No. 14-622

In the Supreme Court of the United States

PETER KURETSKI AND KATHLEEN KURETSKI,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the President's authority to remove a judge of the United States Tax Court for cause under 26 U.S.C. 7443(f) violates the separation of powers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 755 F.3d 929. The order of the Tax Court denying petitioners' motions for reconsideration and vacatur (Pet. App. 50a-54a) is unreported. The memorandum opinion of the Tax Court (Pet. App. 34a-48a) is unreported, but is available at 2012 WL 3964770.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2014. A petition for rehearing was denied on August 1, 2014 (Pet. App. 55a). On October 15, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1921, Congress first provided a pre-assessment opportunity for a taxpayer to dispute, in a hearing at the Bureau of Internal Revenue, the amount of tax owed to the federal government. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265-266. Three years later, Congress established the Board of Tax Appeals as "an independent agency in the executive branch of the Government," thereby granting taxpayers a right to preassessment review of deficiencies before a tribunal separate from the Bureau. Revenue Act of 1924, ch. 234, § 900(a), (e), and (k), 43 Stat. 336, 337, 338. The members of the Board were appointed by the President to 10-year terms with the advice and consent of the Senate, § 900(b), 43 Stat. 336-337, and could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office, but for no other reason," § 900(b), 43 Stat. 337. Congress later made the Board's decisions directly reviewable by the courts of appeals. Revenue Act of 1926, ch. 27, § 1001(a), 44 Stat. 109. In 1942, Congress changed the Board's name to "The Tax Court of the United States" and declared that its members "shall be known" as "judges." Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 957.

In 1969, Congress amended the statute that addressed the court's status. In that version, which remains in effect today, Congress eliminated the reference to "an independent agency in the executive branch" and instead stated that it had "established, under article I of the Constitution of the United States, a court of record to be known as the United

States Tax Court." 26 U.S.C. 7441. Congress further provided that "[t]he United States Tax Court * * * is a continuation of the Tax Court of the United States as it existed prior to the date of enactment of this Act," and that judges of the prior court were to become judges of the continued court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 961, 83 Stat. 735.

The Tax Court comprises 19 judges appointed to 15-year terms by the President with the advice and consent of the Senate. 26 U.S.C. 7443(a), (b), and (e). The judges "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).

b. Until 1998, the Internal Revenue Service (IRS) could make an assessment and levy on a delinquent taxpayer's property without a prior hearing. Pet. App. 6a. In 1998, however, Congress provided that a taxpayer could request a pre-levy hearing before the IRS Office of Appeals (Appeals Office), known as a collection due process (CDP) hearing. *Id.* at 6a-7a; see 26 U.S.C. 6330. Upon a timely request for a hearing after notice of a proposed levy, a taxpayer may dispute his tax liability if he has not previously had the opportunity to do so, 26 U.S.C. 6330(c)(2)(B), and may propose alternatives to collection, such as posting a bond, substituting other assets, paying in installments, or compromising the liability, 26 U.S.C. 6330(c)(2)(A). The Appeals Office then determines whether the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern * * * that any collection action be no more intrusive than necessary." 26 U.S.C. 6330(c)(3)(C). The taxpayer may contest an adverse determination in the Tax

Court, 26 U.S.C. 6330(d)(1), and the Tax Court's decision is appealable to a court of appeals, 26 U.S.C. 7482(a)(1).

2. When petitioners filed their joint federal income tax return for 2007, they reported a tax liability of $24,991, but they made no payment (aside from claiming a withholding credit of $2856). Pet. App. 7a. The IRS assessed the tax due, plus interest and additions for failure to pay tax (under 26 U.S.C. 6651(a)(2)) and for failure to pay estimated tax (under 26 U.S.C. 6664). By October 2008, the amount due on the assessments was $23,601.50. Pet. App. 7a. In order to collect, the IRS sent petitioners a notice of its intent to levy on their property in 30 days. *Ibid.*

Petitioners timely requested a CDP hearing before the IRS Appeals Office and submitted an offer in compromise. Pet. App. 7a-8a. They proposed to settle their tax liability for $1000, payable in five monthly installments of $200, and asked for the penalties to be abated. *Id.* at 8a. The appeals officer rejected the offer and explained in subsequent communications with petitioners' attorney that the IRS might be willing to abate the penalties, but would require full payment of the liability, at the rate of $250 per month for the time remaining on the statute of limitations on collection (about nine years). *Ibid.*; Gov't C.A. Br. 7-9. Petitioners did not accept the full-payment proposal. Pet. App. 8a, 38a. The Appeals Office notified petitioners of its determination to sustain the proposed levy. *Id.* at 8a, 38a-39a.

3. a. Petitioners sought review by the Tax Court, which, following a trial, affirmed. Pet. App. 34a-48a. The court rejected petitioners' contention that they had "reached an enforceable contract with [the Ap-

peals Office] for an installment agreement." *Id.* at 41a. The court found that the appeals officer had not abused her discretion in closing the case after petitioners failed to accept her proposal, *id.* at 42a-43a, and further found that there had been no abuse of discretion in denying abatement of the failure-to-pay penalty because petitioners had not established reasonable cause for that failure, *id.* at 45a-46a. The court directed the Commissioner to abate the addition for failure to pay estimated tax, however, finding that the Commissioner had not produced sufficient evidence to calculate what any estimated tax payment should have been. *Id.* at 47a-48a.

b. Petitioners filed a motion to vacate the decision. They contended for the first time that the President's statutory authority to remove Tax Court judges is unconstitutional. Pet. App. 51a. The Tax Court declined to address that argument because petitioners had failed to explain why they had not raised it in a timely fashion. *Id.* at 53a. The Tax Court also rejected petitioners' accompanying motion to reconsider some of the adverse determinations it had made, finding that the motion merely "rehash[ed] arguments that petitioners raised before the decision was issued." *Id.* at 52a, 53a.

4. Petitioners appealed the Tax Court's decision, and the parties stipulated to venue in the D.C. Circuit. Pet. App. 10a. The court of appeals affirmed. *Id.* at 1a-33a.

a. The court of appeals first addressed petitioners' nonconstitutional arguments. It rejected their contention that the Tax Court had erred in finding them liable for late-payment penalties. Pet. App. 10a-12a.

b. The court of appeals then considered petitioners' constitutional challenge to the President's authority to remove a Tax Court judge under 26 U.S.C. 7443(f). Pet. App. 12a. The court recognized that the constitutional challenge was "belated," but it nevertheless "elected" to consider the issue. *Id.* at 13a. The court also held that petitioners had not waived their "structural claim" about the Tax Court by seeking relief in that court, *id.* at 15a-16a, and that they had standing to raise the challenge because their injury could be redressed by "striking down" the for-cause-removal provision and remanding for a new trial before the Tax Court, *id.* at 16a-17a.

c. The court of appeals rejected petitioners' constitutional claim on the merits. Pet. App. 17a-31a. The court first considered petitioners' "principal submission * * * that Tax Court judges exercise the judicial power of the United States under Article III of the Constitution." *Id.* at 18a. The court explained that pre-collection taxation matters fall in the category of public-rights cases, which Congress may "constitutionally assign to non-Article III tribunals"; that Congress had "undisputedly exercised that option when it initially established the Tax Court as an Executive Branch agency" in 1924; and that the 1969 amendments had not converted the Tax Court to an Article III court by describing the court as one established "under article I." *Id.* at 19a-21a.

The court of appeals recognized that this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), "adds a wrinkle to" the analysis, because that decision held that, for Appointments Clause purposes, the Tax Court is a "Court of Law." Pet. App. 21a-22a. The court explained that, in light of *Freytag*'s discus-

sion of territorial courts, "[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." *Id.* at 22a. The court also discussed this Court's observation in *Freytag* that the Tax Court "exercises a portion of the judicial power of the United States." *Ibid.* (quoting *Freytag*, 501 U.S. at 891). Although that observation could, "if considered in isolation, * * * suggest that Tax Court judges exercise Article III powers," other portions of *Freytag* clarified that the Court had "used the phrase 'judicial power' in an enlarged sense, not in the particular sense employed by Article III." *Id.* at 22a-23a (some internal quotation marks omitted).

The court of appeals next rejected petitioners' "fallback position that the Tax Court functions as part of the Article I Legislative Branch." Pet. App. 24a. It explained that Congress has created multiple tribunals while exercising its non-Article-III powers, and that, although those tribunals are sometimes called "legislative courts," they do not exercise legislative power. *Id.* at 25a-27a.

Having concluded that the Tax Court does not exercise judicial power "pursuant to Article III," and that it does not exercise legislative power, the court of appeals concluded that "the Tax Court exercises its authority as part of the Executive Branch." Pet. App. 27a. The court of appeals explained that this understanding "is fully consistent with *Freytag*" because the Tax Court's "functional independence" from other parts of the Executive Branch, and the fact that the Tax Court is not an executive department for Appointments Clause purposes, do not prevent its judges from being subject to for-cause removal by the Presi-

dent, as are officers in many other "independent" agencies. *Id.* at 27a-29a.

The court of appeals also explained that "the constitutional status of the Tax Court mirrors that of the Court of Appeals for the Armed Forces." Pet. App. 29a. Because Congress expressly sought to align the two courts in 1969, each of them is defined as a "court of record" "established under article I of the Constitution." *Ibid.* (quoting 10 U.S.C. 941 and 26 U.S.C. 7441). Even though Congress had sought to "emphasize the Tax Court's independence as a 'court' reviewing the actions of the IRS," it had not "move[d] the Tax Court outside the Executive Branch altogether." *Id.* at 30a. Noting that this Court has already determined that the Court of Appeals for the Armed Forces is "within the Executive Branch," the court of appeals held that "Congress sought to—and did—achieve the same status for the Tax Court." *Id.* at 30a-31a.

Because it was not persuaded "that Tax Court judges exercise their authority as part of any branch other than the Executive," the court of appeals found it unnecessary to "explore the precise circumstances in which interbranch removal may present a separation-of-powers concern." Pet. App. 17a-18a.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

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[1] The court of appeals also rejected petitioners' separate contention that the IRS's procedures for CDP hearings do not satisfy due process requirements. Pet. App. 31a-33a. That issue is beyond the scope of the question presented in this Court.

1. Petitioners challenge the court of appeals' conclusion that the Tax Court "exercises Executive authority as part of the Executive Branch." Pet. 12 (quoting Pet. App. 3a). In arguing that the President's ability to remove Tax Court judges for cause violates separation-of-powers principles, petitioners contend both that the Tax Court is not part of the Executive Branch (Pet. 19-20), and that the Tax Court must be kept completely independent of executive control because it exercises only judicial power (Pet. 15-17, 18-19). Both of those contentions lack merit.

a. Reprising their principal argument in the court of appeals, petitioners contend in part (Pet. 19) that "the D.C. Circuit's conclusion that the Tax Court is part of the Executive Branch is wrong." See Pets. C.A. Br. 11 ("an interbranch removal power * * * is unconstitutional"); *id.* at 34 ("[T]he Tax Court * * * is certainly not a part of the Executive Branch anymore. Therefore, any removal power held by the President would be an interbranch removal power."). In this regard, however, petitioners cite (Pet. 19-20) only two sources, each of which discussed the Tax Court's duties and functions, rather than whether it should be considered part of the Executive Branch.

Petitioners first cite (Pet. 19) a 1969 committee report, which noted that "the Tax Court has only judicial duties." S. Rep. No. 552, 91st Cong., 1st Sess. 302 (Senate Report). It is true that the accompanying statute eliminated language that had described the Tax Court as "an independent agency in the Executive Branch," 26 U.S.C. 7441 (1964), and replaced it with the current language describing the Tax Court as "a court of record" established "under article I of the Constitution," 26 U.S.C. 7441. That change, however,

did not actually remove the Tax Court from the Executive Branch, where it had long been understood to be, and the committee report otherwise said only that there were concerns about whether the Tax Court should continue to be considered "an executive agency." Senate Report 302, 303.

Petitioners also invoke (Pet. 20) this Court's statement in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), that "[t]he Tax Court exercises judicial, rather than executive, legislative, or administrative, power," *id.* at 890-891. That passage, like the subsequent statement that the Tax Court "remains independent of the Executive and Legislative Branches," *id.* at 891, spoke only to what functions the Tax Court performs, not to which Branch contains it. See Pet. App. 28a (characterizing the latter statement as "describ[ing] the Tax Court's functional independence rather than * * * its constitutional status"). This Court has used similar language to describe Congress's authority to "creat[e] quasi-legislative or quasi-judicial agencies," to require the officers of such agencies to "act in discharge of their duties *independently of executive control*," and "to forbid their removal except for cause." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 629 (1935) (emphasis added). As the Court recently explained, even when agency "activities take * * * 'judicial' form[]," they are still "exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (citation omitted); see *id.* at 1877-1878 (Roberts, C.J., dissenting) (noting that "modern administrative agencies fit most comfortably within the Executive Branch" even when "as a practical matter they exercise * * * judicial power, by adjudicat-

ing enforcement actions and imposing sanctions on those found to have violated their rules").

Freytag's discussion of the Tax Court's "role in the constitutional scheme" came as part of its discussion of why the Tax Court is a "'Cour[t] of Law' within the meaning of the Appointments Clause." 501 U.S. at 890 (brackets in original). By that point in its opinion, however, the *Freytag* Court had already considered the government's contention that "the Tax Court must fall within one of the three branches and that the Executive Branch provides its best home." *Id.* at 885. Rather than rejecting the proposition that the Tax Court is located in the Executive Branch, the *Freytag* majority simply rejected the government's assumption that, for purposes of the Appointments Clause, "every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power." *Ibid.* The Court recognized that, to succeed on its Appointments Clause argument, the government was required to show both "that the Tax Court is a part of the Executive Branch" and "also that it is a department." *Id.* at 885-886. This Court rejected only the latter proposition, holding that "[t]he Tax Court is not a 'Departmen[t],'" *id.* at 888 (second set of brackets in original), without indicating that the Tax Court has ceased to be a part of the Executive Branch.

Accordingly, *Freytag* implicitly supports—and certainly does not conflict with—the court of appeals' conclusion in this case that Tax Court judges do not "exercise their authority as part of any branch other than the Executive." Pet. App. 18a; see *South Carolina State Ports Auth.* v. *Federal Mar. Comm'n*, 243 F.3d 165, 171 (4th Cir. 2001) (paraphrasing the *Freytag* majority as holding that "the Tax Court is a Court

of Law despite being part of the Executive Branch"), aff'd, 535 U.S. 743 (2002).

In any event, even if the Tax Court were deemed to be a non-Article-III entity located outside the Executive Branch, petitioners would still be wrong in contending that the President's authority to remove Tax Court judges for cause violates separation-of-powers principles. Petitioners rely on *Bowsher* v. *Synar*, 478 U.S. 714 (1986), and *Mistretta* v. *United States*, 488 U.S. 361 (1989), for their suggestion (Pet. 18-19) that an official in one branch cannot have "the authority to remove an official in another branch" except "to the extent that they exercise the same *power*." This Court has already explained, however, that "[n]othing in *Bowsher* * * * suggests that one Branch may never exercise removal power, however limited, over members of another Branch," and it has further explained that "the President may remove a judge who serves on an Article I court." *Mistretta*, 488 U.S. at 412 n.35. In *Mistretta*, the Court concluded that the President's ability to remove Article III judges from the Sentencing Commission did not pose any "threat to the balance of power among the Branches" because the Commission was "not exercising judicial power." *Ibid.* The Court therefore focused, as petitioners urge (Pet. 19), on which *powers* were at stake. But that focus arose in the context of a concededly "interbranch removal authority," because the Court concluded that the Commission had been "placed within the Judicial Branch." *Mistretta*, 488 U.S. at 412 n.35.

Here, by contrast, there is no arguable "threat to the balance of power among the Branches." *Mistretta*, 488 U.S. at 412 n.35. The potential for presidential removal of Tax Court judges cannot threaten the Judi-

cial Branch at all, because the Tax Court is not even arguably located in, or its judges otherwise controlled by, the Judicial Branch.[2] Even if the Tax Court could reasonably be viewed as located "in" the Legislative Branch—as opposed to being described, more accurately, as an entity established pursuant to Congress's exercise of its Article I powers, see Pet. App. 27a—the President's for-cause-removal power would still pose no threat to that Branch because the Tax Court clearly does not exercise any legislative powers.

b. Petitioners further contend (Pet. 18-19) that the court of appeals should have considered whether the President (as the Executive) is precluded from wielding any removal power over officers who exercise only judicial power (regardless of whether they are located in the Executive Branch or elsewhere). In petitioners' view, such a removal power is unconstitutional because "even 'slight encroachments' on judicial independence threaten the separation of powers." Pet. 16 (quoting *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011)). The court of appeals correctly held, however, that Tax Court "judges do not exercise the 'judicial Power of the United States' *under Article III*." Pet. App. 21a (emphasis added). That observation eliminates the foundation for petitioners' judicial-independence argument.

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[2] That distinguishes Tax Court judges from magistrate judges and bankruptcy judges, who are located within the Judicial Branch and subject to judicial control. Magistrate judges and bankruptcy judges are appointed and removable by Article III judges (see 28 U.S.C. 152(a)(1) and (e), 332(a)(1), 631(a) and (i)), and they are assigned to particular cases only upon the approval of Article III judges (see 28 U.S.C. 157(a) and (d), 636(b) and (c)).

Petitioners assert that the court of appeals "reasoned that the Tax Court cannot exercise judicial power because it is not an Article III court." Pet. 20; see Pet. 17 (stating that the court of appeals' "decision turned entirely on its conclusion * * * that the Tax Court does not exercise judicial power"). Although that paraphrase is the basis for some of petitioners' suggestions that the court of appeals' reasoning is "inconsistent with" or "in conflict with" *Freytag* (Pet. 17, 21, 26), it does not accurately describe the decision below. The court of appeals plainly distinguished between a broad conception of "judicial power" (which it acknowledged applies to the Tax Court under *Freytag*) and a narrower conception of judicial power "in the particular sense employed by Article III" (which does not apply to the Tax Court). Pet. App. 22a-23a; see *id.* at 18a (disagreeing with the submission "that Tax Court judges exercise the judicial power of the United States under Article III"); *id.* at 27a ("We have explained that Tax Court judges do not exercise the 'judicial power of the United States' pursuant to Article III.").

Petitioners acknowledge (Pet. 21) that the *Freytag* majority used only the broader, non-Article-III conception of "judicial power" in describing the Tax Court. See *Freytag*, 501 U.S. at 889 ("[T]he judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts."); *id.* at 908 (Scalia, J., concurring in part and concurring in the judgment) ("'The judicial power,' as [used by the majority], bears no resemblance to the constitutional term of art we are all familiar with [from Article III, Section 1], but means only 'the power to adjudicate in the manner of courts.'").

Petitioners assert (Pet. 17, 30-31) that the concurring Justices in *Freytag* "hinted at" or "foresaw" the supposed constitutional infirmity that (in petitioners' view) results from holding that judges removable by the President exercise "judicial power." But the lack of independence from the Executive that the concurring opinion identified was simply additional evidence that the majority could not be ascribing to the Tax Court a "judicial power" in the Article III or "constitutional sense." *Freytag*, 501 U.S. at 908, 912 (Scalia, J., concurring in part and concurring in the judgment). Petitioners are therefore wrong in suggesting (Pet. 30) that the concurring Justices "disagreed with the Court's holding that the Tax Court exercises the judicial power of the United States" in a non-Article-III sense. Instead, the concurring Justices simply found that conception of the phrase "judicial power" to be irrelevant—to have "nothing to do with the separation of powers," *Freytag*, 501 U.S. at 908—because they would have held that "the Courts of Law" that may be authorized to appoint inferior officers under the Appointments Clause include only the courts that exercise Article III "judicial power." *Id.* at 908, 912.[3]

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[3] If this Court were to resolve the separation-of-powers question that petitioners believe was "left open by *Freytag*" (Pet. 31), it could well conclude that the analysis in the concurring opinion is more sound than that of the *Freytag* majority. The concurring opinion in *Freytag* reflects the position that the government took in that case. This Court has since adopted some aspects of the concurring opinion's analysis, see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510-511 (2010), but it has not affirmatively re-embraced the Appointments Clause reasoning of the *Freytag* majority—much less extended it, as petitioners advocate here.

Recognizing the distinction between the two conceptions of "judicial power," however, vitiates petitioners' argument about judicial independence. Although it is not apparent from petitioners' quotations, every case they cite to explain the critical importance of the Judiciary's independence from the Executive (and from the Legislature) involved Article III judicial power, not the non-Article-III power exercised by the Tax Court. Thus, the sentence petitioners quote about the "right to have claims decided by judges who are free from potential domination by other branches of government" (Pet. 16 (quoting *United States* v. *Will*, 449 U.S. 200, 218 (1980)) is not about appointment or removal powers. Instead, it comes from a discussion of the express prohibition in Article III, Section 1, on diminishing judicial compensation. See *Will*, 449 U.S. at 218. In other words, it demands a form of independence that Tax Court judges do not have (and that petitioners do not even contend they must have).

Similarly, filling in the ellipsis in petitioners' quotation (Pet. 16) from *Stern*—which was in turn quoting *United States* v. *Nixon*, 418 U.S. 683 (1974)—reveals that this Court's explanation of judges' constitutional inability to "share[]" judicial power with another Branch was about "the 'judicial Power of the United States' *vested in the federal courts by Art. III, § 1*." *Id.* at 704 (emphasis added). Although the ellipsis also appears in *Stern*, see 131 S. Ct. at 2608, that decision does not support petitioners' attempt to extend the proposition to the broader, non-Article-III category of judicial power that the Tax Court exercises. The preceding sentence in *Stern* referred to "Article III," and its citation to *Nixon* acknowledged the quotation from "U.S. Const., Art. III, § 1." *Ibid.*

Finally, petitioners criticize (Pet. 25) the court of appeals for relying on the President's established authority to remove non-Article-III judges from the Court of Appeals for the Armed Forces. See Pet. App. 29a-31a; *Edmond* v. *United States*, 520 U.S. 651, 664 n.2 (1997) (explaining that the Court of Appeals for the Armed Forces is located "within the Executive Branch," and that "the President may remove its judges for neglect of duty, misconduct, or mental or physical disability"). As the court of appeals explained, the "statutes establishing the status of the two courts precisely parallel one another." Pet. App. 29a; see Senate Report 304 (noting that, at the time of the 1969 amendments to the Tax Court statute, the military court's predecessor was "the only other Article I court").[4] Petitioners call (Pet. 25) the court of appeals' comparison between the Tax Court and the Court of Appeals for the Armed Forces a "mistake" in light of the supposedly established difference between "the power to dispense military justice and the judicial power of the United States." But the decisions that petitioners cite (Pet. 25) explained that the divide is between the powers of Article I courts-martial and "the judicial power of the United States" as it is defined by "the 3d article of the Constitution." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 66 (1982) (opinion of Brennan, J.) (quoting

[4] Congress later used the same formula again when it "established, under Article I of the Constitution," what is now called the Court of Appeals for Veterans Claims. 38 U.S.C. 7251. Like Tax Court judges, the judges of the Court of Appeals for Veterans Claims are appointed by the President with the advice and consent of the Senate and "may be removed from office by the President" on certain enumerated grounds. 38 U.S.C. 7253(b) and (f)(1).

Dynes v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858)). As a result, those decisions do not cast doubt on the "precise[] parallel" that the court of appeals identified between the President's undisputed ability to remove non-Article-III judges from the Court of Appeals for the Armed Forces and his ability to remove non-Article-III judges from the Tax Court. Pet. App. 29a.[5]

c. For similar reasons, petitioners' contention (Pet. 22-24) that the court of appeals misunderstood the significance of the public-rights doctrine is a *non sequitur*. In general, prepayment tax matters can be resolved by non-Article-III judges because they involve public rights—that is, "matters arising between individuals and the Government in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those branches." *Stern*, 131 S. Ct. at 2610 (citation and internal quotation marks omitted). Administrative tax-collection decisions have been recognized as public-rights cases since the doctrine's first articulation. See

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[5] Petitioners further suggest (Pet. 25-26) that the court of appeals erred in comparing the Tax Court to territorial courts, because "the separation of powers simply does not apply" to the latter, in light of Congress's plenary powers under Article IV of the Constitution. Yet, even there, petitioners quote *McAllister* v. *United States*, 141 U.S. 174 (1891), to show that Congress may determine the "tenure" or "salary" of territorial-court judges, as well as the means by which those judges are "removed or suspended." *Id.* at 188. In other words, the normal protections of Article III are as inapplicable to territorial courts as they are to the Tax Court. That is entirely consistent with the distinction that the court of appeals drew between the Article III courts and the "legislative courts" that "were created by Congress pursuant to non-Article III powers." Pet. App. 25a.

Atlas Roofing Co. v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-451 & nn.8-9 (1977); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). And prepayment proceedings, like those at issue in this case, were entrusted exclusively to the Department of the Treasury until 1998, when Congress first provided for CDP hearings. See p. 3, *supra*.

Such disputes are readily distinguishable from the controversy in *Stern*, in which the Court held that (at least in the absence of party consent) a non-Article-III bankruptcy judge could not enter "a final, binding judgment * * * *on a common law cause of action*, when the action neither derives from nor depends upon any agency regulatory regime." 131 S. Ct. at 2615 (emphasis added). Petitioners do not dispute that their case fits within the category of public-rights cases that can be decided by non-Article-III courts.[6]

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[6] Petitioners do assert (Pet. 23) that "the Tax Court does not hear only public-rights cases." In support of that proposition, however, they rely (*ibid.*) solely on the fact that the Tax Court may decide "questions of constitutional law" and "bind[] executive officials." As petitioners acknowledge elsewhere, however, the Tax Court decides "constitutional issues" only when they "arise in the cases before it" (Pet. 9)—in other words, only in the tax disputes that are paradigmatic matters involving public rights rather than "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Stern*, 131 S. Ct. at 2609 (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment)). Such decisions are subject to review by Article III judges. See 26 U.S.C. 7482(a)(1). Even an indisputably executive agency is not prohibited from deciding all constitutional issues in the first instance. See *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2134 (2012) (noting that the Merit Systems Protection Board "routinely adjudicates some constitutional claims * * * that an agency took adverse employment action in violation of [a govern-

This case would therefore be a poor vehicle for resolving what petitioners call (Pet. 30) any "such tension as may exist between *Freytag* and *Stern*."

2. For the reasons explained above, the court of appeals' decision in this case does not conflict with *Freytag*, *Bowsher*, *Stern*, or any other decision of this Court. Petitioners do not contend that the decision below conflicts with any other court of appeals decision. They suggest (Pet. 29) that certiorari is warranted because "no percolation is possible" for the subset of taxpayers who have "certain categories of cases," in which the D.C. Circuit is "the appropriate venue" for an appeal from the Tax Court. But whenever a particular circuit decides "the first case in any court of appeals to present [a particular] question," Pet. App. 2a, its ruling will bind other litigants whose right of appeal is to that circuit.

Petitioners do not dispute that the constitutional question they raise could be addressed in appeals from the Tax Court to other circuits. The regional courts of appeals have decided scores, if not hundreds, of cases arising from CDP hearings, and there is no structural obstacle in the venue statute that would prevent a conflict from developing. See *Byers* v. *Commissioner*, 740 F.3d 668, 675-676 (D.C. Cir.) (finding venue in the D.C. Circuit where taxpayer was not seeking a "rede-

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mental] employee's First or Fourth Amendment rights"). And executive agencies in administrative proceedings can issue decisions that "bind[] executive officials" (Pet. 23). See, *e.g.*, *West* v. *Gibson*, 527 U.S. 212, 214 (1999) (holding that the Equal Employment Opportunity Commission "possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment"); see also Pet. App. 28a-29a (citing statutes that allow various Executive Branch adjudicators to "sit in 'independent' judgment of other executive actors").

termination of his tax liability," but recognizing that "some appeals will involve challenges * * * concerning both redeterminations [of tax liability] and collection actions," in which venue would "presumably" lie "in a regional court of appeals" under 26 U.S.C. 7482(b)(1)(A)) (emphasis omitted), cert. denied, 135 S. Ct. 232 (2014).

3. Petitioners contend (Pet. 32) that the Court should "strike down Section 7443(f)," which gives the President power to remove Tax Court judges for cause. The Court did not take that approach in *Bowsher*, where it held that Congress's ability to remove the Comptroller General precluded that official from exercising executive power, and Congress had specified that it wanted to preserve its removal power in the event that those arrangements were found unconstitutional. See 478 U.S. at 734-736. The Court likewise did not take that approach in *Free Enterprise Fund*, where it made the members of the Public Company Accounting Oversight Board *more* accountable to the President by severing the for-cause limitation on the Securities and Exchange Commission's ability to remove them. See 561 U.S. at 508-510; see also *Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1340-1341 (D.C. Cir. 2012) (severing for-cause limitation on statutory power of the Librarian of Congress, an executive official, to remove Copyright Royalty Judges), cert. denied, 133 S. Ct. 2735 (2013). And even if this Court were to adopt the unprecedented remedy that petitioners propose—which would transform Tax Court judges into non-Article-III judges who could not be removed from office by any mechanism other than the impeachment process—petitioners identify no reason to expect that they would obtain a

different result on the merits if this case were "remand[ed] * * * for a new trial before a [Tax Court judge] now free from improper influence by the Executive." Pet. 32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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