it used to manufacture brick. The refund claim and original complaint sought a refund claiming that its depletable base was finished brick. In settlement negotiations during the pendency of the refund suit, the taxpayer asserted that the price for which it sold processed shredded ball clay should be used in determining the depletion deduction. The taxpayer subsequently filed an amended complaint that included this claim in a second count. The district court denied dismissal. The Fifth Circuit agreed, holding that the district court did not err in refusing to dismiss the second count of the amended complaint because the refund claim

asserts no other ground for recovery than its original claims. Both are based upon 114(b)(4)(B) [of the

Internal Revenue Code of 1939], and the amended complaint merely takes account of a definitive construction of that subsection which was handed down between the date of the claims and the date of trial.

Id. at 18.

Importantly, in *Thompson v. United States*, 332 F.2d 657 (5th Cir. 1964), in evaluating whether the claim for refund adequately stated the ground for the refund, the Fifth Circuit also considered the course of conduct during the IRS's examination of the refund claim. In that case the taxpayers filed suit for refunds for multiple years. The district court dismissed the claims for several of the years for failure to file refund claims for those years and entered judgment for the taxpayers on the remaining years. The Fifth Circuit held that there were indeed refund claims filed for the dismissed years. The Government argued that the claims for the dismissed years failed to set forth in detail each ground upon which a credit or refund is claimed and fact sufficient to apprise the Commissioner of the exact basis thereof. The Fifth Circuit rejected this argument, stating:

Perhaps the statement of the ground—if viewed as an isolated paper—would not be very informative. *But in the full context in which it appears* it clearly expresses the legal theory on which Thompsons excluded from their income the royalty payments made to Selected in the first place; namely, that the income was attributable to the mineral interest which they had conveyed to Selected, an educational or charitable trust. This theory was *clearly recognized in the preliminary statements prepared by the Service after the audit of the returns*, and the rejection of the theory formed the basis for the deficiencies determined for all 5 years. This precise theory was asserted by the Thompsons in the refund suit.

Id. at 662–63 (emphasis added).

In this case, Appellants’ Form 1040-X and the course of conduct of the administrative proceedings was as explicit as the claims in *Hartley*, *Burrell*, and *Henderson Clay*. Just as the *Henderson Clay* claim apprised the IRS that it was seeking a refund “based upon 114(b)(4)(B),” Appellants’ Form 1040-X put the IRS on notice that the ground for their refund claim was that they were entitled to a depreciation deduction under I.R.C. § 167 due to the purchase of a private jet for business usage. Depreciation is allowed under I.R.C. § 167. Neither the statute nor the applicable regulations require that the depreciation deduction be reported on a specific schedule. Even if, as in *Thompson*, the Form 1040-X in isolation did not apprise the IRS that the business usage was by Mr. Shleifer as a partner, “in the full context in which it appears,” including the revenue agent’s lead sheet and case activity record, “it clearly expresses the legal theory on which” Appellants claimed a refund.

Thus, Appellants’ refund claim contained the essential elements required under this Court’s precedent to apprise the IRS of the facts and grounds of their refund claim. *See Charter Co.*, 971 F.2d at 1580. There was no substantial variance between the refund claim and the grounds asserted by them in the District Court. To require, as did the District Court, more from taxpayers would

undermine the purpose of the substantial variance doctrine and would contravene this Court's precedent.

II. The District Court Misapplied the Substantial Variance Doctrine by Failing to Properly Consider the IRS's Course of Conduct and the Full Administrative Record

The District Court's formalistic approach underscores the need for this Court to clarify the substantial variance doctrine in order for district courts in this Circuit to apply it in a manner consistent with its historical origins and practical purpose. Tax refund suits are *de novo* proceedings that do not rise or fall on the administrative record. *See, e.g., D'Avanzo v. United States*, 54 Fed. Cl. 183, 186 (2002). Because of this posture, the Government faces few restrictions on the arguments it may advance in court, even when those arguments were not raised administratively. The substantial variance doctrine, therefore, is not concerned with judicial deference to the IRS or the completeness of the administrative record. Rather, its purpose is to ensure that the IRS has a fair opportunity to address a refund claim before being required to defend against such a claim in litigation. The District Court's decision failed to follow these well-established principles.

A. The District Court's decision fails to recognize that perfect compliance is not required

The District Court's analysis treats the substantial variance doctrine as a strict rule that turns exclusively on the text found in the four corners of the refund claim as originally presented (whether submitted on an amended return or in

another form). Indeed, when Appellants pointed the District Court to facts demonstrating that they refined their refund claim during the administrative process, which the IRS's own files memorialized in writing, the District Court brushed aside these uncontroverted facts, and instead focused solely on the fact that Appellants originally reported the depreciation deduction on a Schedule C, rather than a Schedule E.

The District Court's overly restrictive approach is out of step with the substantial variance doctrine's purpose and history. As discussed above, the Supreme Court has long emphasized that the doctrine is a rule of administrative fairness and notice, not a "trap[] for the unwary," *Tucker*, 275 U.S. at 231, and that its application must consider the full administrative record, including how the claim was presented, how the IRS processed and examined it, and what both sides did during that process. This Court's decisions reflect this functional approach, as do those of other federal courts of appeals. *See, e.g., Computervision Corp. v. United States*, 445 F.3d 1355, 1364 (Fed. Cir. 2006) (describing "four limited situations," each of which "has itself come to be identified as a separate doctrine," that "permits consideration of a claim for refund despite failure to timely file detailed formal claims with the IRS when a substantial variance from the requirements of the regulation is not involved"); *El Paso CGP Co. v. United States*, 748 F.3d 225, 229 (5th Cir. 2014) (noting that, while the substantial variance

doctrine may, on its face, appear uncompromising, “courts have not always been so dogmatic in applying it”).

Properly understood, the substantial variance doctrine operates not as a broad or inflexible rule, but rather as a limited and pragmatic principle that balances the Government’s interest that it should not be required to litigate claims it did not have a fair opportunity to address administratively against the taxpayer’s right to have those claims heard in court. This analysis necessarily requires a facts-and-circumstances review not only of the refund claim itself, but also of the full administrative record, which illuminates the IRS’s course of conduct in considering the claim.

Although courts have used various labels when applying the substantial variance doctrine to different factual scenarios—such as the “waiver doctrine,” “informal claim doctrine,” “general claim doctrine,” and “germaneness doctrine”—they consistently hold that applying the variance doctrine requires looking beyond the four corners of the original refund claim when the record shows that the IRS had notice of and an administrative opportunity to consider the grounds or facts later raised in litigation, and that the Government was not unfairly prejudiced. *See, e.g., Memphis Cotton Oil Co.*, 288 U.S. at 67, 71 (a taxpayer’s “[i]ndefinite and general” claim, later amended and supplemented before the IRS reached a decision, should be treated as “a claim single and indivisible, the new

indissolubly welded into the structure of the old”); *United States v. Andrews*, 302 U.S. 517, 524 (1938) (explaining that although the IRS “could have rejected [a claim] as too general,” if the claim “has not misled [the IRS] but has been the basis of an investigation which disclosed facts necessary to [its] action in making a refund,” then “an amendment which merely makes more definite the matters already within [the IRS’s] knowledge, or which, in the course of [its] investigation, [the IRS] would naturally have ascertained, is permissible”); *United States v. Kales*, 314 U.S. 186, 196–97 (1941) (informal written notice triggering agency consideration, later perfected by amendment, waives requirement of formality and particularity of a claim); *see also Computervision Corp.*, 445 F.3d at 1370.

The Supreme Court decisions foundational to the substantial variance doctrine preclude the Government from coming into court and arguing strict compliance as a sword against judicial review when the IRS, has, in fact, considered the claim. *See Felt & Tarrant Mfg. Co.*, 283 U.S. at 273 (“Compliance may be dispensed with by waiver, as an administrative act”); *Tucker*, 275 U.S. at 230–31 (holding that the IRS could waive an objection to the sufficiency of an administrative claim by choosing not to contest it in a refund suit).

Here, by disregarding the context surrounding the IRS’s handling of the subject refund claim, the District Court applied an unduly rigid rule that departs

from applicable precedent and the substantial variance doctrine's history and purpose.

B. The District Court's decision improperly ignores the course of conduct during the examination of the administrative refund claim

The facts of this case illustrate precisely why the entire course of conduct in consideration of an administrative claim for refund claim is important in determining whether the substantial variance doctrine should bar relief in a refund suit. As the District Court observed, Appellants sought a refund based on a depreciation deduction which was reported on a Schedule C for a single-member limited liability company that also reported "zero dollars in gross profits and income." Doc. 56 at 2. According to the District Court, because the expense was reported on a Schedule C for the limited liability company, the examining agent's investigation should naturally be limited to whether the limited liability company "generate[d] profit or report[ed] any other expenses" and whether it "offer[ed] travel services to the public," such that it might qualify for a business depreciation deduction. *Id.* at 10.

But, as the District Court itself noted, the record shows that the IRS *did not* summarily deny Appellants' refund claim after a cursory review of the Schedule C attached to Appellants' Form 1040-X. Instead, the IRS conducted a full audit of the claim, during which its examination division concluded that the claimed

depreciation “is an investment expense that can be deducted against Flow-thru income on Sch. E.” *Id.* at 3. The IRS reached this conclusion after discussions with Ablamsky regarding the nature and business use of the aircraft for partnership purposes. *Id.* at 10, 14.⁷ The District Court’s description of these substantial documented discussions between the agent and Ablamsky as “mere notice” flies in the face of both the record and the substantial variance doctrine, under which a claim is sufficient if there is “mere notice” of the basis of the claim. *Id.* at 14.

The IRS examined the claim, received and reviewed information about the aircraft’s business use and the partnership expense theory (before the claim was formally disallowed), and memorialized the Schedule E grounds raised by Ablamsky in its files. The claimed refund amount is unchanged; the asset, year, and depreciation method are the same. The provisions of the Internal Revenue

⁷ The District Court’s order confusingly states that Ablamsky “made an oral representation that such a deduction could be made [on a Schedule E] . . . only after the agent disallowed the deduction,” suggesting that any supplement or amendment to the claim was untimely. Doc. 56 at 10. Yet, as the District Court itself recognized, these communications occurred only after the issuance of a *proposed* notice of disallowance. *Id.* at 3. A proposed notice of disallowance does not constitute a final determination on the merits of a claim; as its title indicates, it is merely preliminary. *See Memphis Cotton Oil Co.*, 288 U.S. at 282 (holding that supplementation or amendment is permissible even after a taxpayer has been given “notice . . . that the claims would be rejected,” so long as the disallowance has not been finalized). The record here makes clear that the final notice of disallowance was issued only after Ablamsky orally provided the examining agent with additional information clarifying the scope and substance of Appellants’ claim. Doc. 56 at 4.

Code that Appellants rely on to support the depreciation expense deduction, I.R.C. §§ 167 and 168, are unchanged between their administrative and litigation claims. The District Court's application of the substantial variance doctrine here is, quite literally, all form and no substance.

The substantial variance doctrine serves as a procedural shield to protect the integrity of the administrative process. It should not be a weapon for the IRS to wield in cutting down refund claims it prefers not to litigate when it had the grounds and facts of the claim during the course of the administrative process. Here, Appellants' entitlement to a depreciation deduction and the amount of the deduction were not in dispute. The only issue was whether reporting the deduction on Schedule C rather than Schedule E barred the District Court from considering whether the private jet was used in partnership business, even though the IRS was aware that Appellants claimed that they were entitled to the deduction as an unreimbursed partnership expense.

The District Court gave scant consideration of the administrative record and the IRS's conduct in considering Appellants' claim, reasoning that an "oral claim" is insufficient. Doc. 56 at 15. Yet the claim here was not submitted orally. As the District Court itself noted, it was submitted on a Form 1040-X, with the deduction at issue reported on Schedule C. *Id.* at 10. The District Court appears to suggest that information communicated orally by the taxpayer or its representative during

the administrative process cannot be considered in determining whether the IRS was adequately on notice of the claim's scope before a refund suit is filed (and whether the substantial variance doctrine is applicable). That, however, is *not* the law. The District Court seems to incorrectly conflate the requirement that an initial "informal claim" contain a written component with whether subsequent supplementation or amendment to a formal claim must also be in writing. These are different concepts.

In any event, the District Court's focus on whether any supplementation or amendment by the taxpayers was in writing is misguided. Any "written component" requirement (if applicable) serves a practical, not technical, purpose: to provide the IRS with a stable record of the facts and grounds for relief, since "personnel in governmental departments is constantly changing." *Wrightsmen Petroleum Co. v. United States*, 35 F. Supp. 86, 96 (Ct. Cl. 1940). Courts, including this Court, in *Mills v. United States*, 890 F.2d 1133, 1135 (11th Cir. 1989), have applied this rule flexibly. They look to the record as a whole and have treated the "written component" requirement liberally, for example, allowing an employee to maintain a refund suit for FICA taxes based on an employer's Form 941-C submission, followed years later by the employee's own written refund request. *Id.* at 1134.

Accordingly, any writing requirement ensures administrative continuity rather than imposing a procedural trap. In keeping with that purpose, writings generated by the IRS itself that memorialize communications with taxpayers communicating a claim or refining the scope of a previously submitted claim, like the lead sheet and the agent’s notes here, should satisfy any “written component” requirement, to the extent such a requirement exists.

The claim that depreciation was deductible as an unreimbursed partnership expense was raised during the examination and considered by the revenue agent. It was the subject of discovery in District Court. Thus, the Government was not prejudiced by litigating this claim in a refund suit. By concluding, at the summary judgment stage, that the IRS’s administrative handling of Appellants’ refund claim was all but irrelevant to whether the case was barred by the substantial variance doctrine, the District Court committed legal error.

C. The District Court’s decision belies sound principles of tax administration and reality

Tax reporting—including in the context of refund claims—often requires fitting complex financial information into standardized tax forms and schedules, much like forcing a square peg into a round hole. In practice, a taxpayer’s financial situation at times will not align neatly with the framework of these forms, which are designed to be used by tens of millions of taxpayers. Preventing a taxpayer from pursuing a meritorious suit for refund because the Government

asserts—years after the IRS considered the claim—that the information was reported in the wrong place or on the wrong form produces an inequitable result. Application of the substantial variance doctrine in a formalistic and rigid manner, as the District Court did here, strips the doctrine of its purpose-driven character and reduces it to a mechanical checklist, ill-suited to the reality of tax administration.

The substantial variance doctrine does not affect only wealthy or well-represented taxpayers; it applies equally to unrepresented taxpayers and litigants who lack the assistance of a trained accountant or lawyer in preparing an administrative refund claim. It is easy to imagine a *pro se* taxpayer submitting a claim on the wrong form or, as in this case, on the correct form but on the wrong schedule.

A clearly articulated, holistic approach to the substantial variance doctrine—one that requires courts to consider not only the taxpayer’s written claim but also the conduct of both the IRS and the taxpayer during the examination and administrative process—accords with the doctrine’s historical application and serves its underlying purposes. The District Court’s constrained, “gotcha” application of the substantial variance doctrine should be corrected.

CONCLUSION

Applying the substantial variance doctrine with its purpose and history in mind, this Court should reject the District Court's rigid, four-corners methodology and hold that the so-called variance does not preclude a merits adjudication of Appellants' claim for refund. At minimum, this Court should remand this matter to the District Court for reconsideration of its decision that gives appropriate weight to the IRS's conduct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the contents and form requirements of FED. R. APP. P. 29(a)(4) and 11TH CIR. R. 29-2.
2. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,470 words, excluding the parts exempted by FED. R. APP. P. 32(f).
3. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 25(d), I hereby certify that, on October 23, 2025, I electronically filed the foregoing *Brief of Amicus Curiae American College of Tax Counsel* with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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