No. 24-2037

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEPHANIE MURRIN,
***Petitioner-Appellant*,**

v.

COMMISSIONER OF INTERNAL REVENUE,
***Respondent-Appellee*.**

ON APPEAL FROM THE
UNITED STATES TAX COURT
Docket No. 14614-19; Hon. Judge Patrick J. Urda

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT
FOR REVERSAL

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September 18, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Third Circuit Local Appellate Rule 26.1.1, *amicus* certifies that the American College of Tax Counsel does not have any parent corporation and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT OF FINANCIAL INTEREST

Amicus files this brief with the consent of all parties. Pursuant to FED. R. APP. P. 29(a)(4)(E), counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and none of its members, or its counsel, or any other person other than *amicus*, made a monetary contribution to fund the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Internal Revenue Code of 1986, As Amended (Unless Otherwise Indicated) (26 U.S.C.)

Page(s)

Rules

Other Authorities

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner-appellant Stephanie Murrin ("Appellant" or "Ms. Murrin"). Pursuant to Rule 29(a),[1] this *amicus* brief is filed with the consent of both parties in the case below.

INTEREST OF THE *AMICUS*

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in 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 foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of 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

[1] Rule references are to the Federal Rules of Appellate Procedure and, unless otherwise indicated, section references are to the Internal Revenue Code.

Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* 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 statute of limitations issue with potentially far-reaching consequences. The College agrees with the positions taken by Appellant in her opening brief and by Professor Bryan Camp in his *amicus* brief with respect to statutory interpretation and legislative history. The College submits this Brief to inform the Court of the adverse tax administration and policy implications of the Tax Court's decision.

SUMMARY OF ARGUMENT

The Internal Revenue Service ("IRS") must assess additional tax within three years after a "return was filed." IRC § 6501(a). The period of limitations on assessment does not start to run where the return is "a false or fraudulent return *with the intent to evade tax.*" IRC § 6501(c)(1) (emphasis added). At issue is whose intent matters.

Taxpayers who act in good faith and file what they believe to be accurate tax returns are entitled to finality under sections 6501(a) and 7803(a)(3)(F) with respect to the government's ability to assess additional tax. The government should not be

permitted to bypass the statute of limitations on assessment based on the fraudulent conduct of third parties where the taxpayer had no knowledge of the fraud. This is particularly true in cases involving an ongoing investigation or criminal conviction of a tax return preparer or advisor (*e.g.*, in connection with a guilty plea or the resolution of a preparer or promoter investigation), where the preparer or advisor may be motivated to admit to fraudulent intent as to specific returns in order to gain an advantage in that other proceeding.

The Tax Court's interpretation of section 6501(c)(1) puts taxpayers in the difficult and counterintuitive position of having to defend a third party against an allegation of fraudulent conduct, often without any firsthand knowledge of the fraud and years or even decades after the alleged conduct occurred. The Tax Court's holding will violate taxpayer rights, disproportionately hurt unsuspecting taxpayers victimized by unscrupulous tax return preparers and advisors, and undermine fair tax administration and sound public policy.

ARGUMENT

I. The Tax Court's Interpretation of Section 6501(c)(1) Ignores Self-Serving Motivations of Third Parties to Admit Fraudulent Conduct and Imposes an Unfair Burden on Taxpayers to Dispute Such Admissions

According to the Tax Court, the "temporal limit [of section 6501(a)] disappears," *Murrin v. Commissioner,* T.C. Memo. 2024-10 at *1 (A5 (opinion)), with the admission of fraudulent intent to evade tax by a tax return preparer or other

third party even where the taxpayer did not engage in or have knowledge of the fraudulent conduct. In so holding, the Tax Court ignores the self-serving motivations that are often behind such third-party admissions and the often insurmountable hurdles placed in front of a taxpayer who is forced to challenge such admissions.

As illustrated in *BASR P'ship v. United States*, 795 F.3d 1338 (Fed. Cir. 2015), *aff'g* 113 Fed. Cl. 181 (2013), a tax advisor or return preparer under investigation or indictment often has an inherent conflicting interest in cooperating with authorities—and conceding the illegitimacy of a tax position taken—to avoid or mitigate criminal prosecution or obtain an advantage at sentencing. In *BASR,* Erwin Mayer ("Mayer") was indicted in 2009 for, *inter alia*, filing fraudulent tax returns in connection with promoted tax shelters. A year later, Mayer signed a plea agreement that required him to cooperate with the government in all things related to his tax shelter activities. *See BASR*, 795 F.3d at 1341 n.2. Mayer spent more than five years cooperating extensively—thousands of hours reviewing documents, preparing summary exhibits for the prosecutions of his co-defendants, and testifying in two criminal trials. His cooperation included a declaration stating that he intended "to fraudulently evade the federal income tax" liabilities of the BASR partners. *Id.*

Prior to his declaration, Mayer repeatedly maintained that the strategy he promoted to the Pettinati family, who were the partners in BASR, was lawful.[2] His concession in late-2010 that he had the intent to evade all along came only after he was facing trial and seizure of his assets. In making the best deal he could, Mayer agreed to cooperate and assist in related civil proceedings. At that point, the declaration came at no cost to Mayer. Such admissions, obtained where the taxpayers at issue have no standing and no ability to cross-examine or challenge the veracity of the statements, leave those taxpayers at a substantial disadvantage if the Tax Court's interpretation of section 6501(c)(1) is affirmed.

In this case, the Tax Court based its holding, in part, on the notion that the Commissioner is especially disadvantaged in detecting fraud. Murrin, T.C. Memo. 2024-10, at *8–9 (quoting *Allen v. Commissioner*, 128 T.C. 37, 40 (2007)) (A12–A13). As discussed *infra*, it is difficult to reconcile that finding with the government's extensive knowledge of Howell's activities. Moreover, even in cases where a return preparer's fraud puts the government at some special disadvantage, taxpayers like the Pettinatis in *BASR* or the Murrins are at an even *greater*

[2] Courts reached different conclusions about whether a taxpayer could reasonably rely on Mayer's advice, but all recognized him as a reputable, competent attorney who represented to clients that the transaction was legal. Compare *Am. Boat Company, LLC v. United States*, 583 F.3d 471 (7th Cir. 2009) (reliance reasonable) with *SAS Inv. Partners v. Commissioner*, T.C. Memo 2012-159 (no reasonable reliance).

disadvantage. The government will know of the fraud before the taxpayers do, and will, as demonstrated in *BASR*, use that opportunity and the threat of increased criminal sanctions to cause the preparer (who in *BASR* was not even a signing return preparer) to cooperate. Those unsuspecting taxpayers did nothing wrong, and there is no good policy reason to give the IRS more time than normal to assess tax—in this case, more than twenty years.

II. The Tax Court's Interpretation of Section 6501(c)(1) Allows the IRS to Violate Taxpayers' Rights to Finality as Guaranteed by Sections 7803(a)(3) and 6501

Under the Taxpayer Bill of Rights,[3] as codified in section 7803(a)(3), taxpayers have the right to quality service, which includes "*prompt,* courteous, and professional assistance in their dealings with the IRS,"[4] and the right to finality, which includes the right to know "the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt."[5] *See* IRC § 7803(a)(3)(B), (F). The Tax Court's holding violates these statutory rights because, whenever a return preparer

[3] Some courts have held that section 7803(a)(3) does not confer substantive rights on taxpayers. *See, e.g.*, *Facebook, Inc. v. Internal Revenue Service*, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018). Regardless, section 6501(a), as a statute of repose, does create substantive rights in taxpayers, and section 7803(a)(3)(B) and (F) reflect and reinforce Congressional policy favoring closure of tax matters for honest taxpayers.

[4] IRS Pub. 1, *Your Rights as a Taxpayer* (Rev. 9-2017) (emphasis added).

[5] *Id.*

or other third party had an intent to evade tax with respect to a taxpayer's return, the taxpayer's assessment period will, unbeknownst to the taxpayer, stay open forever.

As courts have long recognized, "[t]he statute of limitations on assessment is 'an almost indispensable element of fairness as well as of practical administration of an income tax policy.'" *Fowler v. Commissioner*, 155 T.C. 106, 110 (2020) (quoting *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 301 (1946)). It is particularly unreasonable, unjust, and a violation of taxpayer rights to allow the IRS to wait years to audit and assess tax, despite having full knowledge of a third party's fraudulent conduct, as it did in this case. Such delay is highly prejudicial to taxpayers, who must overcome lost or destroyed evidence, faded memories, and unavailable or deceased perpetrators and witnesses. *See Rothensies*, 329 U.S. at 301 ("Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest.").

It is undisputed that for tax years 1993 through 1999, the Murrins "relied on a tax return preparer, Duane Howell ["Howell"], to prepare their joint federal income tax returns, as well as returns for two partnerships in which Ms. Murrin was a general partner. Unbeknownst to the Murrins, Mr. Howell placed false or fraudulent entries on those tax returns with the intent to evade tax." *Murrin,* T.C. Memo. 2024-10, at

*2 (A6). It is also undisputed that "[t]he Murrins themselves did not put any false or fraudulent information on their returns, nor did they intend to evade tax." *Id.*

The IRS was aware of Howell's fraudulent conduct as early as the mid-1980s. In 1986, Howell was convicted of conspiring to defraud the United States and for attempting to interfere with the administration of the internal revenue laws, all in connection with his role in preparing fraudulent tax returns during the 1980s. *See United States v. Sanders, et al.*, Docket No. 7:86-cr-00325-UA-3 (S.D.N.Y. 1986). Undeterred by the first criminal prosecution, Howell was indicted again in 2006 and pled guilty the following year to aiding and assisting in the preparation of false tax returns in violation of section 7206(2). *See United States v. Howell, et al.,* Docket No. 7:06-cr-00283-CM-1 (S.D.N.Y. 2006).

Despite clear knowledge of Howell's conduct and access to tax returns he prepared, the IRS waited nearly *two decades* to finally determine adjustments to the Murrins' tax returns. Contrary to the Tax Court's finding that Howell's fraud may have placed the Commissioner at some special disadvantage, the undisputed facts say otherwise. The IRS waited until May 13, 2019, to issue a notice of deficiency, in which it determined deficiencies for the Murrins' tax years 1993 through 1999 totaling $65,318 and accuracy-related penalties totaling $13,064. (A36 (Notice of

Deficiency)). At the time the notice of deficiency was issued, accrued interest totaled more than $235,000.[6]

Unfortunately, this extraordinary delay is not an aberration in cases involving fraudulent preparers. The IRS has waited many years after a taxpayer's returns were filed to initiate an audit based on a third party's allegedly fraudulent conduct, of which the IRS was aware long before contacting the taxpayer. *See BASR,* 795 F.3d at 1340–41 (IRS issued a Final Partnership Administrative Adjustment to BASR with respect to its 1999 partnership return in 2010, despite having notice of the tax-advantaged transaction and promoter's conduct as early as 2004);[7] *Finnegan v. Commissioner,* T.C. Memo. 2016-118, at *14–16 (IRS proposed adjustments to taxpayers' 1994 through 2001 returns in 2013, despite notice of preparer's fraudulent conduct prior to 2006), *aff'd on other grounds*, 926 F.3d 1261 (11th Cir. 2019).

The lengthy delay in *Murrin,* involving a final determination issued more than 20 years after the returns at issue were filed, eviscerates the core purpose of section 6501(a), which is to fix a predictable time frame within which the IRS must act.

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[6] *See* IRC § 6601.

[7] In fact, the IRS was aware of the transaction in BASR (referred to as "Son-of-BOSS") as early as 2000, when it issued Notice 2000-44 (2000-36 IRB 1) describing it as not legitimate. The IRS also challenged the transaction in litigation involving the same promoters long before initiating the audit of BASR. *See, e.g., Kligfeld Holdings v. Commissioner*, 128 T.C. 192 (2007) (1999 transaction); *Am. Boat Co., supra* (1998 transaction); *Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636 (2008) (2000 transaction); and *SAS Inv., supra* (2001 transaction).

Indeed, this case shows that as more time passes, the more likely it may be that the government will use resources available to it alone to avoid the three-year period of limitations, all while the taxpayer remains in the dark.

If the Tax Court's interpretation prevails, taxpayers will be left open to an audit of not only the allegedly fraudulent item(s), but of all items on the return, because fraud holds open the time that the IRS has to assess tax, penalties, and interest on the entire return. *See Rhone-Poulenc Surfactants & Specialties, LP v. Commissioner*, 114 T.C. 533, 548 (2000). Such an audit may occur long after the third party that intended to evade tax disappears or is charged, and long after records that might be helpful to the taxpayer are destroyed. While this may be good for tax collections, it violates taxpayer rights to finality and prompt resolution.

III. The Tax Court's Interpretation of Section 6501(c)(1) Violates Taxpayers' Right to a Fair and Just Tax System

Taxpayers also have a right to a fair and just tax system. IRC § 7803(a)(3)(J). This includes "the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely." IRS Pub. 1, *Your Rights as a Taxpayer* (Rev. 9-2017). The Tax Court's interpretation of section 6501(c)(1) is particularly unreasonable given that affected taxpayers have often already suffered a non-tax monetary loss at the hands of the fraudulent tax preparer.

For example, in *City Wide Transit, Inc. v. Commissioner*, 709 F.3d 102 (2d. Cir. 2013), *rev'g* T.C. Memo 2011-279, Manzoor Beg ("Beg"), a tax advisor, filed fraudulent employment tax returns for a bus company responsible for transporting children with disabilities, and then embezzled the funds designated to pay the IRS. In a Collection Due Process proceeding, City Wide argued that (1) Beg's actions did not extend the limitation period for assessment against City Wide, and (2) the government failed to prove Beg's fraudulent intent to evade tax. The Tax Court found for City Wide on the second argument. On appeal, City Wide conceded the first argument. The Second Circuit "accept[ed] this concession without deciding whether certain factual situations might arise that sever the tax *payer's* liability from the tax-*preparer's* wrongdoing." *Id.* at 107 n.3 (emphasis in original). Thus, the Second Circuit reversed the Tax Court based on finding that the Tax Court committed clear error on the facts. It did not analyze the legal argument presented by this case. *Id.* at 108.

For taxpayers like City Wide, assessments of tax, penalties, and interest after the expiration of the general three-year limitations period constitute a significant financial hardship. In the College's collective experience, such cases are sadly all too common; when a preparer files a fraudulent return without the taxpayer's knowledge, it often comes enmeshed with other acts of embezzlement or fraud that financially harm the taxpayer. *See, e.g.*, *United States v. Pratt*, No. 14-67-1, 2015

WL 4199052 (E.D. Pa. July 13, 2015) (section 7206(2) conviction of preparer who prepared false returns for clients and embezzled portions of the resulting refunds).

IV. An Unlimited Period of Assessment is Unnecessary Where the IRS has Established Alternatives to Collect from the Wrongdoer

According to the Tax Court, section 6501(c)(1) is designed to address "the special disadvantage to the Commissioner in investigating these types of returns," *Murrin,* T.C. Memo. 2024-10, at *8 (quoting *Allen,* 128 T.C. at 40) (A12), and presumably, to allow for the collection of tax due. *See* IRC § 6502. These objectives ring particularly hollow where the fraud is committed by a third party, not the taxpayer, given that the IRS has numerous avenues to collect from the fraudulent third parties.

Thousands of taxpayers are affected by the fraud of corrupt tax return preparers each year, and one corrupt preparer can produce thousands of false and fraudulent returns.[8] With electronic filing, corrupt preparers can file false and

[8] *See Justice Department Continues Efforts to Stop Unlawful Tax Return Preparers,* (March 28, 2024) (examples of criminal convictions against fraudulent tax return preparers during the 2023 filing season), https://www.justice.gov/opa/pr/justice-department-continues-efforts-stop-unlawful-tax-return-preparers.

fraudulent returns without the client's knowledge or consent,[9] a point conceded by IRS Criminal Investigation in its annual report.[10]

Congress has enacted an extensive framework of civil and criminal tax penalties to sanction the conduct of third parties intending to evade a taxpayer's tax—penalties that are far better equipped to compensate the government for its loss due to fraud. For instance, for the willful or reckless understatement of tax on a return by a preparer, the IRS can summarily assess a civil penalty under section 6694(b), in the amount of the greater of $5,000 or 75% of the income derived with respect to the return by the preparer.[11] In addition, the government can prosecute a

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[9] The Taxpayer Advocate Service, an independent organization within the IRS that addresses hundreds of cases annually involving preparer fraud or misconduct, described the common tactics in its 2024 legislative recommendations to Congress:

> In the most common scenario, a taxpayer visits a preparer to get his tax return prepared, the preparer completes the return while the taxpayer is present, and the preparer alters the return after the taxpayer leaves before submitting it to the IRS. . . . In other cases, the preparer increases the refund amount and elects a "split refund," so the taxpayer receives the refund amount he expects, and the additional amount goes to the preparer.

National Taxpayer Advocate, *2024 Purple Book* 72 (Legislative Recommendation No. 32, 2023), https://www.taxpayeradvocate.irs.gov/2024PurpleBook.

[10] *2023 Annual Report*, IRS Criminal Investigation, at 14 (Jan. 2024), https://www.irs.gov/pub/irs-pdf/p3583.pdf (last visited Sept. 17, 2024).

[11] Other civil penalties apply to third parties in addition to or in lieu of section 6694(b), including sections 6694(a) (understatement of tax due to unreasonable position), 6695 (*inter alia*, various failures to retain or furnish information or records), 6700 (promotion of an abusive tax shelter), 6701 (aiding and abetting of

fraudulent preparer under section 7206(2) and seek a restitution order for the amount of loss suffered by the government.[12] *See, e.g.*, *United States v. Johnson*, 911 F.3d 849, 851–52 (7th Cir. 2018) (affirming restitution imposed against the preparer for the amount of unlawfully avoided tax that had not yet been collected from preparer's clients). In turn, the IRS can summarily assess the amount of restitution ordered and swiftly move to collect from the preparer using tax collection procedures. *See* IRC § 6201(a)(4). These remedies properly target the preparer or other third party, who is culpable for the fraud and often the party with the most ability to pay for the loss.

Moreover, if the Tax Court's interpretation of section 6501(c)(1) is affirmed, the low-income taxpayer community and innumerable victims of abusive return preparers will suffer the hardest blow:

> Punishing taxpayers for fraud committed by their preparers "may disproportionately impact clients of low-cost tax preparers, such as those who pad returns with imagined charitable deductions, including many in immigrant communities," [John] Colvin said, adding that the system "seems to steamroll over many who are trying to do the right thing but who accidentally hooked up with the wrong preparer, rather than those who affirmatively cheat on their own."

Jeremiah Coder, *The IRS's Misguided Fraud Whodonit,* 137 Tax Notes 7, 11 (2012). These taxpayers frequently are ill-equipped to address technical fraud allegations

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understatement of tax), 6707 (failure to timely file reportable transaction disclosure), and 6708 (failure to furnish list of advisees as to reportable transaction).

[12] The government could also seek forfeiture of property used by the preparer in connection with the criminal violation. *See* IRC § 7302.

and are limited to challenging the fraud allegations without counsel in the Tax Court—the only prepayment forum.

Taking the Tax Court's holding to its logical conclusion, each and every client of fraudulent return preparers or other third parties[13] must face the possibility of financially devastating assessments of tax, penalties, and interest years or even decades into the future.

CONCLUSION

Under the Tax Court's holding, the "temporal limit [of section 6501(a)] disappears" whenever the government can establish, by whatever means necessary, that someone allegedly committed some level of fraud at some point in time, and that a taxpayer's return was somehow, in some way, impacted by the fraudulent conduct, regardless of whether the taxpayer knew the third party, had knowledge of the fraudulent conduct, or was aware that the return was inaccurate. The Tax Court's interpretation violates taxpayer rights to finality and a fair and just tax system, and public policy demands more equitable treatment. For the reasons stated herein, the Tax Court's decision should be reversed.

[13] The Tax Court suggests that its holding only applies when the third party with the intent to evade tax "had a hand in the preparation or filing of a tax return." *Murrin*, T.C. Memo. 2024-10, at *12 (A16). However, the government pushed this boundary in *BASR*, arguing that an attorney-advisor's fraud triggered the exception. Furthermore, the Tax Court's holding is entirely predicated on the notion that section 6501(c)(1) is "agnostic as to who had to have the intent to evade tax." *Id.* at *4 (A8).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH 3D CIR. L.A.R. 28.3(D)

In accordance with 3d Cir. R. 28.3(d), it is hereby certified that counsel for *amicus curiae*, Caroline D. Ciraolo and Michael Waalkes, are members of the bar of the United States Court of Appeals for the Third Circuit, and counsel for *amicus curiae*, Thomas A. Cullinan has filed an application for admission to the bar of the United States Court of Appeals for the Third Circuit.

September 18, 2024

/s/ Caroline D. Ciraolo
Caroline D. Ciraolo

CERTIFICATE OF COMPLIANCE

1. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because this brief's text contains 3,695 words, excluding the cover page, tables of contents and authorities, the certifications, and the signature block.

2. 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 this brief has been prepared in Microsoft Word using 14-point Times New Roman, which is a proportionally spaced typeface.

3. A virus detection program, SentinelOne version 23.3.3.264, was run on the electronic version of the *Brief of the American College of Tax Counsel as* Amicus Curiae and no virus was detected.

4. The text of the electronic version of the *Brief of the American College of Tax Counsel as* Amicus Curiae is identical to the paper copies.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on this 18th day of September 2024. I further certify that service of the brief was made on counsel for the appellant and appellee by CM/ECF.

I further hereby certify that I will, on September 18, 2024, mail to the Clerk of the Court of the United States Court of Appeals for the Third Circuit seven paper copies of the foregoing brief.

September 18, 2024

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