No. 14-____

IN THE
Supreme Court of the United States

PETER KURETSKI AND KATHLEEN KURETSKI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the President's authority under 26 U.S.C. § 7443(f) to remove judges of the United States Tax Court. As this Court explained in *Bowsher* v. *Synar*, 478 U.S. 714 (1986), except as set forth in the Constitution itself, the Constitution's separation of powers precludes a government actor exercising one power (legislative, executive, judicial) from removing another government actor exercising a different power. Petitioners here challenged the Internal Revenue Service's determination of their income tax liability before a judge of the Tax Court who, under Section 7443(f), was removable by the opposing litigant—the Executive Branch of the government. The D.C. Circuit rejected petitioners' separation-of-powers challenge to the Tax Court's judgment against them, holding that the President's removal authority is constitutional because the Tax Court exercises executive, not judicial, power. That reasoning directly conflicts with this Court's conclusion in *Freytag* v. *Commissioner*, 501 U.S. 868, 890-91 (1991), that the Tax Court exercises "the judicial power of the United States," "*rather than executive*, legislative, or administrative, power" (emphasis added). The decision below thus left in place the President's unconstitutional ability to influence Tax Court judges' decisions in tens of thousands of cases every year.

The question presented is:

Whether the President's authority under 26 U.S.C. § 7443(f) to remove Tax Court judges violates the Constitution's separation of powers.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court below, are two individuals: Peter and Kathleen Kuretski.

Respondent, who was the appellee in the court below, is the Commissioner of Internal Revenue, currently John Koskinen, in his official capacity.

TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTION AND STATUTES:

REGULATIONS AND RULE:

OTHER AUTHORITIES:

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 755 F.3d 929. The Tax Court's opinion (Pet. App. 34a-48a) is unofficially reported at 104 T.C.M. (CCH) 295. The Tax Court's order denying petitioners' motions to vacate the Tax Court decision and to reconsider the Tax Court opinion appears at Pet. App. 50a-54a.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2014. The court of appeals denied a petition for panel rehearing on August 1, 2014 (Pet. App. 55a). On October 15, 2014, the Chief Justice extended the time for filing this petition to and including November 26, 2014. No. 14A388. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Section 7443(f) of the Internal Revenue Code of 1986, 26 U.S.C. § 7443(f), which provides: "Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

INTRODUCTION

Tens of thousands of taxpayers each year litigate questions of federal law against the Executive Branch in the United States Tax Court. And in each

of those cases, the Chief Executive enjoys a degree of power over the decisionmaker: A federal statute allows the President to remove Tax Court judges for specified cause. 26 U.S.C. § 7443(f). The question presented is whether the separation of powers permits giving the President power to remove these judicial officers.

The removal provision in Section 7443(f) is a nearly century-old anachronism, enacted before the Tax Court was the Tax Court and before its members were judges. Congress adopted Section 7443(f) to authorize the President to remove members of the Board of Tax Appeals, an entity within the Executive Branch. In 1969, however, Congress replaced the Board of Tax Appeals with the Tax Court. And as this Court has squarely held, the Tax Court is a "Court[] of Law" that exercises "a portion of the judicial power of the United States" and does not exercise "executive" or "administrative" power. *Freytag* v. *Comm'r*, 501 U.S. 868, 890-91 (1991). Thus, Section 7443(f) today subjects those exercising "the judicial power of the United States," and not any executive power, to removal by the Executive Branch. The Constitution precludes requiring the judicial power to answer to the executive power in that manner. See *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

The D.C. Circuit reached the opposite conclusion *solely* by disregarding this Court's characterization of the Tax Court as exercising only judicial power. Instead, the D.C. Circuit adopted the theory this Court rejected in *Freytag*: that the Tax Court "exercises Executive authority as part of the Executive Branch." Pet. App. 3a. Because it mischaracterized the nature of the power exercised

by the Tax Court, the court of appeals concluded that Section 7443(f) poses no constitutional difficulties.

The question of Section 7443(f)'s constitutionality goes to the heart of the Tax Court's legitimacy and the independence of the judicial power of the United States that the Tax Court exercises. The Tax Court is the primary forum for tax-related disputes between taxpayers and the Executive Branch, hearing tens of thousands of cases each year. Its nationwide jurisdiction extends not only to monetary claims between taxpayers and the government, but also to, *inter alia*, sensitive and even politically charged disputes regarding the tax-exempt status of non-profit organizations. Under the decision below, judges of the Tax Court must make those decisions knowing that they can be removed from office by one of the litigants: the Chief Executive.

The court of appeals decided an important constitutional question, affecting tens of thousands of persons each year, based on reasoning that directly conflicts with this Court's precedent. This Court should grant certiorari to vindicate taxpayers' right to have their cases heard by judges free from undue influence by the Executive.

STATEMENT

A. Statutory Background and Development of the Tax Court

1. To understand the roots of the current controversy it is necessary to know the Tax Court's history. The Tax Court replaced the Board of Tax Appeals (the "Board"), which Congress had established in 1924 as an "independent agency in the executive branch of the Government" to provide

taxpayers with a forum for pre-payment challenges to proposed tax assessments. Revenue Act of 1924, ch. 234, § 900(a), (e), (k), 43 Stat. 253, 336-38; see *Old Colony Trust Co.* v. *Comm'r*, 279 U.S. 716, 721 (1929). The Board's powers were limited: It was empowered to redetermine proposed tax liabilities but it could not enter final judgment on those proposed liabilities. Thus, the losing party (whether the taxpayer or the government) could file suit over those tax liabilities in federal district court, where the Board's decision would be treated only as *prima facie* evidence of the facts. Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 253, 337; Harold Dubroff, *The United States Tax Court: An Historical Analysis* 116 (1979). Board members were appointed by the President with the advice and consent of the Senate, and were removable by the President "for inefficiency, neglect of duty, or malfeasance in office, but for no other reason." Revenue Act of 1924, ch. 234, § 900(b), 43 Stat. 253, 336-37.

Soon after creating it, Congress began altering the nature of the Board, making it less like an administrative body and more like a federal district court. In 1926, just two years later, Congress made Board determinations subject to direct appellate review in the federal courts of appeals, rather than requiring initiation of a suit in the district courts. Revenue Act of 1926, ch. 27, §§ 1001-1003, 44 Stat. 9, 109-10; see *United States* v. *Dalm*, 494 U.S. 596, 603 n.4 (1990); Dubroff, *supra*, at 118-19. This transformation continued in 1942, when Congress changed the name and titles of the Board and its members to reflect their exclusively judicial functions and form. Thus, Congress renamed the

Board "The Tax Court of the United States" and redesignated its members as "judges." Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957.

In 1969, Congress enacted a large-scale reform "with the express purpose of 'making the Tax Court an Article I court rather than an executive agency.'" *Freytag*, 501 U.S. at 887 (quoting S. Rep. No. 91-552, at 303 (1969)). Congress replaced the provision in the 1924 Act referring to the Tax Court as "an independent agency in the executive branch" with language "establish[ing], under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified at 26 U.S.C. § 7441). Congress enacted this change in recognition of the fact that "the Tax Court has *only judicial* duties." S. Rep. No. 91-552, at 302 (1969) (emphasis added). Congress found it "anomalous to continue to classify [the Tax Court] with quasi-judicial executive agencies that have rulemaking and investigatory functions." *Id.* Congress also was concerned that the Tax Court's "constitutional status as an executive agency, no matter how independent, raise[d] questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency." *Id.*

The Tax Reform Act of 1969 also gave the Tax Court new powers commensurate with those of the federal district courts. § 956, 83 Stat. 487, 732 (codified at 26 U.S.C. § 7456). Congress authorized the Tax Court to punish contempt with fines or imprisonment and provided that the Tax Court

would "have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States." *Id.* Congress awarded these powers because it "seem[ed] inappropriate that the Tax Court [was] required to look to the District Courts to enforce its own authority." S. Rep. No. 91-552, at 302. "In accordance with [the Tax Court's] change [in status], the Tax Court [wa]s given the same powers regarding contempt, and the carrying out of its writs, orders, etc., that Congress ha[d] previously given to the District Courts." *Id.* at 304.[1]

Since 1969, Congress has continued expanding the Tax Court's jurisdiction, consistently enlarging the court's fundamentally *judicial* powers. The Tax Court is now empowered, for example, to enforce overpayment determinations against the government (26 U.S.C. § 6512(b)), to order the government to refund amounts prematurely collected (*id.* § 6213(a)), to decide challenges to IRS Office of Appeals decisions in collection actions (*id.* § 6330(d)(1)), to grant equitable relief to innocent spouses (*id.* § 6015(e)), to hear disputes regarding awards for whistleblowers exposing violations of the tax laws (*id.* § 7623(b)(4)), and to issue declaratory judgments in matters ranging from disputes regarding the value of a gift (*id.* § 7477) to the tax status of state and local government bond interest (*id.* § 7478).

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[1] Congress also recognized the Tax Court's new status by changing the form for seeking review of a Tax Court decision from a "petition for review" to a "notice of appeal." Pub. L. No. 91-172, § 959, 83 Stat. 487, 734 (codified at 26 U.S.C. § 7483).

2. As a result of these many changes since 1924, the Tax Court is today functionally akin to the federal district courts. The Tax Court is an independent tribunal that is not part of the IRS or any other agency.[2] The court exercises no "executive" powers: It makes no administrative determinations and performs no independent investigations, instead adjudicating based on the evidence presented by litigants. *Freytag*, 501 U.S. at 891 ("It is neither advocate nor rulemaker."); see *Fed. Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 777 (2002) (distinguishing Tax Court, "a special Article I court" that exercises the judicial power of the United States, from administrative agencies, which do not) (Breyer, J., dissenting). Tax Court decisions are not subject to review by the Commissioner of Internal Revenue or by anyone else within the IRS. Unless disturbed on appeal, the Tax Court's decisions are binding on the taxpayer as to tax liability and on the federal government as to refunds. 26 U.S.C. § 6512(a), (b)(2). The Tax Court's decisions can be appealed exclusively to the federal courts of appeals, where they are reviewed "in the same manner and to the same extent as decisions of the district courts in civil

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[2] "In 1974, the Tax Court solidified its independence from the executive branch (and the IRS) by moving its physical location from the National Office of the Internal Revenue Service to its own separate building in Washington, D.C." David Laro, *The Evolution of the Tax Court As An Independent Tribunal*, 1995 U. Ill. L. Rev. 17, 22. Before the relocation, "[t]he court's independence from the IRS was not apparent to those taxpayers who had to pass through the corridors of the [IRS] to get to the Tax Court facilities." Samuel B. Sterrett, *The United States Tax Court: A Tumultuous 20 Years*, 57 Tax Notes 949, 949 (1992).

actions tried without a jury," *id.* § 7482(a)(1), which includes application of the "clear error" standard for factfinding, Fed. R. Civ. P. 52(a). That standard of review sharply contrasts with that which the courts of appeals apply pursuant to the Administrative Procedure Act to agency determinations. *Dickinson* v. *Zurko*, 527 U.S. 150, 152-54 (1999) (contrasting court/court and court/agency review); *Freytag*, 501 U.S. at 892.

The Tax Court's powers and procedures for deciding disputes match those of the federal district courts. *Freytag*, 501 U.S. at 891 ("[T]he Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs."). The Tax Court hears evidence, presides over bench trials, and issues opinions and judgments. It applies the doctrine of *stare decisis* to bring uniformity to its decisions. See *Sec. State Bank* v. *Comm'r*, 111 T.C. 210, 213-14 (1998). In deciding cases, the Tax Court's judges possess "the authority to apply the full range of equitable principles generally granted to courts that possess judicial powers." *Zapara* v. *Comm'r*, 126 T.C. 215, 226 (2006) (quotation marks omitted), aff'd, 652 F.3d 1042 (9th Cir. 2011); see also 26 U.S.C. § 6214(b) (granting Tax Court power to apply the doctrine of equitable recoupment to the same extent as federal district courts and Court of Federal Claims).

Tax Court judges also exercise the same critical enforcement powers as Article III judges. They can subpoena witnesses, order the production of documents, administer oaths, and examine witnesses. 26 U.S.C. § 7456(a). They can issue injunctions, including those enjoining actions in

other courts. *Id.* § 6213(a). They can punish contempt by fine or imprisonment and have at their disposal "such assistance in the carrying out of [their] lawful writ, process, order, rule, decree, or command as is available to a court of the United States." *Id.* § 7456(c); see *Trohimovich* v. *Comm'r*, 77 T.C. 252 (1981) (ordering taxpayer imprisoned for 30 days for refusing to comply with Tax Court's subpoenas and order to produce). Finally, Tax Court judges can order not just the taxpayer, but also the government, to pay monies owed. 26 U.S.C. § 6512(b)(2).

Within the realm of tax-related issues, the Tax Court's jurisdiction is broad and far-reaching. The Tax Court shares jurisdiction with the federal district courts, the Court of Federal Claims, and the bankruptcy courts over certain matters, such as the classification of tax-exempt organizations. *Id.* § 7428(a); 28 U.S.C. § 1507. For a wide range of matters, the Tax Court is the exclusive judicial venue for aggrieved petitioners. For example, for litigants who challenge a collection due process determination (26 U.S.C. § 6330(d)), the IRS's refusal to abate interest (*id.* § 6404(h)), or the IRS's determination of a whistleblower award (*id.* § 7623(b)(4)), the Tax Court is the only court that is authorized to hear their claims in the first instance. Short of declaring bankruptcy, the only venue for a taxpayer to challenge the validity of a proposed tax deficiency without having to first pay it is the Tax Court. *Id.* § 6213(a); 11 U.S.C. § 505(a); *Flora* v. *United States*, 362 U.S. 145 (1960). And the Tax Court can decide constitutional issues that arise in the cases before it. *Infra* at 23-24, 27-29.

B. Proceedings In This Case Before The IRS And The Tax Court

This case arose from a dispute between petitioners and the IRS about the collectability of petitioners' 2007 income-tax liability. Petitioners had timely filed their 2007 joint income-tax return, but they were unable to pay the balance of their reported tax liability at that time. C.A. App. A5. The IRS assessed the reported tax liability, added penalties for failing to pay the reported tax liability and for underpayment of estimated taxes, added interest, and then issued each petitioner a Final Notice of Intent to Levy—*i.e.*, to seize and sell petitioners' property to satisfy the debt. *Id.* at A13, A17-20.

Petitioners requested Collection Due Process hearings with the IRS Office of Appeals, see *id.* at A21-24, and submitted an Offer in Compromise, seeking to settle their outstanding tax liability. *Id.* at A25-28. An IRS settlement officer informed petitioners that the proposed compromise was unacceptable to the IRS but continued communications with petitioners regarding a possible settlement. *Id.* at A90. Without notice to petitioners of her intent to do so, however, the settlement officer closed the case file and the IRS issued petitioners a Notice of Determination, sustaining the proposed levy. *Id.* at A94-97.

Petitioners appealed the Notice of Determination to the Tax Court. *Id.* at A103-04; 26 U.S.C. § 6330(d)(1). The matter proceeded to trial before U.S. Tax Court Judge Robert Wherry, Jr. C.A. App. A105-54. After hearing live testimony and considering documentary evidence, Judge Wherry

found, *de novo*, that petitioners were liable for the entire assessed penalty for failing to pay their reported tax liability but that the IRS had not met its burden to support an additional penalty for underpayment of estimated taxes. He then held that the IRS could proceed with collection by levy of the unpaid principal, late-payment penalty, and accumulated interest (approximately $25,000 at that time). Pet. App. 34a-49a.

Petitioners filed a motion for reconsideration and a motion to vacate. Petitioners argued, *inter alia*, that the Tax Court's decision should be vacated because the case was heard by a judge who, though exercising the judicial power of the United States, was subject to removal by the President in violation of the Constitution's separation of powers. Petitioners asked the Tax Court to declare 26 U.S.C. § 7443(f) unconstitutional and thereafter rehear their case. Judge Wherry entered an order denying both motions. *Id.* at 50a-54a.

C. The Decision Below

Petitioners filed a notice of appeal to the D.C. Circuit. C.A. App. A177-80. Before the court of appeals, petitioners again argued that Section 7443(f) violates the separation of powers by granting the President the ability to remove and therefore influence judges exercising the judicial power of the United States.

The court of appeals affirmed in a published opinion. Pet. App. 1a-33a. At the threshold, the court considered and rejected waiver, consent, and standing arguments raised by the government. *Id.* at 12a-17a. On the merits, the court of appeals concluded that Section 7443(f) does not violate the

separation of powers because "Tax Court judges do not exercise the 'judicial power of the United States'" but rather work for the President, "exercis[ing] Executive authority as part of the Executive Branch." *Id.* at 3a, 27a. According to the court of appeals, "if a President were someday to exercise the authority under 26 U.S.C. § 7443(f) to remove a Tax Court judge for cause, the removal would be entirely consistent with separation-of-powers principles." *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Decision Conflicts Directly With This Court's Decision in *Freytag*

In *Freytag*, this Court ruled that the Tax Court "exercises *judicial*, *rather than executive*, legislative, or administrative, power . . . ." 501 U.S. at 890-91 (emphasis added); *id*. at 891 (Tax Court exercises the "judicial power of the United States"). The decision below, however, turned on the D.C. Circuit's conclusion that the Tax Court "exercises Executive authority as part of the Executive Branch." Pet. App 3a. From that fundamental misconception of the Tax Court's power all else followed. Just as this Court held in *Bowsher* that Congress's for-cause removal power over an official exercising the executive power violated the Constitution's separation of powers, so too does the President's for-cause removal power over Tax Court judges exercising the judicial power. The square conflict between the decision below and this Court's decision in *Freytag* warrants granting certiorari.

1. *Freytag* arose in the Appointments Clause context, but its holding necessitated an analysis of

the Tax Court's status in the constitutional scheme. Taxpayers in that case sought to invalidate a judgment issued by a Special Trial Judge in the Tax Court because, in their view, the Chief Judge of the Tax Court had no authority to appoint the Special Trial Judge. 501 U.S. at 871-72. Under the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, the appointment of the Special Trial Judge as an "inferior Officer[]" of the United States was valid under the Constitution only if the Tax Court is either a "Department" or a "Court[] of Law."

To address this issue, the Court exhaustively analyzed the function, form, and powers of the Tax Court—as described above, *supra* at 5-10—and found that they were all "quintessentially judicial in nature." 501 U.S. at 891. The Court found it instructive that Congress had eliminated the Tax Court's prior explicit classification as an "independent agency in the executive branch," and instead described it as a "court of record under Article I." 501 U.S. at 885*; supra* at 5. The Court further relied on the fact that the Tax Court performs a "function and role in the federal judicial system [that] closely resemble[s] those of the federal district courts." 501 U.S. at 891.

In the end, the Court concluded that the Tax Court is a "Court[] of Law" that "exercises a portion of the judicial power of the United States." *Id.* at 891-92. The Court could not have been clearer: The Tax Court "exercises judicial, *rather than executive*, legislative, or administrative, power . . . ." *Id.* at 890-91 (emphasis added). And the Court rejected the separately concurring Justices' view that the Tax Court is an executive Department. *Id.* at 885-88.

This Court's subsequent decisions only support *Freytag*'s conclusion that the Tax Court exercises "the judicial power of the United States." Most recently, in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Court confronted the question whether federal bankruptcy judges exercise the judicial power. The Court's reasoning was instructive: The Court concluded that bankruptcy judges exercise judicial power because they have "the power to enter appropriate orders and judgments—including final judgments—subject to review only if a party chooses to appeal." *Id.* at 2619 (quotation marks omitted). The Tax Court likewise has the power to enter final judgments, subject to review only in federal courts of appeals, which treat them identically to judgments by federal district courts entered after bench trials. *Supra* at 7-8. *Stern*'s reasoning confirms what *Freytag* held: that Tax Court judges exercise "the judicial power of the United States."

2. "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag*, 501 U.S. at 870. This Court has long explained that:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential co-equality.

Bowsher, 478 U.S. at 725 (citation omitted).

The risk posed to the separation of powers by allowing government actors exercising one power to remove actors exercising a separate power was the basis for this Court's decision in *Bowsher*. That case involved a for-cause removal provision similar to Section 7443(f), one that allowed Congress (which exercises legislative power) to remove the Comptroller General (who was being given executive power) for cause. 31 U.S.C. § 703(e)(1)(B) (allowing removal for, among other things, "inefficiency," "neglect of duty," or "malfeasance").[3]

The Court held that this inter-powers removal authority violated the Constitution's separation of powers, noting that "to permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto." *Bowsher*, 478 U.S. at 726. The Court was concerned not simply with the actual exercise of that removal authority, which Congress had never used, but with the potential of that authority to do much more insidious harm to the separation of powers through the lurking "threat[]" of removal. *Id.* at 726-27 ("Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress.").

The Constitution's separation of powers, of course, is not limited to preventing encroachments by the legislative on the executive power, as in

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[3] The Court described this removal authority—even for cause—as "very broad," noting that "as interpreted by Congress, [it] could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." *Bowsher*, 478 U.S. at 729.

Bowsher. "A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-18 (1980).[4] "'[T]he "judicial Power of the United States" . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'" *Stern*, 131 S. Ct. at 2608 (quoting *United States* v. *Nixon*, 418 U.S. 682, 704 (1974)). This Court has emphasized that even "slight encroachments" on judicial independence threaten the separation of powers. *Id.* at 2620.

Here, there is much more than a "slight encroachment." Tax Court judges decide complicated, controversial, and even politically charged cases—*e.g.*, tax exemption for non-profit groups—and they are forced to do so in the shadow of the Executive's removal power. Whether the President explicitly threatens to use that authority is beside the point; the mere existence of the power is enough to work its insidious effects on decisionmaking and public confidence. *Edmond* v. *United States*, 520 U.S. 651, 664 (1997) ("The power to remove officers, we have recognized, is a powerful tool for control."). The Court was therefore correct in *Bowsher* to observe that the similar limits on

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[4] "As Hamilton put it, quoting Montesquieu, '"there is no liberty if the power of judging be not separated from the legislative and executive powers."'" *Stern*, 131 S. Ct. at 2608 (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting 1 Montesquieu, Spirit of Laws 181)).

Congress's removal power over the Comptroller General, if applied to judges, could not ensure *judicial* independence. 478 U.S. at 730 ("Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance.'"). Indeed, the concurring Justices in *Freytag* hinted at Section 7443(f)'s inherent incompatibility with the exercise of judicial power: "How anyone with these characteristics [including removability by the President] can exercise *judicial* power 'independent . . . [of] the Executive Branch' is a complete mystery." 501 U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment) (quoting the Court's opinion).

In summary, if—as this Court concluded in *Freytag*—the Tax Court "exercises a portion of the judicial power of the United States," and not "executive" or "administrative" power, then the Constitution precludes the President from removing the Tax Court's judges. Section 7443(f) is therefore unconstitutional.

B. The Reasons Given By The Court of Appeals For the Decision Below Are Flawed

The D.C. Circuit did not disagree that, if the Tax Court exercises only judicial power, then the President's removal power under Section 7443(f) is unconstitutional; it never even addressed the point. Rather, its decision turned entirely on its conclusion, flatly inconsistent with *Freytag*, that the Tax Court does not exercise judicial power, but instead "exercises Executive authority as part of the

Executive Branch." Pet. App. 3a. The reasons given by the court of appeals for its conclusion cannot withstand scrutiny.

1. As an initial matter, the court of appeals fundamentally erred by converting the separation-of-powers doctrine into a separation-of-branches analysis. Instead of addressing petitioners' argument that the Tax Court exercises the judicial *power* of the United States, thus making the President's removal power over its judges unconstitutional, the court of appeals reasoned that the Tax Court resides in the Executive Branch and, due to that formal placement, the President can remove its judges:

> Even if the prospect of 'interbranch' removal of a Tax Court judge would raise a constitutional concern in theory, there is no cause for concern in fact: the Tax Court, in our view, exercises Executive authority as part of the Executive Branch. Presidential removal of a Tax Court judge thus would constitute an intra—not inter—branch removal.

Id.

That analytical approach does not comport with this Court's separation-of-powers precedent. This Court has explained that it is the separation of *powers* that concerned the Framers, not strictly the separation of *branches*. It is entirely permissible to give an official in one branch the authority to remove an official in another branch, but only to the extent

that they exercise the same *power*.[5] In *Mistretta* v. *United States*, 488 U.S. 361 (1989), for example, this Court found no constitutional infirmity with the President's authority to remove Article III judges from the United States Sentencing Commission, even though the Commission is located within the Judicial Branch. *Id.* at 410-11. As the Court explained, there was no separation-of-*powers* problem because the Article III judges on the Sentencing Commission were not subject to removal from their Article III role of exercising the judicial power of the United States. *Id.* They were subject to removal *only* from their executive-like duties of promulgating sentencing guidelines. *Id.*

Bowsher likewise disproves any notion that the separation-of-powers doctrine is concerned with the branch in which an official formally resides. As *Bowsher* observed, the Comptroller General was "an officer of the Legislative Branch," but the challenged statute gave him powers that were executive in nature. 478 U.S. at 731-33. The Court thus found a clear separation-of-powers violation in Congress's ability to remove the Comptroller General despite both entities residing within the same branch. *Id.* at 734.

In any event, the D.C. Circuit's conclusion that the Tax Court is part of the Executive Branch is wrong. When Congress formally reclassified the Tax Court as an Article I court, the Senate Committee on Finance correctly observed that "the Tax Court has *only judicial* duties." *Supra* at 5 (emphasis added).

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[5] Likewise, it is also, of course, perfectly permissible for those in one branch to remove an officer of another branch by way of the impeachment process set forth in the Constitution.

In *Freytag* this Court described the Tax Court as one of the "Courts of Law," and stated emphatically that the Tax Court "exercises judicial, *rather than executive*, legislative, *or administrative*, power . . . ." 501 U.S. at 890-91 (emphases added). For all practical purposes the Tax Court is akin to a federal district court, with similar legal and equitable authority, including the authority to enter final judgments reviewed in the courts of appeals. *Supra* at 5-10. There is simply nothing tying the Tax Court to the Executive Branch *except* the President's removal power. It would be entirely circular to hold that the President's authority to remove Tax Court judges is constitutional because the President has authority to remove Tax Court judges; the removal power cannot be the only basis for its own constitutionality.[6] Thus, even if the D.C. Circuit's "inter-branch" approach to separation-of-powers analysis is correct, the decision below still must fail because the Tax Court is not in the Executive Branch.

2. The D.C. Circuit also reasoned that the Tax Court cannot exercise judicial power because it is not an Article III court. Pet. App. 17a-21a.[7] That

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[6] Relatedly, there is no need for the President to have removal authority over Tax Court judges because he will not be held accountable for their actions.

[7] Petitioners did not argue below and do not argue now that the Tax Court is an Article III court. The court of appeals construed petitioners' argument as seeking and requiring that classification. Pet. App. 17a-18a. The court of appeals then proceeded to knock down that straw man and hold that because the Tax Court is in the Executive Branch (regardless of the powers it exercises) there is no separation-of-powers problem with the President's removal authority over its judges. *Id.* at 17a-27a. Yet where the Tax Court falls in the U.S.

reasoning is inconsistent with *Freytag*, which explained that "the judicial power of the United States is not limited to the judicial power defined under Article III" and that "non-Article III tribunals [may] exercise the judicial power of the United States." 501 U.S. at 889.

Freytag was clearly correct in this regard. There are other non-Article III judges, besides Tax Court judges, who exercise "the judicial power of the United States." And tellingly, these other judges, consistent with the separation of powers, are not subject to removal by the Executive. In particular:

- As noted in *Freytag*, *id.* at 889, in *Williams* v. *United States*, 289 U.S. 553, 565 (1933), this Court held that the Article I Court of Claims "undoubtedly . . . exercise[d] judicial power." So does its modern successor, the Article I United States Court of Federal Claims, but, unlike the Tax Court, the Court of Federal Claims' judges are removable by Article III judges on the Federal Circuit, not the President. 28 U.S.C. § 176.
- Federal magistrate judges exercise the judicial power of the United States: When parties consent, magistrate judges may hold trials (including jury trials), oversee all pretrial

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government's organizational chart is beside the point. Petitioners are not seeking lifetime tenure and salary protections for Tax Court judges, who currently serve 15-year terms and receive the salary of federal district court judges. 26 U.S.C. § 7443(c), (e). The separation of powers is concerned with just that—power—and because Tax Court judges exercise the judicial power of the United States, it is unconstitutional for the Chief Executive to have the power to remove them.

> matters, and enter final judgments reviewable by the court of appeals directly, without further oversight by a federal district court judge. *Id.* § 636(c)(1), (3). Magistrate judges have authority to punish contempt by fine, imprisonment, or both. *Id.* § 636(e). And again, similar to judges on the Court of Federal Claims, magistrate judges are removable by Article III judges on the federal district courts, not the President. *Id.* § 631(i).

Thus, contrary to the D.C. Circuit's reasoning, that the Tax Court is not an Article III court is not determinative of the questions whether the Tax Court exercises the "judicial power of the United States" and whether the President may remove its judges.

3. The court of appeals placed great weight on the "public rights doctrine," Pet. App. 19a-20a, reasoning that tax disputes between the Executive Branch and taxpayers may be assigned to adjudicatory bodies within the Executive Branch. That reasoning too is flawed, proving both too much and too little.

The Court has acknowledged that its description of what cases fall within the public rights doctrine "has not been entirely consistent" and comprises "various formulations." *Stern*, 131 S. Ct. at 2611. Roughly speaking, the doctrine applies "to matters that historically could have been determined exclusively by [Executive] departments," *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion); cases in which "'it depends upon the will of congress whether a remedy in the courts shall be allowed at all,' so Congress

could limit the extent to which a judicial forum was available," *Stern,* 131 S. Ct. at 2612 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)); and "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority," *id.* at 2598. Just because public rights cases could be assigned exclusively to non-Article III tribunals, however, does not mean that they *must* be. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 549-50 (1962). Article III courts are able to, and do, hear public-rights disputes. *N. Pipeline*, 458 U.S. at 67-68 ("'congress may or may not bring'" public-rights cases "'within the cognizance of the courts of the United States'" (plurality opinion) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284)). That the Tax Court often hears cases involving public rights thus proves too little; Article III courts can hear public rights cases too.

The appeals court's public-rights analysis also proves too much, for the Tax Court does not hear only public-rights cases. The Tax Court frequently is called upon to enter final judgment on questions of constitutional law and to effectuate those judgments through equitable relief that binds executive officials. See *supra* at 6-10; *infra* at 27-29. Such constitutional and equitable matters scarcely qualify as "public rights" that "historically could have been determined exclusively" by the Executive. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of

fact and law, necessary to the performance of that supreme function."). That *some* of the Tax Court's jurisdiction involves public rights that could be (but again, need not be) adjudicated by an Executive Branch body scarcely suffices to establish that Executive Branch employees answerable to the President may enter final judgments on constitutional claims and enforce them by way of injunction, as the Tax Court can.

4. Finally, the D.C. Circuit reasoned that the Tax Court is more akin to adjudicative bodies that exercise "executive power" than to Courts of Law. Pet. App. 26a-31a. The court of appeals' reasoning in that regard closely mirrors that of the concurring Justices in *Freytag*, who opined that the Tax Court should be considered an "administrative" body within the Executive Branch. 501 U.S. at 909 (stating that Tax Court judges, like administrative bodies, "determine facts, apply a rule of law to those facts, and thus arrive at a decision" but stating "there is nothing 'inherently judicial' about 'adjudication'").

But a majority of this Court *rejected* that characterization of the Tax Court in *Freytag*. The Court's opinion flatly stated that the Tax Court exercises neither "executive" nor "administrative" power. *Id.* at 890-91. And correctly so. Key dissimilarities between Tax Court judges and administrative law judges dispel any notion that Tax Court judges are ALJs by another name. Tax Court judges derive their authority from an independent Act of Congress, not from a delegation by the Commissioner of Internal Revenue. That stands in contrast to ALJs, who exercise delegated authority. See, *e.g.*, 12 U.S.C. § 248(k) (authorizing Board of Governors of the Federal Reserve System to delegate

their authority to ALJs); 42 U.S.C. § 3608(c) (authorizing Secretary of Housing and Urban Development's to delegate his authority to ALJs). Likewise, Tax Court decisions, unlike many decisions by ALJs, are not subject to review by an executive officer. See, *e.g.*, 10 C.F.R. §§ 2.321, 2.341 (Atomic Safety and Licensing Board decisions reviewed by Nuclear Regulatory Commission); 18 C.F.R. §§ 385.711, 385.712 (opinions (called "initial decisions") of ALJs within the Federal Energy Regulatory Commission are subject to review by the Commission). And ALJs, unlike Tax Court judges, have limited-to-no power to enforce their own subpoenas. Instead, they ordinarily must refer such matters to a federal district court. [8]

The D.C. Circuit thought a comparison of the Tax Court to the territorial courts and the Court of Appeals for the Armed Forces to be particularly apt. Pet. App. 22a-25a, 29a-31a. But that was a mistake. With respect to the Court of Appeals for the Armed Forces, this Court previously has noted the extraordinary authority vested in the Executive Branch over "'the trial and punishment of military and naval offences,'" such that the power to dispense military justice and the judicial power of the United States "'are entirely independent of each other.'" *N. Pipeline*, 458 U.S. at 66 (plurality opinion) (quoting *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857)). And with respect to the territorial courts, the separation of powers simply does not apply: "Art. IV

[8] See, *e.g.*, 15 U.S.C. § 49 (requiring Federal Trade Commission to "invoke the aid of any court of the United States" to enforce subpoenas).

bestowed upon Congress alone a complete power of government over territories not within the States that constituted the United States." *Id.* at 64-65 (citing *Am. Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828)); *McAllister* v. *United States*, 141 U.S. 174, 188 (1891) ("The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the constitution with congress, under its plenary power over the territories of the United States.").

There is no dispute that Executive Branch employees sometimes adjudicate disputes, and no dispute that the President ordinarily must be able to remove members of the Executive Branch. Petitioners therefore do not dispute that some people who happen to be called "judges" could be removed by the President. For the reasons given above, however, the Tax Court is not an adjudicatory body exercising executive power. Therefore, the President's authority to remove Tax Court judges is unconstitutional.

C. The Question Presented Is Important And Warrants Review By This Court

The decision below is clearly in conflict with a decision of this Court, which ruled that Tax Court judges exercise the judicial power of the United States. *Freytag*, 501 U.S. at 890-91. As a result, the decision below also runs afoul of *Bowsher*, for it allows one governmental power to remove from office persons exercising a different power. The question presented is a pure question of law that applies to every case decided by the Tax Court. There is little

to be gained and much to be lost from waiting to decide it.

1. The Tax Court is an important and busy court; it hears the vast majority of tax-related cases despite sharing jurisdiction over certain matters with the federal district courts, the Court of Federal Claims, and the bankruptcy courts. There were more than 28,000 cases pending in the Tax Court as of September 30, 2013. IRS, Data Book, 2013, at 61 (March 2014), http://www.irs.gov/pub/irs-soi/13databk.pdf. The number of tax cases pending in the Tax Court dwarfs the number of tax cases pending in other courts: Approximately 96 percent of the approximately 30,000 tax cases filed annually are filed in the Tax Court.[9]

At the same time, the Tax Court does not only "interpret[] and apply[] the internal revenue laws." Pet. App 26a. It also renders opinions on questions of constitutional law in which taxpayers are adverse to the Executive Branch. The Tax Court has been

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[9] The 2013 annual report of the Administrative Office of the United States Courts reported 1,113 tax cases filed in the federal district courts and 79 tax cases filed in the Court of Federal Claims, while the IRS's 2013 Data Book reported 29,837 cases filed in the Tax Court. Administrative Office of the United States Courts, Judicial Business of the United States Courts: Annual Report of the Director, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012 and 2013) (2013), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf; *id*. at Table G-2A (U.S. Court of Federal Claims—Cases Filed, Terminated and Pending for the 12-Month Period Ending September 30, 2013), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/G02ASep13.pdf; IRS, Data Book, *infra*, at 61.

asked to decide whether a regulation defining whether advocacy by an organization is "educational" violates the First, Fifth, and Fourteenth Amendments. *Nationalist Movement* v. *Comm'r*, 102 T.C. 558 (1994). It has been asked to decide whether the tax code's treatment of single versus married persons, and same-sex versus opposite-sex married couples, violates the Equal Protection Clause. See, *e.g.*, *Kellems* v. *Comm'r*, 58 T.C. 556 (1972) (rejecting constitutional challenge by single person to differential treatment from married couples); *Mueller* v. *Comm'r*, 79 T.C.M. (CCH) 1887 (2000) (same, in challenge by same-sex couple).

Unfortunately, the fairness of the application of the nation's tax laws by the IRS is sometimes called into question. Recently, assertions of political retaliation by the IRS against certain groups seeking tax-exempt status have been the subject of headlines, Congressional investigations and hearings, and Presidential statements.[10] Cases challenging adverse tax-exempt status determinations can be and are heard by the Tax Court. *E.g.*, *Gen. Conference of The Free Church of Am.* v. *Comm'r*, 71 T.C. 920 (1979) (upholding IRS determination that religious organization does not qualify for 501(c)(3) status). Taxpayers are entitled to know that their

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[10] See, *e.g.*, Juliet Eilperin and Zachary A. Goldfarb, *IRS Officials in D.C. Implicated*, Washington Post, May 14, 2013, at A1 (discussing targeting of conservative groups seeking tax-exempt status by IRS); *Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. On Oversight and Gov't Reform*, 113th Cong. (2014); The White House, Office of the Press Secretary, *Statement by the President*, May 15, 2013, http://www.whitehouse.gov/the-press-office/2013/05/15/statement-president.

challenges to adverse determinations by the IRS will be decided by judges immune from pressure by the very same administration that allegedly reached a politically-biased determination in the first place.

2. The decision below sustains the removal power for all cases that come to the D.C. Circuit. That circuit is the exclusive forum for many taxpayers: For certain categories of cases, the appropriate venue for all Tax Court appeals is the D.C. Circuit. 26 U.S.C. § 7482(b)(1); see *Byers* v. *Comm'r*, 740 F.3d 668, 677 (D.C. Cir. 2014) ("Excluding a few exceptions that are not relevant here, the plain text of § 7482(b)(1) says that the proper venue to seek review of a Tax Court decision lies in the D.C. Circuit *unless* one of the circumstances enumerated in subparagraphs (A)-(F) applies."). For taxpayers who have nowhere else to go, the D.C. Circuit's decision is the final word; for them, no percolation is possible.

3. While *Freytag* unambiguously ruled that the Tax Court is a Court of Law exercising the judicial power of the United States, this Court did more recently state in *Stern* that "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article." 131 S. Ct. at 2620. That statement arguably is in tension with *Freytag*'s conclusion that both the Court of Federal Claims and the Tax Court exercise the judicial power. That tension may be resolved—with respect to some categories of cases heard by the Tax Court—by the existence of consent to jurisdiction (as with magistrate judges) and/or categorization of claims as falling under the public rights doctrine. *Id.* at 2614-15 & n.8, 2627-28 (majority and dissent discussing role of consent in allowing cases to be

heard by non-Article III judges).[11] For purposes of the question raised by this petition—the constitutionality of the President's removal authority over non-Article III judges exercising the judicial power of the United States—the resolution of this tension may not be necessary: Even if Tax Court judges, magistrate judges, and Court of Federal Claims judges do not enjoy the full protections of Article III, the Constitution's separation of powers prevents *the Executive Branch* from removing them. In any event, to the extent resolving such tension as may exist between *Freytag* and *Stern* is necessary to decide this case, that is yet another reason why the Court should grant the petition.

The petitioners in *Freytag* did not raise the separation-of-powers issue presented here, but the concurring Justices nonetheless foresaw that this Court would ultimately need to address it. Although those Justices disagreed with the Court's holding that the Tax Court exercises the judicial power of the United States, they understood that the relief petitioners seek here flows directly from it. Citing *Bowsher*, they stressed that the President's removal authority over Tax Court judges made it virtually

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[11] The question whether Article III permits bankruptcy courts to exercise the judicial power of the United States where the parties consent is currently before the Court in *Wellness Int'l Network* v. *Sharif*, No. 13-935. See *Exec. Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2170 n.4 (2014) (reserving the question "whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim"). That question has no bearing on this petition. Petitioners here do not challenge the Tax Court's authority to adjudicate their dispute despite its judges lacking Article III protections; they challenge only the President's removal power over its judges.

inconceivable that they could exercise their judicial power independent from the Executive Branch. *Freytag*, 501 U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment). It is important to take this case to resolve this issue left open by *Freytag*.

4. The separation-of-powers issue raised by this petition is not merely theoretical. At least one call by an unhappy litigant for the President to remove a Tax Court judge has become public in recent years. Sam Young, *Kanter Plaintiffs Call for Investigation of Tax Court Judges*, Tax Notes Today, Mar. 8, 2010, at 1182.

To be sure, there is no evidence that the President threatened or even considered removing Judge Wherry over petitioners' case, which is small in the grand scheme of things if of tremendous importance to the petitioners personally. But that is beside the point. As discussed above, the President need not exercise—or even threaten to exercise—his removal authority for that authority to be struck down as unconstitutional. The separation-of-powers doctrine is compromised by the existence of aggrandizement of power in one branch, regardless of any actual exercise of that power. *Supra* at 14-17. Thus, this Court typically considers separation-of-powers issues related to an inter-power removal authority in cases that do not actually involve an attempt to exercise that power. See *Bowsher*, 478 U.S. at 719 (Congress's removal power over Comptroller General not exercised before provision deemed unconstitutional and, in fact, complaint for declaratory relief was filed "within hours of the President's signing of the Act"); *Mistretta*, 488 U.S. at 408-12 (analyzing President's removal power over

Article III judges on the Sentencing Commission prior to any public exercise of that power); *Morrison* v. *Olson*, 487 U.S. 654, 685-93 (1988) (analyzing constitutionality of limits on Attorney General's removal power prior to any attempt to exercise that power).

* * * * *

As this Court has made clear, the Tax Court is a "Court[] of Law" exercising the "judicial power of the United States." That court has been improperly subjected to Executive control. This Court therefore should strike down Section 7443(f) and remand this case to the Tax Court for a new trial before a decisionmaker now free from improper influence by the Executive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 26, 2014

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 26, 2013 Decided June 20, 2014

No. 13-1090

PETER KURETSKI AND KATHLEEN KURETSKI,
APPELLANTS

V.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
APPELLEE

On Appeal from the Decision and
Order of the United States Tax Court

Tuan N. Samahon argued the cause for appellants. With him on the briefs were *Carlton M. Smith*, *Frank Agostino*, and *John P.L. Miscione*.

Bethany B. Hauser, Attorney, U.S. Department of Justice, argued the cause for appellee. With her on the brief was *Teresa E. McLaughlin*, Attorney.

Before: SRINIVASAN, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by Circuit Judge SRINIVASAN.

SRINIVASAN, *Circuit Judge*: Peter and Kathleen Kuretski owed more than $22,000 in federal income taxes for the 2007 tax year. They paid none. The Internal Revenue Service assessed the unpaid amount plus penalties and interest, and then attempted to collect from the Kuretskis by means of a levy on the couple's home. The Kuretskis unsuccessfully challenged the proposed levy in the Tax Court.

The Kuretskis now contend that the Tax Court judge may have been biased in favor of the IRS in a manner that infringes the constitutional separation of powers. They point to 26 U.S.C. § 7443(f), which enables the President to remove Tax Court judges on grounds of "inefficiency, neglect of duty, or malfeasance in office." According to the Kuretskis, Tax Court judges exercise the judicial power of the United States under Article III of the Constitution, and it violates the constitutional separation of powers to subject any person clothed with Article III authority to "interbranch" removal at the hands of the President. The Kuretskis thus ask us to strike down 26 U.S.C. § 7443(f), vacate the Tax Court's decision, and remand their case for re-decision by a Tax Court judge free from the threat of presidential removal and hence free from alleged bias in favor of the Executive Branch.

To our knowledge, this is the first case in any court of appeals to present the question of whether 26 U.S.C. § 7443(f) infringes the constitutional separation of powers. We answer that question in

the negative. Even if the prospect of "interbanch" removal of a Tax Court judge would raise a constitutional concern in theory, there is no cause for concern in fact: the Tax Court, in our view, exercises Executive authority as part of the Executive Branch. Presidential removal of a Tax Court judge thus would constitute an intra—not inter—branch removal. We also reject the Kuretskis' remaining challenges to the Tax Court's disposition of their case.

I.

A.

When the Internal Revenue Service determines that a taxpayer owes more to the federal government than the taxpayer has paid, the IRS may make an assessment recording the taxpayer's outstanding liability. *See* 26 U.S.C. § 6201; *United States v. Fior D'ltalia, Inc.*, 536 U.S. 238, 243 (2002). An assessment is "essentially a bookkeeping notation" made when the IRS "establishes an account against the taxpayer on the tax rolls." *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976). Upon issuance of an assessment, the federal government acquires a lien on all property belonging to the delinquent taxpayer. *See* 26 U.S.C. §§ 6321, 6322. "'A federal tax lien, however, is not self-executing,' and the IRS must take 'affirmative action to enforce collection of the unpaid taxes.'" *EC Term of Years Trust v. United States*, 550 U.S. 429, 430-31 (2007) (alteration and ellipsis omitted) (quoting *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 720 (1985)). One of the IRS's "principal tools" for collecting unpaid taxes is a "levy," a "legally sanctioned seizure and sale of

property." *Id.* at 431 (internal quotation marks omitted).

Until 1921, taxpayers had no pre-assessment opportunity to dispute the amount they owed the Treasury. Nor could they challenge a levy before its imposition. A taxpayer's only recourse was to pay the disputed amount and then bring a refund suit against the tax collector or the United States. *See Flora v. United States*, 362 U.S. 145, 151-52 (1960); *Burns, Stix Friedman & Co. v. Comm'r*, 57 T.C. 392, 394 n.7 (1971).

The Revenue Act of 1921 for the first time required giving taxpayers pre-assessment notice of a deficiency. The 1921 Act also provided that "[o]pportunity for hearing shall be granted" before assessment of the tax. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 266. But it was not until 1924 that Congress created a tribunal separate from the Bureau of Internal Revenue (as the IRS was then known) to hear taxpayers' pre-assessment appeals. *See* Harold Dubroff, *The United States Tax Court: An Historical Analysis*, 40 Alb. L. Rev. 7, 64-66 (1975); *see also John Kelley Co. v. Comm'r*, 326 U.S. 521, 527-28 (1946).

The Revenue Act of 1924 established the "Board of Tax Appeals" as "an independent agency in the executive branch of the Government." Revenue Act of 1924, ch. 234, § 900(a), (k), 43 Stat. 253, 336, 338. The Act provided for the President to appoint members of the Board to ten-year terms with the advice and consent of the Senate. *Id.* § 900(b), 43 Stat. at 336-37. The Act also stated that "[a]ny member of the Board may be removed by the

President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason." *Id.* at 337. In 1926, Congress extended the term of Board members to twelve years and amended the removal provision to guarantee "notice and opportunity for a public hearing" before the President could remove a Board member for cause. Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 9, 105-06. The 1926 Act also made the Board's decisions directly reviewable by the circuit courts of appeals. *Id.* § 1001(a), 44 Stat. at 109-10.

In 1942, Congress changed the name of the Board to "The Tax Court of the United States" and declared that the court's members "shall be known" as "judges." *See* Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957. But the 1942 Act otherwise left intact the provisions governing the former Board of Tax Appeals.

More than a quarter of a century later, Congress enacted a series of additional changes to the statutes governing the Tax Court. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36. The 1969 Act amended the statute addressing the status of the court to read:

> There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

Id. § 951, 83 Stat. at 730 (codified at 26 U.S.C. § 7441). The 1969 Act extended the term of Tax

Court judges from twelve years to fifteen years. *See* Pub. L. No. 91-172, § 952, 83 Stat. at 730. Congress did not, however, alter the provision allowing for presidential removal of Tax Court judges. The removal statute remains in place today, and states:

> Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

26 U.S.C. § 7443(f). It appears that no President has ever sought to remove a member of the Tax Court or the Board of Tax Appeals. *See* Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 Cornell L. Rev. 985, 994 n.54 (1991).

After the 1969 Act, the Tax Court continued to provide a pre-assessment forum for taxpayers to challenge the IRS's deficiency determinations. Upon making an assessment, however, the IRS could levy on a delinquent taxpayer's property without any additional opportunity for a hearing. *See United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 720 (1985); *United States v. Rodgers*, 461 U.S. 677, 682-83 (1983). That changed in 1998, when Congress established the "collection due process" hearing procedure "to temper 'any harshness'" caused by the IRS's ability to levy on a taxpayer's property before the taxpayer could challenge the collection action. *Byers v. Comm'r*, 740 F.3d 668, 671 (D.C. Cir. 2014) (quoting *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005)); Internal Revenue Service

Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401(b), 112 Stat. 685, 747-48 (codified as amended at 26 U.S.C. § 6330).

Under the 1998 Act, the IRS must give thirty days' notice before levying on any property to collect unpaid taxes. 26 U.S.C. § 6330(a). During those thirty days, the taxpayer may request a collection-due-process hearing before the IRS Office of Appeals, at which the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy." *Id.* § 6330(b)(1), (c)(2). If dissatisfied with the result of a collection-due-process hearing, the taxpayer may appeal to the Tax Court. *See id.* § 6330(d)(1). The Tax Court's decisions in collection-due-process cases are subject to review in this Court. *Byers*, 740 F.3d at 675-77.

B.

On April 15, 2008, Peter and Kathleen Kuretski of Staten Island, N.Y., filed a joint federal income tax return for 2007 on which they reported a tax liability of $24,991 and claimed a withholding credit of $2856. The Kuretskis did not include any payment of the liability reported on their return. Because the Kuretskis did not dispute the amount they owed, the IRS assessed the balance shown on the return along with penalties and interest. In October 2008, the IRS notified the Kuretskis that they owed $23,601.50 to the United States Treasury, and the IRS told the Kuretskis that it intended to levy on their property thirty days later unless they paid the amount due.

The Kuretskis, through their counsel, filed timely requests for a collection-due-process hearing

on the ground that "a levy would create a burden and hardship" for the couple. The Kuretskis submitted an "offer in compromise," proposing to pay $1000 in five monthly installments of $200 to settle their outstanding tax liabilities, and they also asked for an abatement of penalties. *See* 26 C.F.R. § 301.7122-1 (procedure for compromises); *see also id.* § 301.6651-1(c) (procedure for abatement of penalties based on reasonable cause for failure to pay).

In a letter to the Kuretskis' attorney dated April 14, 2010, an IRS settlement officer rejected the Kuretskis' offer in compromise. The letter explained that the Kuretskis' equity in their home rendered the offer "unacceptable as an alternative for collection." The settlement officer later told the Kuretskis' attorney that the IRS might be willing to accept a full-payment installment agreement under which the Kuretskis would pay $250 a month for the next nine years.

On June 8, 2010, the Kuretskis' attorney advised the IRS that her clients continued to seek a partial-payment agreement instead of the full-payment installment plan. On June 28, the Kuretskis and their attorney met with the settlement officer, but did not then (or later) accept the full-payment installment offer. On July 7, 2010, the settlement officer closed the Kuretskis' case file. An IRS appeals team manager approved the settlement officer's decision the next day, and the IRS sent a notice of determination to the Kuretskis on July 20 informing them that their requests for a compromise and an abatement of penalties had been rejected. The Kuretskis appealed to the Tax Court. *See* 26

U.S.C. § 6330(d)(1) (right to Tax Court review of IRS's collection-due-process determination).

C.

On September 12, 2011, the Kuretskis' case was tried before the Tax Court. As is relevant here, the Kuretskis, represented by new counsel, argued that the IRS settlement officer abused her discretion by closing their case file and issuing a notice of determination even though the parties were on the verge of reaching agreement on an alternate schedule for installment payments. The IRS settlement officer, however, testified that she had no recollection of any discussions on an alternate schedule, and that she had concluded by early July 2010 that she could no longer keep open the $250-a-month offer that had been on the table since April of that year. The Tax Court found that the "weight of the evidence" supported the settlement officer's account. Mem. Findings of Fact & Op. at 10. According to the Tax Court, the settlement officer had maintained a "firm stance" on the $250 figure through several months of negotiations, and an IRS officer "is not obligated to negotiate indefinitely." *Id.* at 11.

The Kuretskis also alleged that they should avoid any liability for late-payment penalties because they had reasonable cause for their failure to pay. *See* 26 U.S.C. § 6651(a)(2). The Tax Court rejected that argument. The Tax Court noted that the Kuretskis bore the burden of proof on this issue and concluded that the Kuretskis had failed to carry their burden. The Tax Court did find for the Kuretskis on one issue, overturning an assessed

penalty of $972 for underpayment of estimated tax under 26 U.S.C. § 6654.

One month after the Tax Court's decision, the Kuretskis filed a motion for reconsideration and a motion to vacate the decision. The Kuretskis argued for the first time that the statute allowing for presidential removal of Tax Court judges, 26 U.S.C. § 7443(f), violates Article III of the Constitution. The Kuretskis asked the Tax Court to find § 7443(f) unconstitutional, and then to decide the case again "free of 'the improper threat of interbranch removal.'" Order at 1-2 (Mar. 4, 2013) (quoting Kuretskis' argument).

On March 4, 2013, the Tax Court denied both motions. The court declined to address the Kuretskis' Article III argument, concluding that they had failed to explain why they waited to raise the argument until after the court's initial decision. The Kuretskis appealed to this Court, and the parties stipulated that the D.C. Circuit is the proper venue for review. *See* 26 U.S.C. § 7482(b)(2) (Tax Court decisions may be reviewed by any federal court of appeals designated by the IRS and the taxpayer "by stipulation in writing").

II.

The Kuretskis challenge the Tax Court's decision on both constitutional and nonconstitutional grounds. As to the latter, the Kuretskis argue that the Tax Court committed clear error in finding them liable for late-payment penalties under 26 U.S.C. § 6651(a)(2). We first take up that challenge before addressing the constitutional claims.

Under § 6651(a)(2), taxpayers who fail to pay their income taxes on time are liable for an additional 0.5% of the amount due for each additional month of nonpayment, up to a maximum of 25%. A taxpayer may gain relief from liability for late payment by showing "that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(2). The taxpayer "must make an affirmative showing of all facts alleged as a reasonable cause for his failure to . . . pay such tax on time *in the form of a written statement containing a declaration that it is made under penalties of perjury*." 26 C.F.R. § 301.6651-1(c)(1) (emphasis added). The written statement "should be filed with the district director or the director of the service center with whom the [taxpayer's] return is required to be filed." *Id.*

The Kuretskis contend that they "clearly had reasonable cause" for their failure to pay their taxes on time, thus entitling them to penalty relief under § 6651(a)(2). Pet'rs' Br. 49. The Kuretskis, however, have never submitted a written statement under penalty of perjury explaining why they had reasonable cause for their nonpayment. They raise no challenge to the validity of the regulation requiring a written statement under penalty of perjury as a prerequisite for penalty abatement. *Cf. Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712-16 (2011) (*Chevron* deference to IRS regulations). The regulation was adopted after notice and comment, *see* 36 Fed. Reg. 13,594, 13,596 (July 22, 1971), and the Kuretskis do not dispute its applicability to the penalty abatement issue in their case. *See* Pet'rs' Br.

50-51 (citing 26 C.F.R. § 301.6651-1(c)(1)). We see no basis for excusing their failure to comply with a regulation they concede to be applicable. *See, e.g.*, *Desabato v. United States*, 538 F. Supp. 2d 422, 426 n.6 (D. Mass. 2008) ("Failure to submit such a written statement to the IRS precludes a plaintiff from making a 'reasonable cause' showing for the first time in federal court."); *Brown v. United States*, 43 Fed. Cl. 463, 467 (1999) (taxpayer liable for late-payment penalty where he failed to submit the written statement required under 26 C.F.R. § 301.6651-1(c)(1)). We therefore find no error in the Tax Court's holding that the Kuretskis owe late-payment penalties under 26 U.S.C. § 6651(a)(2). And because the Kuretskis' failure to comply with the regulation affords a sufficient basis for upholding the imposition of late-payment penalties under § 6651(a)(2), we need not consider the Kuretskis' remaining arguments concerning the application of that provision against them.

III.

The Kuretskis' principal contention on appeal is that the prospect of presidential removal of Tax Court judges under 26 U.S.C. § 7443(f) violates the constitutional separation of powers. The IRS, for its part, initially advances three reasons for declining to reach the merits of the Kuretskis' separation-of-powers argument. We first consider (and reject) those asserted reasons before turning to the merits.

A.

The IRS's first asserted basis for declining to reach the Kuretskis' separation-of-powers argument

is that they forfeited the claim by failing to raise it until their motion for reconsideration. The general rule in Tax Court cases is "not to consider an argument raised for the first time in a motion for reconsideration." *Cerand & Co. v. Comm'r*, 254 F.3d 258, 260 (D.C. Cir. 2001). But the Supreme Court has recognized an exception to the general rule: an appellate court may exercise its discretion to hear "a constitutional challenge that is neither frivolous nor disingenuous" if the "alleged defect . . . goes to the validity of the Tax Court proceeding that is the basis for th[e] litigation." *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991). In that situation, the "disruption to sound appellate process entailed by entertaining objections not raised below" may be outweighed by "'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'" *Id.* (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)).

Just as the Supreme Court in *Freytag* elected to consider a belated constitutional challenge to the validity of a Tax Court proceeding, *id.*, we do so here. In *Freytag*, as here, the petitioners raised a nonfrivolous constitutional challenge to the validity of a Tax Court proceeding after the Tax Court's initial decision, and the petitioners' claim implicated the federal judiciary's strong interest in maintaining the separation of powers. The IRS, apparently attempting to suggest that the Kuretskis' separation-of-powers claim is "frivolous," characterizes the Kuretskis' argument as "of a type that has been repeatedly rejected." Resp't Br. 40 (citing *Nash Miami Motors, Inc. v. Comm'r*, 358 F.2d 636 (5th Cir. 1966); *Burns, Stix Friedman & Co.*, 57 T.C. 392; and

Parker v. Comm'r, 724 F.2d 469 (5th Cir. 1984)). None of the decisions on which the IRS relies, however, considered the removal power argument raised by the Kuretskis. Nor does this case involve "sandbagging" concerns of the sort that the Supreme Court noted in *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011), in declining to consider an argument that the bankruptcy court lacked statutory authority to resolve the respondent's defamation claim. In *Stern*, a timely objection to the bankruptcy court's statutory authority could have led to the consideration of the claim in federal district court. *See* 28 U.S.C. § 157(b)(5). Here, by contrast, in light of the Tax Court's exclusive jurisdiction over collection due process appeals, there is no other forum in which the Kuretskis' appeal could have been considered. *See* 26 U.S.C. § 6330(d)(1).

Second, the IRS argues that the Kuretskis waived any pre-payment challenge to the constitutionality of the Tax Court proceedings by seeking relief in the Tax Court in the first place. Although Article III confers on litigants a "personal right" to "have claims decided before judges who are free from potential domination by other branches of government," that right is "subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986) (internal quotation marks omitted). But aside from any "personal right" that they assert, the Kuretskis' arguments also implicate a separate interest protected by Article III: "'the role of the independent judiciary within the constitutional scheme of

tripartite government.'" *Id.* at 848 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985)). And when such a "structural principle is implicated in a given case, . . . notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 850-51. In *Schor*, the Supreme Court thus found that the respondent's decision to seek relief in the CFTC rather than in federal court amounted to a waiver of his claim under Article III of a "personal right" to "an impartial and independent federal adjudication," 473 U.S. at 848, but that he did not (and could not) thereby waive his "structural" claim, *id.* at 850-51.

The IRS errs in resting its waiver argument on *McElrath v. United States*, 102 U.S. 426 (1880). In *McElrath*, a retired Marine Corps officer sued the government in the Court of Claims for back pay, and the government asserted a counterclaim on the ground that the officer had received more than he was entitled to be paid. *Id.* at 435-36, 440-41. After the Court of Claims rendered judgment in favor of the government on its counterclaim, the officer argued in the Supreme Court that the entry of judgment without a jury trial violated the Seventh Amendment. *Id.* at 439-40. The Supreme Court affirmed, observing that "if [a litigant] avails himself of the privilege of suing the government in the special court organized for that purpose . . . , he must do so subject to the conditions annexed by the government to the exercise of the privilege." *Id.* at 440. As the Court later explained in *Schor*, however, the "right to trial by jury in civil cases"—at issue in *McElrath*—is one of the "personal constitutional

rights" that is "subject to waiver." *Schor*, 478 U.S. at 848-49. Because the Kuretskis raise a structural claim in addition to any "personal" claim akin to the one asserted in *McElrath*, they did not waive their structural challenge to the Tax Court proceedings by seeking relief in that court. *See, e.g.*, *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012).

Finally, the IRS asserts that the Kuretskis lack Article III standing to challenge the presidential removal of Tax Court judges. To establish Article III standing, the Kuretskis must show (i) that they have suffered an "injury in fact," (ii) that the injury is "fairly traceable to the challenged action" of the IRS, and (iii) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alteration, ellipsis, and internal quotation marks omitted). The proposed levy on the Kuretskis' home undoubtedly qualifies as an "injury in fact" that is fairly traceable to the IRS, but the IRS argues that the Kuretskis fail to meet the redressability requirement. This Court, however, could grant the Kuretskis adequate redress by striking down 26 U.S.C. § 7443(f) and then remanding the case to the Tax Court for a new trial before a judge no longer subject to the threat of presidential removal. We granted comparable relief in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1340 (D.C. Cir. 2012). After holding that a statutory provision limiting the ability of the Librarian of Congress to remove judges from the Copyright Royalty Board was unconstitutional, we remanded the case to the Board so that the appellants' claims could be heard by a

constitutionally valid tribunal. *Id.* at 1340-42. Although *Intercollegiate Broadcasting System* involved a challenge to a statute *restricting* removal while this case involves a challenge to a statute *allowing* for removal, we see no reason why that distinction could make a difference for redressability purposes. We thus conclude that the Kuretskis have standing to bring their separation-of-powers claim, and we proceed to consider the merits of the issue.

B.

In support of their argument that presidential removal of Tax Court judges violates the constitutional separation of powers, the Kuretskis' "primary position" is that the Tax Court exercises "judicial power" under Article III of the Constitution. In the alternative, the Kuretskis contend that the Tax Court is part of the Legislative Branch. Either way, the Kuretskis argue, presidential removal of Tax Court judges "leaves those judges in an unconstitutional bind" because they "must fear removal from an actor in another branch." Pet'rs' Br. 11, 33.

The Kuretskis' challenge rests on the assumption that "interbranch removal" is unconstitutional under *Bowsher v. Synar*, 478 U.S. 714 (1986). "Nothing in *Bowsher*, however, suggests that one Branch may never exercise removal power, however limited, over members of another Branch." *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989). We need not explore the precise circumstances in which interbranch removal may present a separation-of-powers concern because this case does not involve the prospect of presidential removal of officers in

another branch. Rather, the Kuretskis have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive. Consequently, if a President were someday to exercise the authority under 26 U.S.C. § 7443(f) to remove a Tax Court judge for cause, the removal would be entirely consistent with separation-of-powers principles.

1.

The Kuretskis' principal submission is that Tax Court judges exercise the judicial power of the United States under Article III of the Constitution. We disagree.

Article III prescribes that the "judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Judges of those courts "hold their Offices during good Behaviour," *id.*, which means that they are removable only via impeachment and conviction. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). That arrangement aims "to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." *Id.*

"Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern*, 131 S. Ct. at 2609. As a result, "[w]hen a suit is made of 'the stuff of the traditional

actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* (citation omitted) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)).

At the same time, the Supreme Court has recognized a "category of cases involving 'public rights'" that Congress can constitutionally assign to non-Article III tribunals. *Id.* at 2610 (quoting *Northern Pipeline*, 458 U.S. at 67 (plurality opinion)). The "public rights" category comprises disputes that "'could be conclusively determined by the Executive and Legislative Branches'" without judicial intervention. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (quoting *Northern Pipeline*, 458 U.S. at 68). The "public rights doctrine reflects simply a pragmatic understanding that, when Congress selects a quasi-judicial method of resolving matters" that could be decided with no judicial review, "the danger of encroaching on the judicial powers is reduced." *Id.*

Although the precise contours of the "public rights" doctrine are not fully formed, *see Stern*, 131 S. Ct. at 2610; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 n.8 (1989), it is "settled" that the category of public rights includes matters of "internal revenue" and "taxation," at least at the pre-collection stage. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-51 & nn.8-9 (1977) (internal quotation marks omitted); *see*

Crowell v. Benson, 285 U.S. 22, 50-51 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856). Congress therefore can constitutionally assign the adjudication of pre-collection tax disputes to non-Article III tribunals. *See Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 992 (2d Cir. 1991) ("The relationship between the government and taxpayer plainly gives rise to public rights and we have no doubt that the resolution of such disputes can be relegated to a non-Article III forum."), *abrogated on other grounds by Freytag*, 501 U.S. at 892.

Congress undisputedly exercised that option when it initially established the Tax Court as an Executive Branch agency rather than an Article III tribunal. *See* Revenue Act of 1924 § 900(k), 43 Stat. at 338 (Board of Tax Appeals established as independent executive agency); Revenue Act of 1942 § 504(a), 56 Stat. at 957 (Board renamed "The Tax Court of the United States," but status as independent executive agency unchanged); *see also* 26 U.S.C. § 1100 (1946). The Kuretskis believe that Congress shifted course in the 1969 Tax Reform Act, when it adjusted the Tax Court's formal title from "Tax Court of the United States" to "United States Tax Court," and provided that the Tax Court was "established[] under article I of the Constitution." 26 U.S.C. § 7441. There is no indication, however, that by prescribing that the Tax Court had been established under Article I, Congress somehow converted what had been an Executive Branch tribunal into an Article III court. The legislative history in fact indicates a belief and intention that the Tax Court is not an Article III body. *See* S. Rep.

No. 91-552, at 304 n.2 (1969) ("limitations of Article III of the Constitution, relating to life tenure and maintenance of compensation," do not apply to Tax Court judges). It would seem clear, then, that the Tax Court is not a part of the Article III Judicial Branch, and that its judges do not exercise the "judicial Power of the United States" under Article III.

The Supreme Court's decision in *Freytag v. Commissioner*, however, adds a wrinkle to what would otherwise be a straightforward analysis. The dispute in *Freytag* concerned a statute allowing the Chief Judge of the Tax Court to appoint "special trial judges" and assign certain cases to them. See 26 U.S.C. § 7443A. The petitioners in *Freytag* contended that the provision for appointment of special trial judges violates the Appointments Clause of Article II. That clause grants Congress the power to "vest the Appointment of . . . inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The *Freytag* petitioners argued that "a special trial judge is an 'inferior Officer'" and that "the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power." *Freytag*, 501 U.S. at 878 (alteration omitted). The Supreme Court rejected that argument. Four Justices would have held that the Tax Court is an executive "Department" and the Chief Judge is its head. *See id.* at 920-22 (Scalia, J., concurring in part and concurring in the judgment). A majority of five Justices instead held that the Tax Court is a "Court of Law" (and, implicitly, that the Chief Judge of the Tax Court can exercise the

appointment power on behalf of the court). *See id.* at 870, 892.

The Kuretskis rely substantially on the *Freytag* majority's holding that the Tax Court is a "Court of Law." That holding, however, does not call into question the constitutionality of the President's removal power over Tax Court judges under 26 U.S.C. § 7443(f). A tribunal may be considered a "Court of Law" for purposes of the Appointments Clause notwithstanding that its officers may be removed by the President. The *Freytag* Court's treatment of territorial courts confirms the point. The Court indicated that territorial courts constitute "Courts of Law" for purposes of the Appointments Clause, *see Freytag*, 501 U.S. at 892, even though it was by then well settled that the President may remove judges from territorial courts (including without cause) if the governing statute allows it. *See Shurtleff v. United States*, 189 U.S. 311, 316 (1903) ("judges of the territorial courts may be removed by the President"); *see also McAllister v. United States*, 141 U.S. 174, 179-91 (1891) (rejecting constitutional challenge to President Cleveland's suspension of Alaska territorial judge).

To be sure, the *Freytag* Court observed that the Tax Court "exercises a portion of the judicial power of the United States." *Freytag*, 501 U.S. at 891. That statement, if considered in isolation, could be construed to suggest that Tax Court judges exercise Article III powers. But the *Freytag* Court clarified that "non-Article III tribunals . . . exercise the judicial power of the United States," such that "the judicial power of the United States is not limited to

the judicial power defined under Article III." *Id.* at 889 (citing *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). The Court therefore used the phrase "judicial power" in "an enlarged sense," not in the particular sense employed by Article III. *See Murray's Lessee*, 59 U.S. at 280 ("judicial act" in "an enlarged sense" encompasses "all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law"); *cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting) (administrative agencies exercise "judicial power" when they "adjudicat[e] enforcement actions and impos[e] sanctions on those found to have violated their rules"). As another court of appeals has explained, a "central lesson from *Freytag* is that adjudication by adversarial proceedings can exist outside the context of Article III." *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 171 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002); *see Freytag*, 501 U.S. at 891 (Tax Court is "an adjudicative body"). The *Freytag* Court, after all, repeatedly compared the Tax Court to the non-Article III territorial courts. *See id.* at 889-90, 892.

The Kuretskis argue that the precedents allowing for presidential removal of territorial judges have little bearing on their separation-of-powers argument because "territorial courts do not exercise the judicial power of the United States." Pet'rs' Br. 40-41. It is true that territorial courts do not exercise "the judicial power of the United States" in the particular sense addressed by Article III. *See McAllister*, 141 U.S. at 190. But the *Freytag* Court

suggests that territorial courts exercise "judicial power" in the same overarching sense in which the Tax Court exercises "judicial power," such that the territorial courts and the Tax Court are similarly situated for purposes of the Appointments Clause. *See Freytag*, 501 U.S. at 889-90 (territorial court is "one of the 'Courts of Law'" under Appointments Clause). We see no reason why the territorial courts and the Tax Court are not also similarly situated for purposes of presidential removal. Accordingly, we conclude that the Tax Court's status as a "Court of Law"—and its exercise of "judicial power"—for Appointments Clause purposes under *Freytag* casts no doubt on the constitutionality of the President's authority to remove Tax Court judges.

2.

Even if the Tax Court does not exercise Article III judicial power, the Kuretskis argue as a fallback position that the Tax Court functions as part of the Article I Legislative Branch. Understandably, the Kuretskis make no attempt to explain how the Tax Court could conceivably be considered a legislative body or conceivably be seen to possess legislative power. Instead, the Kuretskis suggest that the Tax Court may fall within the Legislative Branch because it constitutes "an Article I legislative court." We have no disagreement with the characterization of the Tax Court as an "Article I legislative court." Congress, as explained, amended 26 U.S.C. § 7441 in 1969 to provide that the Tax Court is a "court of record" established "under article I of the Constitution." And the Freytag Court understood that the "clear intent of Congress" in the

1969 Act was "to transform the Tax Court into an Article I legislative court." *Freytag*, 501 U.S. at 888. But even if the 1969 Act transformed the Tax Court into an Article I legislative court, it did not thereby transfer the Tax Court to the Legislative Branch.

The Constitution itself "nowhere makes reference to 'legislative courts'"; the "concept of a legislative court" instead "derives from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter.*" *Glidden*, 370 U.S. at 543-44 (citing *Canter*, 26 U.S. (1 Pet.) 511). In *Canter*, Chief Justice Marshall used the phrase "legislative Courts" to describe the territorial courts of Florida, which at the time had yet to be admitted to the Union as a state. "The jurisdiction with which [the Florida territorial courts] are invested," according to Chief Justice Marshall, "is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *Canter*, 26 U.S. (1 Pet.) at 546; *cf.* U.S. Const. art. IV, § 3, cl. 2 ("Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory . . . belonging to the United States"). Later decisions describe tribunals such as the Court of Customs Appeals and the superior courts of the District of Columbia as "legislative courts"; those bodies, like the Florida territorial courts, were created by Congress pursuant to non-Article III powers. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 449-61 (1929); *cf.* U.S. Const art. I, § 8, cl. 1 ("Power To lay and collect . . . Duties, Imposts and Excises"); *id.* art. I, § 8, cl. 17 (legislative power "over such District . . . as may . . .

become the Seat of the Government of the United States").

A tribunal constitutes a "legislative court" if its power "is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument." *Williams v. United States*, 289 U.S. 553, 565-66 (1933). Congress's authority to create the Tax Court stems from two clauses in Article I, Section 8 of the Constitution: the Taxing and Spending Clause and the Necessary and Proper Clause. *See* U.S. Const. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare"); *id.* art. I, § 8, cl. 18 (authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). The Tax Court itself has explained that it owes its existence to Congress's authority under those Clauses. *See Burns, Stix Friedman & Co.*, 57 T.C. at 394-95.

The Tax Court's status as an "Article I legislative court," *Freytag*, 501 U.S. at 888, does not mean that its judges exercise "legislative power" under Article I. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001) ("legislative power" consists of decisionmaking authority without any "'intelligible principle to which the person or body authorized . . . is directed to conform'" (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))). The Tax Court is in the business of interpreting and applying the internal revenue laws, *see Freytag*, 501 U.S. at 891, not in the business of making those laws. And the Tax Court's Article I origins do not

distinguish it from the mine run of Executive Branch agencies whose officers may be removed by the President. After all, every Executive Branch entity, from the Postal Service to the Patent Office, is established pursuant to Article I. *See* U.S. Const. art. I, § 8, cl. 7 (Postal Clause); *id.* art. I, § 8, cl. 8 (Copyright and Patent Clause). The Tax Court no more exercises Article I powers than do those agencies. The Tax Court's status as an "article I legislative court" therefore presents no barrier to presidential removal of Tax Court judges. *See Mistretta*, 488 U.S. at 411 n.35 ("the President may remove a judge who serves on an Article I court").

3.

We have explained that Tax Court judges do not exercise the "judicial power of the United States" pursuant to Article III. We have also explained that Congress's establishment of the Tax Court as an Article I legislative court did not transfer the Tax Court to the Legislative Branch. It follows that the Tax Court exercises its authority as part of the Executive Branch.

That conclusion is fully consistent with *Freytag*. The *Freytag* majority rejected the argument that the Tax Court is an executive "Department" for purposes of the Appointments Clause. *See Freytag*, 501 U.S. at 888. But the majority also made clear that an entity can be a part of the Executive Branch without being an executive "Department." *See id.* at 885 ("We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power."); *id.* at 886 ("a holding that

every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint"). One of our sister circuits thus understands *Freytag* to hold that "the Tax Court is a Court of Law *despite being part of the Executive Branch" S.C. State Ports Auth.*, 243 F.3d at 171 (emphasis added).

The *Freytag* majority also observed that the Tax Court "remains independent of the Executive . . . Branch[]," and in that sense exercises something other than "executive" power. 501 U.S. at 891. We understand that statement to describe the Tax Court's functional independence rather than to speak to its constitutional status. The Supreme Court has used similar language to describe "quasilegislative" and "quasijudicial" agencies such as the Federal Trade Commission, noting that such agencies are "wholly disconnected from the executive department" and that their members must "act in discharge of their duties independently of executive control." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-30 (1935). While "independent," members of such agencies can be removed by the President for cause. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting on other grounds) (noting that "[c]onstitutionally speaking, an 'independent' agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government," and "even 'independent' agencies[] are more appropriately considered to be part of the Executive Branch"). And the Tax Court is hardly the sole Executive-Branch "adjudicative body," *Freytag*, 501 U.S. at 891, to sit in "independent" judgment of other executive actors. *See, e.g.*, 5 U.S.C. § 1204(a)

(Merit Systems Protection Board sits in judgment of other agencies); *id.* § 7105(g) (Federal Labor Relations Authority); 10 U.S.C. § 867 (Court of Appeals for the Armed Forces reviews decisions of other Defense Department entities); 29 U.S.C. § 659(c) (Occupational Safety and Health Review Commission sits in judgment of Secretary of Labor); 39 C.F.R. § 3001.1 *et seq.* (Postal Regulatory Commission sits in judgment of Postal Service). Congress may afford the officers of those entities a measure of independence from other executive actors, but they remain Executive-Branch officers subject to presidential removal. *Cf. City of Arlington*, 133 S. Ct. at 1873 n.4 ("Agencies . . . conduct adjudications . . . and have done so since the beginning of the Republic. These activities take . . . 'judicial' form[], but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power.'" (quoting U.S. Const. art. II, § 1, cl. 1)).

In relevant respects, the constitutional status of the Tax Court mirrors that of the Court of Appeals for the Armed Forces. The statutes establishing the status of the two courts precisely parallel one another. Each provides that the respective court is a "court of record" "established under article I of the Constitution." 10 U.S.C. § 941 (Court of Appeals for the Armed Forces); 26 U.S.C. § 7441 (Tax Court). In fact, when Congress in 1969 enacted that language for the Tax Court, it specifically sought to bring the Tax Court into alignment with the Court of Appeals for the Armed Forces (then known as the Court of Military Appeals). See S. Rep. No. 91-552, at 304 ("The bill establishes the Tax Court as a court under

Article I of the Constitution," and "[a]t the present time, the Court of Military Appeals is the only other Article I court."). In doing so, and in departing from the prior language describing the Tax Court as an executive "agency," Congress aimed to emphasize the Tax Court's independence as a "court" reviewing the actions of the IRS. *See id.* at 302 (observing that "it is anomalous to continue to classify [the Tax Court] with quasi-judicial executive agencies that have rulemaking and investigatory functions" as opposed to a body having "only judicial duties," and noting "questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency"). And while we have no need to reach the issue here, Congress, in establishing those entities as a "court" rather than an "agency," perhaps also exempted them from statutes that apply solely to executive "agencies." *Cf. Megibow v. Clerk of the U.S. Tax Court*, No. 04-3321, 2004 U.S. Dist. LEXIS 17698, at *13-22 (S.D.N.Y. Aug. 31, 2004) (Tax Court is a "court of the United States" and not an "agency" under the Administrative Procedure Act, 5 U.S.C. § 551(1)), *aff'd*, 432 F.3d 387 (2d Cir. 2005) (per curiam).

Congress did not, however, move the Tax Court outside the Executive Branch altogether. Indeed, the Supreme Court has recognized that the Court of Appeals for the Armed Forces is an "Executive Branch entity" and that its judges are "Executive officers." *Edmond v. United States*, 520 U.S. 651, 664-65 (1997); *see id.* at 664 n.2 (finding it "clear that [the Court of Appeals for the Armed Forces] is within

the Executive Branch"). Congress sought to—and did—achieve the same status for the Tax Court.

IV.

The Kuretskis raise a separate constitutional challenge to the IRS's procedure for collection-due-process hearings. That procedure, in the Kuretskis' view, failed in their case to satisfy the requirements of the Fifth Amendment's Due Process Clause. We are unpersuaded.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The Kuretskis acknowledge that they received notice of the IRS's proposed levy and a hearing before the IRS settlement officer assigned to their case. The Kuretskis, however, have a "sneaking suspicion" that the decision to deny them a penalty abatement was "influenced" by the appeals team manager who supervised the settlement officer. Pet'rs' Br. 54. They argue that they should have been afforded an opportunity to comment on the settlement officer's written report to her appeals team manager or "some opportunity to interact" with the manager before he made a final decision to deny their abatement request. *Id.* at 56.

Assuming arguendo that the Due Process Clause generally requires the IRS to afford a taxpayer some manner of hearing before imposing a levy, *see United States v. James Daniel Good Real Prop.*, 510 U.S. 43,

60-61 (1993), there is no basis for recognizing a constitutional entitlement for taxpayers to comment on an IRS settlement officer's report to her appeals team manager or present their case directly to the appeals team manager. The Kuretskis rely on *Ballard v. Commissioner*, 544 U.S. 40 (2005), which holds that the Tax Court must disclose the reports of special trial judges who serve as factfinders in cases in which Tax Court judges make the ultimate decision. But the Court based its holding on its interpretation of the Tax Court Rules, *see id.* at 46-47 & n.2, and "express[ed] no opinion" on whether "the Due Process Clause requires disclosure of a trial judge's factfindings that have operative weight in a court's final decision," *id.* at 64-65.

In *Gottlieb v. Pena*, 41 F.3d 730 (D.C. Cir. 1994), we rejected a due process claim similar to the one advanced by the Kuretskis. There, a Coast Guard lieutenant commander applied to a Coast Guard board for correction of his military record, and the board heard evidence before submitting a recommended decision to the Secretary of Transportation. The Secretary was the final decisionmaker, however, and the plaintiff had no opportunity to examine the board's initial decision or make a submission to the Secretary in light of the board's recommendation. We held that the Coast Guard's procedures did not violate the Fifth Amendment Due Process Clause, concluding that the lieutenant commander had no "entitle[ment] to input or process past the first 'tier' and cannot force the agency to open its essentially deliberative process." *Id.* at 737 (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936)); *see also Morgan*, 298 U.S. at 481

("[e]vidence may be taken by an examiner" and "may be sifted and analyzed by competent subordinates," so long as "the officer who makes the determinations . . . consider[s] and appraise[s] the evidence which justifies them").

In any event, regardless of the procedure in the collection-due-process hearing, the Kuretskis subsequently had an opportunity to challenge the IRS's proposed levy in Tax Court, and also to contest any underlying liability for which they lacked a prior opportunity to raise a challenge. *See* 26 U.S.C. § 6330(c)(2), (d)(1). When a petitioner appeals the IRS's proposed levy action to the Tax Court, the levy action is suspended while the appeal remains pending. *Id.* § 6330(e)(1). Thus, the Tax Court proceeding *itself* allows an opportunity for a pre-deprivation hearing. Because the Kuretskis make no claim that the Tax Court proceedings fall short of the Fifth Amendment Due Process Clause's requirements, they cannot prevail on their challenge under that Clause.

* * * * *

For the foregoing reasons, we affirm the decision of the Tax Court.

So ordered.

T.C. Memo. 2012-262

UNITED STATES TAX COURT

PETER KURETSKI AND KATHLEEN KURETSKI, Petitioners v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent

Docket No. 18545-10L. Filed September 11, 2012.

Ps filed a petition for review pursuant to I.R.C. sec. 6330 in response to R's determination that the levy action was appropriate and that abatement of additions to tax under I.R.C. secs. 6651(a)(2) and 6654(a) should be denied.

Held: R's determination to proceed with collection action is sustained except to the extent modified herein.

Held, further, Ps are liable for the I.R.C. sec. 6651(a)(2) addition to tax.

Held, further, Ps are not liable for the I.R.C. sec. 6654(a) addition to tax.

Frank Agostino and Theodore F. Weltner, III, for petitioners.

Amitai B. Barth and Robert A. Baxer, for respondent.

MEMORANDUM FINDINGS
OF FACT AND OPINION

WHERRY, Judge: This case is before the Court on a petition for review of a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination).[1] Petitioners seek review of respondent's determination to proceed with a proposed levy and respondent's denial of their request for abatement of additions to tax.

The collection action stems from unpaid income taxes petitioners self-reported for the 2007 taxable year on Form 1040, U.S. Individual Income Tax Return, additions to tax under sections 6651(a)(2) and 6654, and interest. The issues for decision are whether respondent's settlement officer abused her discretion in sustaining the proposed levy action and in denying petitioners' request for abatement of additions to tax under sections 6651(a)(2) and 6654.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulations, with accompanying exhibits, are incorporated herein by this reference. At the time the petition was filed, petitioners resided in Staten Island, New York.

In 2004 the United States arrested petitioners' son. Charges were filed against petitioners' son in Federal court. Petitioners took distributions from

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect at the relevant time, and all Rule references are to the Tax Court Rules of Practice and Procedure.

their retirement accounts to help pay for legal representation for themselves as well as for their son. At the same time, they used their residence as collateral to secure a release bond in the amount of $1 million for their son. The following year, petitioners withdrew more money from their retirement accounts to pay the prior year's Federal tax liability and to pay living expenses.

On April 15, 2008, petitioners timely filed Form 1040 for the taxable year ending December 31, 2007, reporting a tax liability of $24,991 and a $2,856 withholding credit. Petitioners failed to pay the balance of the tax due with the return. Respondent assessed the tax shown on the return as well as an addition to tax for failure to pay, an addition to tax for underpayment of estimated tax payments, and interest.

On October 13, 2008, respondent issued a Final Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice) showing an amount due of $23,601.50. This notice indicated that respondent intended to levy to collect overdue taxes. On November 17, 2008, petitioners' representative, Suzanne Ascher, submitted to respondent a Form 12153, Request for a Collection Due Process or Equivalent Hearing. This form requested as a collection alternative an installment agreement or an offer-in-compromise. The Form 12153 also requested abatement of the additions to tax.

On October 29, 2009, Ms. Ascher met with Settlement Officer Sylvia Irizarry, who had been assigned to conduct petitioners' collection due process hearing. At the meeting, Ms. Ascher

submitted Form 656, Offer in Compromise, in which petitioners offered to pay $1,000 based on doubt as to collectibility as well as effective tax administration. After this meeting the Appeals case was reassigned to a different settlement officer, Desa Lazar. On February 8, 2010, petitioners provided Ms. Lazar with a letter again requesting abatement of the additions to tax for reasonable cause and elaborating on their request for an offer-in-compromise.

On April 14, 2010, Ms. Lazar sent Ms. Ascher a letter explaining that the offer-in-compromise was not an acceptable collection alternative. Ms. Lazar determined that the pledge of their house as collateral to secure their son's bail did not affect petitioners' equity in their residence for the purposes of determining reasonable collection potential. The letter gave Ms. Ascher 10 days to respond; otherwise Ms. Lazar would close the case on the basis of the record at that time. Despite the passing of the 10-day deadline, Ms. Lazar did not close the case.

On April 27, 2010, Ms. Ascher and Ms. Lazar spoke by telephone. Ms. Ascher asked about the abatement request, and Ms. Lazar said she would research the issue. Ms. Ascher also inquired as to a possible partial payment installment agreement, but Ms. Lazar said such an agreement would not be possible given petitioners' assets. Ms. Lazar stated that a full payment installment agreement of $250 per month for the length of the period of limitations on collection might be acceptable. Ms. Lazar requested that Ms. Ascher respond by May 7, 2007, with a request for abatement and an installment agreement.

Ms. Ascher did not get back to Ms. Lazar until June 8, 2010, despite several messages left by Ms. Lazar stating that she would agree to a full payment installment payment agreement of $250 per month. On June 8, Ms. Lazar reiterated that she could not accept a partial payment installment agreement and that the most she was willing to do was abate penalties and enter a full payment installment agreement. Ms. Lazar agreed to meet with Ms. Ascher and petitioners. Ms. Ascher and petitioners hoped that if Ms. Lazar met petitioners in person she would reconsider her decision not to accept an offer-in-compromise based on effective tax administration.

On June 28, 2010, Ms. Lazar met with Ms. Ascher and petitioners. At this meeting, Ms. Lazar again explained that petitioners' financial situation did not warrant an offer-in-compromise based on doubt as to collectibility or effective tax administration. Ms. Lazar again stated that she would agree to an abatement of penalties as well as a full payment installment agreement but that they could discuss another amount. By the end of the meeting, petitioners recognized that the only option moving forward was a full payment installment agreement. Petitioners did not accept the offer at the meeting. Ms. Ascher and Ms. Lazar spoke several times after the in-person meeting, but petitioners never definitively accepted Ms. Lazar's proposed installment agreement.

On July 7, 2010, after giving petitioners ample opportunity to accept the full payment installment agreement, Ms. Lazar closed the Appeals case,

determining that petitioners could fully pay the tax liability. On July 20, 2010, the Internal Revenue Service (IRS) Appeals Office sent petitioners the notice of determination sustaining the proposed levy action. Petitioners timely petitioned this Court for review. A trial was held on September 13, 2011, in New York, New York.

OPINION

I. Determination of Collection Action

Section 6331(a) authorizes the Commissioner to levy upon property or property rights of a taxpayer liable for taxes if the taxpayer fails to pay those taxes within 10 days after notice and demand for payment. Section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to an unpaid tax liability only if the Commissioner has given written notice to the taxpayer 30 days before the levy. Section 6330(a) requires the Commissioner to send a written notice to the taxpayer of the amount of the unpaid tax and of the taxpayer's right to a section 6330 hearing at least 30 days before the levy.

If an administrative hearing is requested in a levy case, the hearing is to be conducted by the Appeals Office. Sec. 6330(b)(1). At the hearing, the Appeals officer conducting it must verify that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(c)(1). The taxpayer may raise any relevant issue with regard to the Commissioner's intended collection activities, including spousal defenses, challenges to the appropriateness of the proposed levy, and alternative

means of collection. Sec. 6330(c)(2)(A); see also Sego v. Commissioner, 114 T.C. 604, 609 (2000); Goza v. Commissioner, 114 T.C. 176, 180 (2000). Taxpayers are expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing. Sec. 301.6330-1(e)(1), Proced. & Admin. Regs.

Where the underlying liability is not in issue, the Court reviews the determination of the Appeals officer for abuse of discretion. Alessio Azzari, Inc. v. Commissioner, 136 T.C. 178, 184 (2011). Among the issues that may be raised at Appeals and are reviewed for abuse of discretion are "offers of collection alternatives" such as installment agreements. Sec. 6330(c)(2)(A)(iii). The Court reviews the Appeals officer's rejection of collection alternatives to decide whether the rejection was arbitrary, capricious, or without sound basis in fact or law and therefore an abuse of discretion. Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

Section 7122(a) authorizes the Commissioner to compromise any civil case arising under the internal revenue laws. In general, the decision to accept or reject an offer, as well as the terms and conditions agreed to, are left to the discretion of the Commissioner. Sec. 301.7122-1(c)(1), Proced. & Admin. Regs.

The grounds for compromise of a tax liability are doubt as to liability, doubt as to collectibility, and promotion of effective tax administration.

Sec. 301.7122-1(b), Proced. & Admin. Regs. Petitioners based their offer-in-compromise on doubt as to collectibility and effective tax administration. Ms. Lazar rejected both reasons. Petitioners do not contend that Ms. Lazar abused her discretion in rejecting their offer-in-compromise. Rather, petitioners allege that they reached an enforceable contract with IRS Appeals for an installment agreement.

Section 6159 authorizes the IRS to enter into written agreements allowing taxpayers to pay tax in installment payments if it deems that the "agreement will facilitate full or partial collection of such liability." Petitioners do not meet the requirements of section 6159(c), which obligates the IRS to accept full payment installment agreements in certain circumstances.[2] In all other cases, the decision to accept or reject installment agreements lies within the discretion of the Commissioner. Sec. 301.6159-1(a), (b)(1), (c)(1)(I), Proced. & Admin. Regs. Ms. Lazar was not obligated to accept an installment agreement. Nothing in the record indicates that the parties reached a final agreement as to the terms of any installment payment agreement. In particular, Ms. Lazar and Ms. Ascher never agreed as to the amount of the initial

[2] Specifically, the liability at issue without regard to penalties, interest, and additions to tax cannot exceed $10,000, and the agreement must provide for full payment within three years. Sec. 6159(c)(1), (4). Petitioners' liability exceeds $10,000, and the agreement called for payments to continue for well beyond three years.

payments. There was never a full meeting of the minds and thus no agreement to enforce.[3]

Petitioners contend, in the alternative, that Ms. Lazar abused her discretion by issuing the notice of determination without informing petitioners that she rejected a proposed installment agreement of $150 per month for the first 6 to 12 months and $250 per month thereafter. Ms. Ascher stated that she called Ms. Lazar shortly after the June 28, 2010, meeting and said that petitioners were willing to pay $150 per month for the first 6 to 12 months, then $250 per month thereafter. Ms. Ascher claimed that Ms. Lazar said she would consider that offer. Ms. Ascher did not provide or make any contemporaneous written notes about this offer. Ms. Lazar explained that she does not recall the offer, and her contemporaneous notes do not reflect any such offer.

While this Court does not believe either witness testified falsely as to her memory, the weight of the evidence supports respondent. Ms. Lazar's notes show that she took a firm stance on the amount of the monthly payment early on in the collection due process hearing. Her decision to close the case appears to be based in large part on petitioners' continued attempts to negotiate her collection alternative offer down from that firm stance. An Appeals officer is not obligated to negotiate indefinitely or wait any specific time before issuing a determination. See Kreit Mech. Assocs., Inc. v.

[3] Because we find that the parties did not reach an agreement, we need not decide whether such an agreement is enforceable by this Court.

Commissioner, 137 T.C. 123, 134 (2011); Clawson v. Commissioner, T.C. Memo. 2004-106. Thus, Ms. Lazar did not abuse her discretion when she closed the case after petitioners failed to accept the proffered $250 per month installment agreement.

Petitioners further contend that the Court should remand the case to Appeals for further negotiations. The gist of this argument is that the parties were so close to agreement that remand would result in settlement. Petitioners argue that we need not find an abuse of discretion to remand to Appeals. Remand may be appropriate even where the Commissioner did not abuse his discretion if the taxpayer was not afforded "a proper hearing and the new hearing is necessary or will be productive." Kelby v. Commissioner, 130 T.C. 79, 86 n.4 (2008). Finally, remand may, in some limited circumstances, be appropriate where it would be helpful because of "a material change in a taxpayer's factual circumstances". Churchill v. Commissioner, T.C. Memo. 2011-182. Here, the record reveals that the hearing provided to petitioners was proper, and petitioners have not provided any information documenting a change in factual circumstances for which remand would be helpful. To remand the case under these circumstances would be tantamount to pressuring respondent and actively taking petitioners' side in the negotiations, a role we should not as a court and neutral arbitrator undertake.

Ms. Lazar considered and rejected petitioners' request for an offer-in-compromise. The parties never finalized an installment agreement. Ms. Lazar determined that petitioners could fully pay the tax

liability. She determined that the levy appropriately balanced the need for efficient collection with petitioners' concern that collection be no more intrusive than necessary. Her determination was not arbitrary, capricious, or without sound basis in fact or law. Therefore, Ms. Lazar did not abuse her discretion in sustaining the levy action.

II. Abatement of Additions to Tax

Section 6330(c)(2)(B) provides that a taxpayer may raise at the Appeals hearing challenges to the existence or amount of the underlying tax liability if the taxpayer did not receive a notice of deficiency for the liability or did not otherwise have an opportunity to dispute the liability. A taxpayer's underlying tax liability includes additions to tax. See Katz v. Commissioner, 115 T.C. 329, 339 (2000). Petitioners did not have a previous opportunity to contest the additions to tax and raised the issue of their liability for the section 6651(a)(2) and 6654 additions to tax before the levy hearing. We therefore review de novo respondent's determination that petitioners are liable for these additions to tax. See Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 181-182.

Respondent bears the burden of production with respect to the additions to tax. See sec. 7491(c); Higbee v. Commissioner, 116 T.C. 438, 446-447 (2001). To meet this burden, respondent must produce sufficient evidence establishing that it is appropriate to impose the addition to tax. See Higbee v. Commissioner, 116 T.C. at 446. The burden of establishing that the deficiency was due to reasonable cause rather than willful neglect remains

with petitioners. See id. at 447; Davis v. Commissioner, 81 T.C. 806, 820 (1983), aff'd without published opinion, 767 F.2d 931 (9th Cir. 1985).

A. Section 6651(a)(2) Addition to Tax

Section 6651(a)(2) imposes an addition to tax for failure to pay the amount of tax shown on the taxpayer's Federal income tax return unless the failure is due to reasonable cause and not due to willful neglect. Respondent produced transcript records, Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, establishing that petitioners did not pay the full amount of tax shown due on their 2007 tax return. Thus, respondent has met his burden of production, and petitioners bear the burden of proving reasonable cause rather than willful neglect. See sec. 6651(a)(2); Higbee v. Commissioner, 116 T.C. at 447. Reasonable cause requires "a satisfactory showing that * * * [the taxpayer] exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship * * * if he paid on the due date." Sec. 301.6651-1(c)(1), Proced. & Admin. Regs. Petitioners argue that they have reasonable cause on account of undue hardship caused by their financial, legal, and health-related problems.

The regulations define undue hardship as "more than an inconvenience to the taxpayer." Sec. 1.6161-1(b), Income Tax Regs.; see also sec. 301.6651-1(c)(1), Proced. & Admin. Regs. (giving the term "undue hardship" the same meaning as under section 1.6161-1(b), Income Tax Regs.). Rather, undue

hardship exists if "substantial financial loss * * * will result to the taxpayer for making payment on the due date". Sec. 1.6161-1(b), Income Tax Regs.; see also Hardin v. Commissioner, T.C. Memo. 2012-162. Petitioners did not show that they would have suffered a substantial financial loss if they had paid the tax liability when due. Specifically, petitioners did not show that their legal or health problems would have created an undue hardship had the tax been paid on the date it was due. Petitioners have not carried their burden of proof with respect to reasonable cause and lack of willful neglect. Therefore, petitioners are liable for the section 6651(a)(2) addition to tax, and respondent did not err in declining to abate that assessment.

B. Section 6654(a) Addition to Tax

Section 6654(a) imposes a mandatory addition to tax in the case of any underpayment of estimated tax by individual taxpayers. Section 6654(c)(1) requires the payment of four installments of a taxpayer's estimated tax liability for each taxable year. Except in instances of annualized income, each of the required installments of estimated tax is equal to 25% of the required annual payment. Sec. 6654(d)(1)(A). For individual taxpayers filing a joint tax return whose adjusted gross income for the taxable year is $150,000 or less, a "required annual payment" is equal to the lesser of--

> (i) 90 percent of the tax shown on the return for the taxable year (or, if no return is filed, 90 percent of the tax for such year), or

> (ii) 100 percent of the tax shown on the return of the individual for the preceding taxable year.
>
> Clause (ii) shall not apply if the preceding taxable year was not a taxable year of 12 months or if the individual did not file a return for such preceding taxable year.

Sec. 6654(d)(1)(B) and (C). The underpayment addition rate is determined pursuant to section 6621 and is applied to the amount of the estimated tax underpayment for the period of underpayment. Sec. 6654(a) and (b).

To meet his burden of production, respondent, at a minimum, must produce evidence necessary to enable the Court to conclude that petitioners had a required annual payment for the 2007 taxable year. See secs. 7491(c), 6654(d)(1)(B); Wheeler v. Commissioner, 127 T.C. 200, 211 (2006), aff'd, 521 F.3d 1289 (10th Cir. 2008). Respondent introduced no evidence that petitioners did not file a Federal income tax return for 2006 or had a tax liability for the 2006 tax year.[4] Without knowing that petitioners did not file a 2006 income tax return or knowing petitioners' income tax for the 2006 taxable year, we cannot do the comparison required by

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[4] The parties submitted a stipulated exhibit, Form 656, Offer in Compromise, in which petitioners stated that they sought to compromise tax liabilities for the 2006, 2007, and 2008 taxable years. This exhibit suggests that petitioners had a tax liability for the 2006 year but sheds no light on whether it was an income tax liability. In any event, this cursory statement is insufficient for us to determine the tax shown on the return for the 2006 taxable year.

section 6654(d)(1)(B) and cannot calculate petitioners' estimated annual payment for their 2007 taxable year, if any. See Wilson v. Commissioner, T.C. Memo. 2012-229, at *17. Thus, respondent has not met his burden of producing evidence that petitioners had a required annual payment under section 6654. Therefore, petitioners are not liable for the addition to tax under section 6654, and we will direct respondent to abate that assessment.

The Court has considered all of petitioners' contentions, arguments, requests, and statements. To the extent not discussed herein, the Court concludes that they are meritless, moot, or irrelevant.

To reflect the foregoing,

An appropriate decision will be entered.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PETER KURETSKI AND KATHLEEN KURETSKI,	)	
Petitioner	)	
v.	)	Docket No. 18545-10L
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

DECISION

Pursuant to the to the determination of the Court as set forth in its Memorandum Opinion (T.C. Memo. 2012-262), filed September 11, 2012, it is

ORDERED AND DECIDED that respondent may proceed with collection as determined in the Notice of Determination Concerning Collection Action dated July 20, 2010, with respect to the deficiency and section 6651(a)(2) addition to tax assessed for petitioners' taxable year 2007. It is further

ORDERED AND DECIDED that respondent may not proceed with collection with respect to the section 6654 addition to tax for petitioners' taxable year 2007 and shall abate the assessment thereof from petitioners' account.

(Signed) Robert A. Wherry, Jr.
Judge

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PETER KURETSKI AND KATHLEEN KURETSKI,	)	
Petitioners	)	
v.	)	Docket No. 18545-10L
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

O R D E R

In our opinion in this collection case of September 11, 2012, T.C. Memo. 2012-262, we ruled that there was no meeting of the minds sufficient to form a valid installment agreement, and so the Appeals Officer had not abused her discretion. We also decided that petitioners had not shown reasonable cause and lack of willful neglect sufficient to avoid the addition to tax for failure to pay, but that respondent had failed to show that petitioners were liable for the estimated tax addition to tax. Petitioners have now filed a Motion To Vacate Decision (motion to vacate), a Motion for Reconsideration, and a Memorandum of Law in support of their Motion for Reconsideration. Respondent has filed responses opposing both motions. In addition, petitioners have filed a Reply to respondent's response to petitioners' motion to vacate, and a Supplement to their motion to vacate. Respondent has filed a Motion for Leave to File a

Surreply to petitioners' reply to respondent's response to petitioners' motion to vacate.

In their motion to vacate, petitioners contend that I.R.C. section 7443(f), which provides for Presidential removal of Tax Court judges under certain circumstances, is unconstitutional under Article III of the Constitution. However, petitioners do not question our jurisdiction on that ground, which they could do at any time, Henderson ex. rel. Henderson v. Shinseki, ___ U.S. ___, ___, 131 S. Ct. 1197, 1202 (2011). Instead petitioners ask that if we agree with their contention, we first determine that section 7443(f) is unconstitutional and then, free of "the improper threat of interbranch removal" from office, decide this case again on the record and previous briefing. They also ask that we consider all of the arguments in their motion for reconsideration as if made in their opening brief, rather than the record as it was submitted under the standard applicable to motions for reconsideration. It remains unclear how this remedy would address or solve the Constitutional question raised by petitioners.[1]

[1] The Court has an independent obligation to determine whether it has jurisdiction over a case, and the parties cannot stipulate jurisdiction nor can they waive jurisdictional defects. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); Charlotte's Office Boutique. Inc. v. Commissioner, 121 T.C. 89, 102 (2003), aff'd, 425 F.3d 1203 (9th Cir. 2005). A determination by this Court that section 7443(f) is unconstitutional would not be conclusive of that issue. If there is a constitutional problem, such a ruling would not make a second determination of the case on its merits any freer from potential prejudice or duress than our first determination.

In their motion for reconsideration, petitioners argue that there was an installment agreement authorized by respondent at the meeting of June 28, 2011. Petitioners also argue in their motion for reconsideration that the IRS Office of Appeals failed to properly implement the determination of the Appeals Officer that the failure to pay addition to tax should be abated. Petitioners do not seek to present additional evidence with their motion for reconsideration.

Motions to reconsider and to vacate are governed by Tax Court Rules 161 and 162, respectively. Those rules establish filing deadlines but provide no guidance on the circumstances under which the Court should grant or deny such motions. In the absence of more specific guidance, we look to case law and the Federal Rules of Civil Procedure. See Tax Court Rule 1(b). The decision to grant motions to reconsider and to vacate lies within the discretion of the Court. Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998) (motion to reconsider); Kun v. Commissioner, T.C. Memo. 2004-273 (motion to vacate).

Motions to vacate are generally not granted absent a showing of unusual circumstances or substantial error, e.g., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other reason justifying relief. See, e.g., Fed. R. Civ. P. 60(b); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999, 1001 (1978). Motions for reconsideration are also not generally granted in the absence of unusual circumstances or substantial error. Estate of Quick

v. Commissioner, supra at 441-442. Motions to reconsider are generally "intended to correct substantial errors of fact or law and allow the introduction of newly discovered evidence that the moving party could not have introduced by the exercise of due diligence in the prior proceeding." Knudsen v. Commissioner, 131 T.C. 185, 185 (2008). "Reconsideration is not the appropriate forum for rehashing previously rejected legal arguments or tendering new legal theories to reach the end result desired by the moving party." Estate of Quick v. Commissioner, supra at 441-442. On motions for reconsideration, we do not, except under extraordinary circumstances, address any new issue which a party could have addressed but failed to address prior to the Court's deciding the case. Stoody v. Commissioner, 67 T.C. 643, 644 (1977); Lowry v. Commissioner, T.C. Memo 2004-10, aff'd in unpublished opinion, 171 Fed. Appx. 6 (9th Cir. 2006); Gordon v. Commissioner, T.C. Memo 1997-422. Motions to vacate and to reconsider should be denied if they are based on an unexcused failure to raise an issue earlier. Koufman v. Commissioner, 69 T.C. 473, 476-477 (1977).

Petitioners' constitutional argument could have been raised before our decision was issued, but was not. Petitioners have failed to explain why they waited until after we issued our decision ruling against them to make that argument. We therefore decline to address it now. We also decline to address petitioners' other arguments, because they merely rehash arguments that petitioners raised before the decision was issued.

In light of the foregoing, we need not address any issues regarding petitioners' standing to raise the constitutional argument. Cf. Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 38 (1976) ("[W]hen a plaintiffs standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." (emphasis added)).

Upon due consideration and for cause, it is

ORDERED that respondent's Motion for Leave to File Surreply to Petitioners' Reply to Respondent's Response to Petitioners' Motion To Vacate Decision is granted. It is further

ORDERED that the Clerk of the Court shall file respondent's Surreply to Petitioners' Reply to Respondent's Response to Petitioners' Motion to Vacate Decision, lodged February 13, 2013, as of the date of this Order. It is further

ORDERED that petitioners' Motion To Vacate Decision is denied. It is further

ORDERED that petitioners' Motion for Reconsideration is denied.

(Signed) Robert A. Wherry, Jr.
Judge

Dated: Washington, D.C.
March 4, 2013

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1090 **September Term, 2013**

USTC-18545-10L

Filed On: August 1, 2014

Peter Kuretski and Kathleen Kuretski,

Appellants

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Srinivasan, Circuit Judge, and Edwards and Sentelle, Senior Circuit Judges

O R D E R

Upon consideration of appellants' petition for panel rehearing filed on July 21, 2014, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk