No. 07-904

In the Supreme Court of the United States

CHARLES THOMAS CLAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an individual's legal duty to file a tax return if his gross income exceeds a minimum threshold is negated because the threshold is calculated by reference to the Consumer Price Index.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 506 F.3d 405.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2007. The petition for a writ of certiorari was filed on January 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of making and subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and six counts of willful failure to file a tax return, in violation of 26 U.S.C. 7203. He was sentenced to 60 months of

imprisonment. The court of appeals affirmed. Pet. App. 1a-20a.

1. Section 6012 of the Internal Revenue Code requires individuals to file a tax return if their gross income exceeds certain thresholds, which are defined by reference to the "exemption amount." 26 U.S.C. 6012(a)(1)(A). By statute, the exemption amount is set at $2000 but is subject to annual adjustments for inflation. 26 U.S.C. 151(d) (2000 & Supp. V 2005). Specifically, in each taxable year, the exemption amount is to be increased by the "cost-of-living adjustment," which is calculated based on "the last Consumer Price Index for all-urban consumers published by the Department of Labor." 26 U.S.C. 1(f)(3)-(5), 151(d)(4)(A).

2. In 1992, petitioner, a medical doctor, became associated with a tax-protest organization. Pet. App. 2a. He did not file a 1992 tax return or pay any tax on his income that year. *Ibid.* He later pleaded guilty to willful failure to file an income-tax return for 1992, and he was sentenced to one year of probation. *Ibid.*

Petitioner filed returns for 1997 and 1998, but by 2000, he began promoting the so-called "Section 861 argument," which asserts that only foreign-source income is subject to the United States income tax, while income from domestic sources is exempt. Pet. App. 2a. Petitioner refused to file returns for the years 1999 through 2004, even though he earned over $1.5 million during that period. *Id.* at 3a. In addition, he filed amended returns for 1997 and 1998 in which he falsely reported his income as zero and sought the refund of over $167,000 in previously paid tax. *Ibid.*

3. Petitioner was charged with two counts of making and subscribing a false amended tax return for calendar years 1997 and 1998, in violation of 26 U.S.C. 7206(1),

and six counts of willful failure to file a tax return, for calendar years 1999-2004, in violation of 26 U.S.C. 7203. Pet. App. 3a. The jury found petitioner guilty on all eight counts, and petitioner was sentenced to 60 months of imprisonment. *Id.* at 4a.

4. The court of appeals affirmed. Pet. App. 1a-20a. Petitioner argued that no law requires the filing of a federal income-tax return, because the government did not follow the rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, in promulgating the Consumer Price Index (CPI), which is used to establish the exemption amount. Pet. App. 5a. The court of appeals rejected that argument. It explained that the obligation to file a federal income-tax return is derived from 26 U.S.C. 6012 (2000 & Supp. V 2005), which, being a statute enacted by Congress, is not a rule of an "agency" as that term is defined by the APA. Pet. App. 7a. The court noted that the CPI "is simply an ascertainable numerical standard" incorporated by reference into the statute, "and there is no requirement that such a standard incorporated into a statute be itself an enforceable rule of law." *Id.* at 8a.

ARGUMENT

Petitioner claims that he was not legally obligated to file tax returns because the Internal Revenue Code refers to the CPI, which is not promulgated through APA rulemaking procedures. That argument is meritless, and the court of appeals correctly rejected it. Further review is not warranted.

1. Petitioner contends (Pet. 10-18) that the Department of Labor is required to use APA rulemaking procedures in computing the CPI, but that issue is not properly presented in this case. As the court of appeals ex-

plained, petitioner's obligation to file tax returns was based on 26 U.S.C. 6012 (2000 & Supp. V 2005), and that statute is not a rule that is subject to the APA. Pet. App. 7a. There is no requirement that the CPI be a separately enforceable "rule" in order for it to be incorporated by reference into Section 6012. *Id.* at 8a. Petitioner does not challenge the court's reasoning on this point, and it is fatal to his claim.

Moreover, even if the CPI were somehow "void" due to the Labor Department's failure to follow APA rulemaking procedures in issuing it, its invalidity would not benefit petitioner. Instead, a court would have to undertake a severability analysis. Since there is no question that it would be the intent of Congress to have the filing threshold calculated without an inflation adjustment rather than to have no filing requirement at all, that analysis would lead a court to sever the inflation-adjustment provision from Section 6012. Cf. *United States* v. *Booker*, 543 U.S. 220, 245 (2005). That would result in filing thresholds *lower* than the adjusted figures, so it would provide no help to petitioner. Nor does petitioner assert that *any* reasonable inflation adjustment could possibly exempt his entire income from tax.

2. Petitioner asserts (Pet. 14-18) that the decision below conflicts with *Alaniz* v. *OPM*, 728 F.2d 1460 (Fed. Cir. 1984), and *Batterton* v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1980). Petitioner is incorrect. Both of those cases involved changes to the methodology of calculating statistics that in turn were used in grant-making and salary-computation decisions, and the courts held that the changes required notice-and-comment rulemaking. Neither decision suggested that the statistics themselves had to be issued through rulemaking. Such a holding would be inconsistent with the plain language of

the APA, which defines a "rule" as an agency statement "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency," 5 U.S.C. 551(4)—a definition that does not include statistics like the CPI.[*]

Petitioner suggests in passing (Pet. 18) that the decision below conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), "by giving to a number calculated by the [Department of Labor] and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law." But as already explained, the decision below does not rest on a determination that the CPI, in and of itself, has the force of law. What has the force of law is Section 6012, and it is that statute that required petitioner to file a tax return.

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[*] Petitioner relies on *Phillips Petroleum Co.* v. *Johnson*, 22 F.3d 616, 621 (5th Cir.), modified on reh'g, 36 F.3d 89 (5th Cir. 1994), cert. denied, 514 U.S. 1092 (1995), but that case also involved the methodology for calculating statistics, not the statistics themselves. Pet. 18 n.5. In any event, even if the decision below were somehow inconsistent with *Phillips Petroleum*, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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