No. 24-416

IN THE

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

JENNIFER ZUCH,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Janet Galeria
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Lauren Willard Zehmer
Counsel of Record
Kandyce Jayasinghe
Emily Caputo
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
LZehmer@cov.com
(202) 662-6000

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulatory Materials

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a special interest in this case due to the potential implications of the Court's decision for small businesses. More than half of net job growth in the United States over the past three decades is attributable to the more than 30 million small businesses in our nation.[2] These enterprises depend on predictable cash flow—to meet payroll, to manage inventory, and to plan for the future. If the Tax Court is deprived of its jurisdiction over 26 U.S.C. § 6330

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contributions intended to fund the preparation or submission of this brief.

[2] *Frequently Asked Questions about Small Business, 2023*, Office of Advocacy, U.S. Small Bus. Admin. (Mar. 7, 2023), https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023.

proceedings by unilateral IRS action, small businesses will be harmed. They will be forced to incur unnecessary expenses of restarting and relitigating their tax disputes in a different court, and in some cases may be deprived of judicial review entirely. Adopting the Government's position would also erode the transparency of the tax administration system, giving the IRS unprecedented discretion over which taxpayers can continue to litigate in the more accessible Tax Court and which are shut out.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Collection Due Process ("CDP") procedures were enacted to "afford taxpayers due process" and "increase fairness" before the Internal Revenue Service ("IRS") seizes and sells someone's property to pay a tax debt. S. Rep. No. 105-174, at 67 (1998). The Government's position in this case would eviscerate those purposes by giving the IRS power to significantly delay or even deny pre-levy judicial review and relief. Under the Government's approach, the IRS could apply a taxpayer's refunds for subsequent years to deprive the taxpayer of the ability to have its CDP case heard in Tax Court—even where there are open issues about the tax. But nothing in 26 U.S.C. § 6330 gives the IRS the power to unilaterally—and selectively—determine the jurisdiction of the Tax Court. Such an approach would disproportionately harm small businesses and other taxpayers with limited resources, who do not have the time or cash-flows to withstand the additional years of litigation that would result (assuming judicial review is available at all). This Court should affirm the judgment of the Third

Circuit to protect taxpayers from the IRS's gamesmanship and abuses that the CDP procedures were designed to counteract.

The Government's position rests on a fundamental misunderstanding of how 26 U.S.C. § 6330 and Tax Court review of an IRS Independent Office of Appeals ("Appeals") determination operate. The IRS has the power to levy a taxpayer's property to satisfy a tax debt. 26 U.S.C. § 6331(a), (b). Before it can exercise this power, the IRS must notify the taxpayer of its intent and provide an opportunity to challenge the levy through an administrative proceeding, known as a CDP hearing, before Appeals. 26 U.S.C. § 6330(a), (b). During a CDP hearing, the taxpayer may raise "any relevant issue," including "offers of collection alternatives." 26 U.S.C. § 6330(c)(2)(A). At the conclusion of the hearing, Appeals issues a "determination," which "shall take into consideration" the issues that the taxpayer raised at the hearing. 26 U.S.C. § 6330(c)(3). Within thirty days of an Appeals determination, a taxpayer may "petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d).

The Government argues that the Tax Court loses jurisdiction if, during the pendency of a CDP case, the IRS stops pursuing a levy by unilaterally deciding to apply a taxpayer's refunds or "overpayments" from later years to the liability, even when there are other issues outstanding. In this case, Ms. Zuch had challenged a proposed IRS levy in Tax Court connected to her 2010 tax liability. While the case was pending, the IRS took overpayments of tax that Ms. Zuch made

in subsequent years and, rather than refunding them to her, applied them to the 2010 liability. Despite the outstanding question of whether the 2010 tax had already been paid, the Tax Court dismissed the case, holding that it lacked jurisdiction under 26 U.S.C. § 6330(d) in the absence of a proposed levy. The Third Circuit vacated the Tax Court's decision, and this Court granted certiorari.

The Third Circuit's holding is correct. The Tax Court does not lose jurisdiction over a properly filed CDP case when the IRS ceases to pursue a levy but other live issues remain. This is because the Tax Court's jurisdiction is keyed to an Appeals "determination." 26 U.S.C. § 6330(d). And an Appeals determination is not, as the Government argues, limited to the terminal decision whether to proceed with a levy. Section 6330(c) sets forth the items that the determination "*shall* take into consideration," which include "*any* relevant issue relating to the unpaid tax or the proposed levy" that the taxpayer raises at the hearing. 26 U.S.C. § 6330(c)(2), (c)(3)(B) (emphases added). The Government's attempt to bifurcate the final decision to proceed with the levy from the items that must be taken into consideration in coming to that decision is unavailing. The statute does not constrict the contours of an Appeals determination in this manner. Rather, the Tax Court has jurisdiction over the whole of the Appeals determination, including any relevant issues the taxpayer raised and still seeks resolution over, irrespective of whether the IRS no longer intends to levy.

The Government's own regulations confirm this interpretation. The Notice of Determination

memorializing an Appeals determination "will set forth Appeals' findings and decisions." 26 C.F.R. § 301.6330-1(e)(3), Q&A E-10. The Notice must "resolve" issues raised by the taxpayer, "include a decision on" certain taxpayer defenses and challenges, "respond to" offers of collection alternatives, and "address" whether the proposed levy balances the need to collect taxes with the taxpayer's legitimate concerns. *Id.* It is therefore clear that an Appeals determination is broader than the singular decision of whether to proceed with the levy, and includes decisions on issues that the taxpayer raised at the hearing. Because the Tax Court has jurisdiction to review the determination as a whole—not just the levy—jurisdiction is not extinguished by the IRS's unilateral decision to apply a taxpayer's tax refunds to the contested balance.

In addition to being grounded in the statutory and regulatory language, the Third Circuit's holding prevents unfairness to taxpayers and respects Congress's intent. Even though there is no longer the looming prospect of a levy, there is still a live question of whether Mr. Gennardo and Ms. Zuch's estimated tax payment should have been applied to Ms. Zuch's 2010 liability. If so, Ms. Zuch had no unpaid tax liability to justify the levy, and the IRS wrongfully withheld Ms. Zuch's subsequent refunds from her. The Government, however, seeks to deprive the Tax Court of jurisdiction to address this issue and instead force Ms. Zuch to re-litigate from scratch in district court, despite her having spent over a decade already litigating the current proceeding.

Requiring taxpayers to change venues from Tax Court to district court in these circumstances would

cause inequitable delay and further financial costs, disproportionately harming small businesses and other taxpayers with limited resources. As it is, taxpayers often wait years for a Tax Court decision. Having to start the entire litigation process all over again in a different court would be patently unfair: It would needlessly enlarge the time and cost of an already lengthy resolution process, all the while tying up prevailing taxpayers' much-needed refunds.

Moreover, in some instances, the Government's position would result in *no* available judicial review *at all*. Specifically, during a CDP hearing, the taxpayer may suggest collection alternatives, such as an offer-in-compromise that lowers the overall tax due based on certain factors like economic hardship. *See* 26 U.S.C. § 6330(c)(2)(A)(iii); 26 C.F.R. § 301.7122-1(b)(3)(i). If the IRS rejects such an offer, the *only* judicial review available to taxpayers is in Tax Court through the CDP process. In a case where the IRS should have accepted a taxpayer's offer, but decided to use subsequent-year overpayments to satisfy the liability, the taxpayer could very well pay more tax than was due under the law, with no judicial recourse. The IRS should not be able to deprive taxpayers of judicial review in this manner.

Finally, reversing the Third Circuit would give the IRS the power to arbitrarily pick and choose which taxpayers in CDP proceedings can continue with their Tax Court cases and which cannot. This unprecedented concentration of power contravenes Congress's entire purpose in granting the Tax Court jurisdiction to check the IRS's abuses of power and provide due process guardrails for taxpayers. It further punishes

taxpayers who are attempting to comply with their federal tax obligations and who overpay their taxes out of an abundance of caution. Given its lack of statutory support and the unjust consequences, the Government's position should be rejected.

ARGUMENT

I. The Tax Court Has Jurisdiction in This Case Under 26 U.S.C. § 6330.

A. *The Tax Court Has Jurisdiction to Review an Appeals Determination, Not Just a Levy.*

When a taxpayer fails to pay an assessed tax after notice and demand for payment, 26 U.S.C. § 6303, the IRS has several tools at its disposal to collect the tax. One of those tools is a levy. 26 U.S.C. § 6331(a). Before the IRS may levy a taxpayer's property, however, it must provide notice of the proposed levy and, if the taxpayer so requests, an administrative hearing before the IRS Independent Office of Appeals ("Appeals"). 26 U.S.C. § 6330(a)(1), (a)(3)(B), (b)(1). This hearing is known as a Collection Due Process or "CDP" hearing.

At the hearing, the taxpayer "may raise . . . any relevant issue relating to the unpaid tax or the proposed levy." 26 U.S.C. § 6330(c)(2)(A). The statute enumerates three examples of relevant issues a taxpayer may raise: spousal defenses, "challenges to the appropriateness of collection actions," and "offers of collection alternatives," such as an offer-in-compromise. *Id.* The default rule is that a taxpayer cannot challenge the existence or amount of the liability that the IRS is attempting to collect. *See Barnhill v.*

Comm'r, 155 T.C. 1, at *12 (2020). There is an exception to this default rule under 26 U.S.C. § 6330(c)(2)(B), which provides an opportunity to challenge the underlying liability if the taxpayer had no previous chance to do so.

At the conclusion of the hearing, Appeals will issue its "determination." 26 U.S.C. § 6330(c)(3). The determination is memorialized and communicated to a taxpayer through what is called the Notice of Determination. 26 C.F.R. § 301.6330-1(e)(3), Q&A E-10 ("Appeals is required to issue a Notice of Determination in all cases where a taxpayer has timely requested a CDP hearing."). Regulations specify that "[t]he Notice of Determination will set forth Appeals' findings and decisions" and, *inter alia*, must "resolve any issues appropriately raised by the taxpayer." *Id.*

The taxpayer may then "petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d). "In seeking Tax Court review of a Notice of Determination, the taxpayer can only ask the court to consider an issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer's CDP hearing." 26 C.F.R. § 301.6330-1(f)(2), Q&A F-3. When the Tax Court reviews a challenge to the existence or amount of the liability, it applies a *de novo* standard of review. *Goza v. Comm'r*, 114 T.C. 176, 181–82 (2000). Other challenges to an Appeals determination are evaluated under an abuse of discretion standard. *Id.* at 182.

B. *The Statutory Text, Legislative History, and Treasury Regulations All Confirm the Tax Court's Jurisdiction Here.*

In the CDP context, an Appeals determination is the "ticket to the Tax Court." *Cleveland v. Comm'r*, 600 F.3d 739, 741 (7th Cir. 2010) (citing 14 Jacob Mertens, Jr., *The Law of Federal Income Taxation* § 50.22 (2009)). The Tax Court "review[s] . . . such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d). "All agree that the parenthetical grants the Tax Court jurisdiction over petitions for review of collection due process determinations." *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 204 (2022).

The statute does not purport to define the word "determination." The Government argues that it refers *only* to Appeals' ultimate decision on whether to proceed with the levy. Brief for the Petitioner, at 13. There is no statutory support for this reading.

Although the statute does not explicitly define "determination," it states that, among other things, "[t]he determination by an appeals officer under this subsection shall take into consideration . . . the issues raised under paragraph (2)." 26 U.S.C. § 6330(c)(3). Paragraph (2) in turn provides that a taxpayer "may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy." Under the plain language of the statute, then, Appeals' decision with respect to "any relevant issue" is a required part of the "determination" that provides the Tax Court with jurisdiction.

The Government's attempt to bifurcate the ultimate decision to proceed with the levy from the items that must be taken into consideration in coming to that decision are unavailing. An Appeals determination comprises multiple components, including any of the matters that the taxpayer validly raises. There is no statutory basis for the Government's position that the definition of "determination" is limited solely to the ultimate decision to levy. And nothing in 26 U.S.C. § 6330 conditions the Tax Court's jurisdiction on the IRS's continued pursuit of a levy.

If Congress had wanted to limit the Tax Court's jurisdiction in the manner that the Government advocates for, it would have been easy to do so. Rather than imbuing the Tax Court with jurisdiction over "such matter" (i.e., the determination), it could have simply stated that the Tax Court has jurisdiction over the "levy." But Congress intended, and provided, that review of an Appeals determination encompass more than just the decision to proceed with the levy: "The conferees expect the appeals officer will prepare a written determination addressing the issues presented by the taxpayer and considered at the hearing." H.R. Rep. No. 105-599, at 266 (1998) (Conf. Rep.). Congress intentionally chose to give the Tax Court jurisdiction over this entire determination.

Further to this point, 26 U.S.C. § 6330(e)(1) states that the Tax Court has jurisdiction to issue injunctive relief "in respect of the unpaid tax or proposed levy to which the determination being appealed relates." This language confirms that the "determination being appealed" is not the same thing as the proposed levy.

This reading is confirmed by the regulations implementing 26 U.S.C. § 6330. The regulations explicitly instruct that the "Notice of Determination *will set forth Appeals' findings and decisions*." 26 C.F.R. § 301.6330-1(e)(3), Q&A E-8(i) (emphasis added). This provision clearly contemplates that the determination constitutes not just one decision on whether to proceed with a levy but rather multiple "findings and decisions," which form the bases of the Tax Court's jurisdiction. The regulations go on to enumerate a list of items that must be contained within the Notice of Determination. The Notice:

> will resolve any issues appropriately raised by the taxpayer relating to the unpaid tax; it will include a decision on any appropriate spousal defenses raised by the taxpayer; it will include a decision on any challenges made by the taxpayer to the appropriateness of the collection action; it will respond to any offers by the taxpayer for collection alternatives; and it will address whether the proposed collection action represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

26 C.F.R. § 301.6330-1(e)(3), Q&A E-8(i).

Far from being a mere "yea" or "nay" on whether to proceed with the levy, an Appeals determination must "resolve," "include" decisions about, "respond" to, and "address" a panoply of items that span the potential breath of a CDP hearing. Together, these

items form the "determination" over which 26 U.S.C. § 6330(d) grants jurisdiction to the Tax Court. The Government's own regulations therefore belie its position here.

Because the Tax Court's jurisdiction extends to the review of any issue appropriately raised by the taxpayer irrespective of the existence of a continuing collection action, this case is not moot. Even without a levy, the issue of Ms. Zuch's actual liability—whether a prior estimated payment should have been credited to her—is still a relevant issue. The fact that the IRS found a different pot of money to satisfy the contested balance does not moot Ms. Zuch's dispute over the application of the estimated payment and does not deprive the Tax Court of jurisdiction.[3]

II. Holding That the Tax Court Lacks Jurisdiction in This Circumstance Would Deprive Taxpayers of Full and Fair Judicial Review.

A. *Denying Tax Court Review Could Permit the IRS to Unilaterally and Significantly Delay Judicial Review and Relief to Taxpayers.*

The Government's position would likely translate to years of additional and unnecessary litigation and expenses for taxpayers. Given the substantial time it

---

[3] There is also an outstanding issue regarding whether interest and additions to tax should have been running until the 2010 liability was offset by the subsequent overpayments. *See* 26 U.S.C. § 6601(a) (imposing interest on unpaid taxes until the payment date); 26 U.S.C. § 6651(a)(2) (imposing an addition to tax based on a failure to pay); 26 U.S.C. § 6654 (imposing an addition to tax for failing to make estimated tax payments).

already takes for judicial review of a CDP case, depriving taxpayers of Tax Court review for their long-running CDP proceedings would be a significant injustice.

More often than not, CDP cases take years to resolve. In a typical scenario, a taxpayer must wait for the IRS to initiate collection proceedings, ask for and wait months or years for a CDP hearing with Appeals, await the issuance of a Notice of Determination, and then undertake years of Tax Court litigation. Based on a survey of recent CDP cases, it takes approximately a decade from the tax year at issue to the issuance of a Tax Court opinion.[4]

If the Government prevails, these already protracted proceedings would become practically interminable. No matter where they were in the Tax Court process—even on the cusp of a decision—taxpayers would be forced to begin the entire litigation process again in another court. Further, less sophisticated taxpayers would be deprived of the less formal and easier-to-navigate Tax Court procedures designed to promote their access to justice.

Compounding this inequity is the fact that, as discussed in Section III, *infra*, the IRS would be in full control over whether and when a taxpayer loses the

---

[4] *Amicus* conducted an empirical review of more than 30 CDP cases decided by the Tax Court over the past 12 months, finding the average time from the tax year at issue to the Tax Court's decision being filed in those cases was approximately a decade. The search was conducted using the Tax Court's electronic filing system. *Docket Access Within a Secure Online Network (DAWSON)*, U.S. Tax Court, https://dawson.ustaxcourt.gov/.

right to be heard in Tax Court and forced into another court. The IRS should not be able to unilaterally force taxpayers to take such a winding path to justice.

This result is also inconsistent with Congress's intent in conferring the Tax Court jurisdiction in CDP cases—to protect against the IRS's abuses and provide taxpayers with due process and a more efficient forum to bring such challenges. Prior to 2006, CDP cases were either appealable to Tax Court (when the underlying liability was not at issue) or district court (when the underlying liability was at issue). 26 U.S.C. § 6330(d) (1998). In 2006, Congress amended 26 U.S.C. § 6330(d) to grant the Tax Court exclusive jurisdiction in *all* CDP cases, including those contesting the tax liability at issue. Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 781, 1019 (2006). This change was intended to "provide simplification benefits to taxpayers and to the IRS by requiring that all appeals be brought in the Tax Court, because doing so will eliminate confusion over which court is the proper venue for an appeal and *will significantly reduce the period of time before judicial review*." *See* Staff of the J. Comm. on Taxation, 109th Cong., Description of the Revenue Provisions Contained in the President's Fiscal Year 2007 Budget Proposal 230–31 (Comm. Print 2006) ("2007 JCT Bluebook") (emphasis added). The Government's position here would effectively revoke this 2006 amendment for taxpayers who have subsequent year overpayments while a CDP case is pending.

Small businesses and other taxpayers with limited resources would be especially harmed by this outcome. First, the increased expenses that would result

from restarting proceedings would increase the barriers to litigation for such taxpayers. This is exacerbated by the fact that district courts are generally less accessible for small businesses and individuals than Tax Court. For instance, discovery under the Federal Rules of Civil Procedure is generally more formal and complex than in Tax Court. *See* Tax Ct. R. 70 ("[T]he Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.").

Second, such a delay in review and relief is likely to exacerbate the liquidity challenges many small businesses face. When the IRS decides to offset an overpayment against a contested CDP liability, it takes a refund otherwise due to a taxpayer that overpaid its taxes and applies it to the contested liability. The IRS holds onto this sum unless and until a court resolves the issue in the taxpayer's favor. A court may very well eventually decide that the funds do not belong to the IRS at all. In the meantime, however, the business is unable to use these funds to meet pressing payroll, inventory, and other cash-intensive needs—not to mention the costs of litigating against the IRS. Research by the JPMorgan Chase Institute on 25 metropolitan areas demonstrates that "50 percent of small businesses are operating with fewer than 15 cash buffer days – the number of days of typical outflows a business could pay out of its cash balance in the event of a disruption to inflows."[5] Thus, delayed

---

[5] *Small Business Cash Liquidity in 25 Metro Areas*, JPMorgan Chase Inst. (Apr. 2020), https://perma.cc/M3S6-WYHL.

relief could have a significant impact on the operations and even the viability of many such businesses.

B. *Denying Tax Court Review Could Deprive Taxpayers of Any Judicial Review in Certain Situations.*

Beyond delaying judicial review, the Government's position would result in a taxpayer losing the opportunity for *any* judicial review in some instances. This is because only the Tax Court has jurisdiction to review certain components of an Appeals determination. If the Tax Court loses jurisdiction in CDP cases, this important check on agency action will be lost.

As part of its charge to consider "any relevant issue relating to the unpaid tax or proposed levy" at a CDP hearing, Appeals must consider any "collection alternatives" a taxpayer proposes. 26 U.S.C. § 6330(c)(2)(A). One "collection alternative" specified by 26 U.S.C. § 6330(c)(2)(A) is an offer-in-compromise ("OIC"). In submitting OICs, taxpayers seek to negotiate with the IRS to decrease the amount of tax owed for compelling reasons, such as economic hardship. 26 C.F.R. § 301.7122-1(b)(3)(i). The only available judicial review over these collection alternatives is Tax Court review through the CDP process. 26 U.S.C. § 6330(c)(2)(A), (d)(1); Leslie Book & Michael I. Saltzman, *IRS Practice and Procedure* ¶ 15.06 (citing *Dillon v. United States*, 620 F. Supp. 3d 856 (D. Minn. 2022)). In cases where the IRS rejects a taxpayer's proposed OIC and the Tax Court loses jurisdiction over the case, the taxpayer would have no recourse.

Thus, the Government's position has ramifications beyond a change of venue and the attendant time and

financial costs of such a change. If the IRS wrongfully rejected an OIC, a taxpayer would end up paying more tax than due under the law—and there would be no oversight on such an abuse of discretion. *See* 26 U.S.C. § 7803(a)(3)(C) (stating that taxpayers have the "right to pay no more than the correct amount of tax"); *Goza*, 114 T.C. at 182 (explaining that the Tax Court applies an abuse of discretion standard). In addition, the bedrock tax principle of "horizontal equity"—that taxpayers in similar situations should be treated equally—would be violated. *See, e.g.*, Richard A. Musgrave, *Horizontal Equity, Once More*, 43 Nat'l Tax J. 113 (1990); Alan J. Auerbach & Kevin A. Hasset, *A New Measure of Horizontal Equity*, 92 Am. Econ. Rev. 1116 (2002). Without available judicial review, the IRS could unfairly reject an OIC from one taxpayer but accept a comparable OIC from another taxpayer in a nearly identical situation without any check on this power. This goes against the core principles underpinning the U.S. tax system.

Finally, closing the door on review of OIC and other collection alternative decisions contravenes the purpose of 26 U.S.C. § 6330(d) to provide judicial review of these issues. The statute explicitly specifies that "offers of collection alternatives" must be "take[n] into consideration" by Appeals in reaching a determination in a CDP hearing. 26 U.S.C. § 6330(c)(2)(A)(iii), (c)(3). Section § 6330(d)(1) further provides that taxpayers may "petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." Read together, the plain language of these provisions demonstrates that Congress intended judicial review of collection alternatives. Indeed, the Tax Court has

found the IRS to have abused its discretion in such cases. *See, e.g.*, *Long v. Comm'r*, T.C.M. (RIA) 2023-130. The IRS should not be able to unilaterally prevent judicial review of its own actions, contrary to congressional intent.

III. The Government's Position Would Give the IRS Unfettered Discretion to Pick and Choose Which Taxpayers Are Able to Receive Tax Court Review.

The Government's position would allow the IRS to pick and choose which taxpayers in these circumstances receive Tax Court review, and which are forced into a different court or to forgo judicial review altogether. Such broad and arbitrary power is not supported by the statute, creates improper incentives, and harms taxpayers.

This case arose because the IRS chose to apply Ms. Zuch's overpayments from subsequent years to her 2010 liability, rather than issue her a refund. The IRS's authority to offset a liability with overpayments from other years is provided by 26 U.S.C. § 6402(a). That section states that the IRS "*may* credit the amount of such overpayment, including any interest allowed thereon, against any liability. . . ." *Id.* (emphasis added). Offset authority under 26 U.S.C. § 6402(a) is completely discretionary. *Georgeff v. United States*, 67 Fed. Cl. 598, 608 (2005) ("The statute, 26 U.S.C. § 6402, gives the IRS the discretionary authority to credit tax overpayments to any tax liability."). The IRS can choose to exercise that authority or not, at will.

Under the Government's interpretation of the Tax Court's jurisdiction, the IRS's offset authority would manifest as the power to decide whether a taxpayer can have its case heard in Tax Court. Where a taxpayer has petitioned an Appeals determination in Tax Court under 26 U.S.C. § 6330(d), and subsequently accrues an overpayment for a different tax year, the IRS has a choice. It can decide to (1) refund the overpayment to the taxpayer or (2) apply the overpayment to the liability at issue in the CDP case. If the Government prevails, the latter choice would extinguish the Tax Court's jurisdiction over the case even where live issues remain—including a dispute over the very liability or unpaid tax at issue. That is, under the Government's interpretation of 26 U.S.C. § 6330(d), the IRS would have complete discretion to decide whether the taxpayer is allowed to be heard in Tax Court.

Such a reading puts an unprecedented power in the hands of the IRS—exactly the opposite of what Congress intended by enacting 26 U.S.C. § 6330 and providing Tax Court review of CDP cases. The CDP regime was "designed to [e]nsure due process where the IRS seeks to collect taxes." *Organic Cannabis Found., LLC v. Comm'r*, 161 T.C. 13, 20 (2023) (citation omitted). Specifically, it was "designed to afford taxpayers due process in collections with increased fairness to taxpayers." *Id.* (cleaned up). As the legislative history explains, "taxpayers should be entitled to the same rights and protections in dealings with the IRS that persons have in dealing with any other creditors and should receive a 'meaningful hearing before the IRS deprives them of their property.'" *Id.* (quoting S. Rep. No. 105-174, at 67 (1998)).

Allowing the IRS, in this unique subset of cases, the power to decide whether a taxpayer has the chance to be heard in Tax Court (or at all) is antithetical to Congress's purposes of increasing taxpayer fairness and providing taxpayers with rights and protections.

The Government's position that a taxpayer could simply re-file its case in district court is no answer. First, as set forth in Section II, *supra*, this route exacerbates the harm to the taxpayer by requiring protracted litigation over issues already ripe for decision by the Tax Court, and district court is not an available venue for all tax disputes that will be impacted by the Court's decision in this case. Second, Congress decided to grant the Tax Court exclusive jurisdiction over CDP cases in an effort to "eliminate confusion" and "significantly reduce the period of time before judicial review." 2007 JCT Bluebook 230–31; *see Redeker-Barry v. United States*, 476 F.3d 1189, 1190 (11th Cir. 2007) (discussing the Tax Court's exclusive jurisdiction over CDP cases). Interpreting 26 U.S.C. § 6330 in a manner that provides the IRS with the power to kick a CDP case out of Tax Court cannot be reconciled with Congress's clear intent to provide the Tax Court with exclusive jurisdiction over these cases. *See Zuch v. Comm'r*, 97 F.4th 81, 86 (3d Cir. 2024) ("When Congress grants taxpayers the right to challenge what the Internal Revenue Service says is owed to the government, Congress's will prevails. The IRS cannot say that such a right exists only under the circumstances it prescribes.").

An even more recent statutory amendment confirms this understanding of congressional intent. In

2015 Congress amended 26 U.S.C. § 7441 to read: "The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government." Yet the Government's position here would allow the IRS to unilaterally dictate what CDP cases the Tax Court has jurisdiction to hear, contravening clear congressional intent that the Tax Court be independent from the executive branch.

Such discretionary power also creates improper incentives. The IRS may be inclined to apply overpayments in cases it is more likely to lose and unilaterally declare victory to avoid an unfavorable decision. Given the expense and hurdles that taxpayers face in re-filing and re-litigating their case in district court, the IRS's offset authority could be improperly used to litigate by fiat—especially against small businesses and other taxpayers of limited resources who may not be able to afford the additional costs.

Nor can taxpayers circumvent this situation by simply paying the IRS less to avoid creating an overpayment. Corporations, small and large, for example, are required to make quarterly estimated tax payments to the IRS, the amount of which is keyed off last year's tax liability, or face penalties. 26 U.S.C. § 6655(a), (d)(1)(B). Further, taxpayers cannot predict the exact amount of a current year's tax, and overpaying avoids understatement penalties—particularly important for small businesses running on already tight margins. *See* 26 U.S.C. § 6662(b)(2). Adopting the Government's position would thus punish taxpayers attempting to comply with their federal

tax obligations by granting the IRS power to arbitrarily select whose time, money, and refunds are tied up in district court proceedings. This result is the very opposite of the "due process in collections" and "increased fairness to taxpayers" that Congress pursued in enacting 26 U.S.C. § 6330. S. Rep. No. 105-174, at 67 (1998).

CONCLUSION

For the reasons discussed above, the decision of the Third Circuit should be affirmed.

Respectfully submitted,

Janet Galeria
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Lauren Willard Zehmer
Counsel of Record
Kandyce Jayasinghe
Emily Caputo
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
LZehmer@cov.com
(202) 662-6000

Counsel for Amicus Curiae

March 24, 2025