No. 12-49

In the Supreme Court of the United States

LARRY E. TUCKER, PETITIONER

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 employees of the Internal Revenue Service's Office of Appeals who conduct informal, nonadversarial hearings under 26 U.S.C. 6320 and 6330 regarding the use of liens and levies in collecting taxes are "inferior Officers" of the United States within the meaning of the Appointments Clause of the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 676 F.3d 1129. The opinions of the Tax Court (Pet. App. 18a-103a, 104a-141a) are reported at 135 T.C. 114 and 101 T.C.M. (CCH) 1307.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2012. The petition for a writ of certiorari was filed on July 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After making an assessment of taxes, the Secretary of the Treasury, acting through the Internal Revenue Service (IRS), must notify the taxpayer of the assessment and demand payment. 26 U.S.C. 6303. If the taxpayer then neglects or refuses to pay such a tax, the

amount due becomes a "lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. That lien, however, is not self-executing. The IRS may file a notice of lien under 26 U.S.C. 6323 or seek to collect the tax by levy under 26 U.S.C. 6331(a).

In 1998, Congress enacted 26 U.S.C. 6320 and 6330, which generally give a taxpayer the right to a hearing that reviews the propriety of collection activity after a notice of federal tax lien is filed or a notice of intent to levy is issued. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 746. Such a hearing—known as a "collection due process" or "CDP" hearing—is "held by the Internal Revenue Service Office of Appeals" (Appeals Office), 26 U.S.C. 6320(b)(1), 6330(b)(1), and is "conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax" at issue. 26 U.S.C. 6320(b)(3), 6330(b)(3). If the only issue raised relates to collection, the person conducting the hearing will generally be a "Settlement Officer"; if the underlying tax liability is also disputed, that person will be an "Appeals Officer." See Pet. App. 61a; Internal Revenue Manual (I.R.M.) 8.22.4.5.1, 8.22.4.5.2 (Mar. 29, 2012).

CDP hearings are informal and nonadversarial. They are often conducted by telephone or correspondence, and they need not be transcribed or recorded. See, *e.g.*, *Murphy* v. *Commissioner*, 469 F.3d 27, 30 (1st Cir. 2006); *Living Care Alternatives of Utica, Inc.* v. *United States*, 411 F.3d 621, 624 (6th Cir. 2005). The officer or employee who conducts the hearing is expected to verify that the prerequisites to collection (such as assessment, notice, and demand) have been satisfied. 26 U.S.C. 6320(c), 6330(c)(1); see 26 U.S.C. 6203, 6303. The tax-

payer may raise "any relevant issue relating to the unpaid tax or the proposed levy," including spousal defenses, challenges to the appropriateness of collection activities, and offers of collection alternatives (such as an installment agreement or an offer-in-compromise). 26 U.S.C. 6330(c)(2)(A). The determination whether the lien or levy is appropriate also depends on "balanc[ing] the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. 6330(c)(3)(C).

If an Appeals or Settlement Officer sustains a collection activity, his decision is reviewed (and may be overruled) by an Appeals Team Manager. Pet. App. 61; I.R.M. 8.22.4.5.4 (Mar. 29, 2012). The taxpayer may seek review in the Tax Court of any adverse determination made by the Appeals Team Manager. 26 U.S.C. 6320(c), 6330(d)(1).

2. In 2003, petitioner filed a timely income tax return for 2002 and late returns for 2000 and 2001, but without fully paying the taxes he reported as being due. Pet. App. 107a-108a. In 2004, petitioner filed a late return for 1999 and a timely return for 2003, again without fully paying his reported liabilities. *Id.* at 107a-108a. In July 2004, the IRS filed a notice of federal tax lien against petitioner with respect to $19,887.51 in unpaid liabilities for 2000, 2001, and 2002. The agency sent petitioner a notice of the tax-lien filing and of his right to a hearing regarding the propriety thereof under 26 U.S.C. 6320. Pet. App. 108a-109a; C.A. App. A7.

In August 2004, in response to the IRS's notice of lien, petitioner requested a CDP hearing. Pet. App. 110a. He ultimately submitted an "Offer in Compromise," proposing to settle approximately $37,000 in un-

paid liabilities for 1999-2003, based on doubt as to collectibility, for a total of $36,772, payable in 116 monthly payments of $317. *Id.* at 117a, 137a. The Settlement Officer initially rejected that offer and allowed the lien filing to stand. *Id.* at 118a. Petitioner challenged that determination in the Tax Court, which granted respondent's motion to remand the case to the Appeals Office for additional consideration of the offer. *Id.* at 118a-119a. After a supplemental hearing, a Settlement Officer again concluded that petitioner's offer in compromise should be rejected.[1] *Id.* at 119a-124a. The Appeals Office issued a supplemental notice of determination, rejecting petitioner's offer and allowing the lien filing to stand. *Id.* at 124a.

3. Petitioner filed suit in the Tax Court to challenge the supplemental notice of determination. Pet. App. 22a-23a. He contended that personnel who conduct CDP hearings are inferior officers of the United States who must be appointed by the Secretary of the Treasury under the Appointments Clause of the Constitution. *Id.* at 23a.

The Tax Court denied petitioner's motion for a remand, holding that the Appeals Office personnel who

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[1] The Settlement Officer's principal reasons for rejecting petitioner's offer were (1) that the offer was not commensurate with petitioner's reasonable collection potential after taking into account assets he had dissipated in stock trading with a disregard for his outstanding tax liabilities; and (2) that, because petitioner's earning capability was expected to increase, an installment-payment agreement, which is subject to periodic review and adjustment, would be preferable to the fixed-payment schedule he had offered. Pet. App. 122a-123a. The Tax Court (*id.* at 101a-141a) and the court of appeals (*id.* at 16a-17a) sustained the rejection of petitioner's offer. In this Court, petitioner does not seek review of those aspects of the decision below. See Pet. 6.

had conducted his CDP hearing were not "Officers of the United States" within the meaning of the Appointments Clause. Pet. App. 18a-103a. The court first concluded that Appeals Office employees conducting CDP hearings do not hold positions that are "established by Law." *Id.* at 82a-88a. It noted that the duties, salary, and means of appointment of an Appeals Officer are not specified by statute, and that Appeals Officers are not among the very few IRS personnel who are subject to statutory appointment by the President or the Secretary of the Treasury. *Id.* at 82a-83a. The court emphasized that the Appeals Office itself is not created by statute, and that both it and the position of Appeals Officer predated Congress's 1998 adoption of the CDP provisions. *Id.* at 83a & n.69. The court further observed that Section 6330(b)(3) refers to an "officer *or employee*" interchangeably with "appeals officer," and it concluded that the statutes use the term "officer" in a generic sense, rather than in a "specialized" constitutional one. *Id.* at 85a (emphasis added by court). The court held that "[t]he statute thus does not create any positions for the personnel who would perform the CDP function but rather refers to them in a most diffuse manner." *Id.* at 86a.

The Tax Court further held (Pet. App. 95a-102a) that Appeals Officers do not "exercise the 'significant authority' that defines an 'office.'" *Id.* at 23a. The court reasoned that, although Appeals Office personnel "can be said to possess adjudicative powers to conduct hearings and to issue determinations to resolve those hearings," they do not "possess the power to make final decisions for the IRS." *Id.* at 100a. It explained that, with respect to tax-liability determinations in particular, decisions by the Appeals Office "are not binding on the IRS

and may be overturned during audit reconsideration or overruled by the IRS Office of Chief Counsel" in litigation. *Id.* at 100a-101a. The court concluded that no Appeals Office employee in the CDP context is vested with the kind of "'final' decision-making power that may be exercised only by an 'officer of the United States.'" *Id.* at 101a.

4. The court of appeals affirmed. Pet. App. 1a-17a. As relevant here, the court rejected petitioner's Appointments Clause challenge. *Id.* at 5a-12a. The court noted that, in order to be an Officer of the United States, "a person must 'exercis[e] significant authority pursuant to the laws of the United States.'" *Id.* at 5a (brackets added by court; citation omitted). It concluded that "Appeals [Office] employees do not exercise significant authority within the meaning of the Appointments Clause cases." *Id.* at 7a. The court therefore did not "resolve whether their positions were 'established by Law' for purposes of that clause." *Id.* at 7a-8a.

The court of appeals observed that "the main criteria for drawing the line between inferior Officers and employees * * * are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." Pet. App. 8a. Based on this Court's holding in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), that Special Trial Judges (STJs) of the Tax Court are inferior officers, the court "assume[d] * * * that the issue of a person's tax liability is substantively significant enough to meet factor (1)." Pet. App. 8a. The court recognized that Appeals Officers have the authority to compromise cases, but it stressed that such decisions are "highly constrained" and are subject to "consultation requirements, to guidelines, and to supervision." *Id.* at

9a. The court concluded that, for Appointments Clause purposes, Appeals Office employees' "lack of discretion is determinative, offsetting the effective finality of [their] decisions within the executive branch." *Ibid.*[2]

The court of appeals further explained that, unlike the STJs at issue in *Freytag*—who "take testimony and * * * rule on admissibility of evidence"—the Appeals Office "does nothing of this sort. It does not hold trials," but "simply provides a chance for the taxpayer * * * to use argument and information to claim more favorable treatment" than was previously accorded by the IRS. Pet. App. 11a. Finally, the court considered it "plain that the authority [that Appeals Office employees] exercise in the pure collection aspects of CDP hearings," which is based on the "mundane and practical concerns that any creditor faces," is "well below the level necessary to require" that it be exercised only by "an 'Officer.'" *Id.* at 12a.

ARGUMENT

Petitioner contends (Pet. 21-38) that personnel within the IRS's Office of Appeals are "inferior Officers" within the meaning of the Appointments Clause because they are not materially distinguishable from the Special Trial Judges (STJs) of the Tax Court that this Court considered in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). The court of appeals correctly rejected that contention, and petitioner acknowledges (Pet. 22) that the decision below does not conflict with any decision of another circuit. Further review is not warranted.

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[2] The court of appeals noted that, at oral argument, petitioner had contended that only "team managers, who oversee the CDP determinations," are officers. Pet App 5a. The court nevertheless observed that its reasoning applied as well to "settlement officers" and "appeals officers" within the Appeals Office. *Ibid.*

1. The Appointments Clause of the Constitution provides that the President

> shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, Cl. 2. The "Officers of the United States" to which the Appointments Clause refers include "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976); see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010); *Edmond* v. *United States*, 520 U.S. 651, 662 (1997). The term does not, however, encompass "employees of the United States," who are "lesser functionaries subordinate to officers of the United States." *Buckley*, 424 U.S. at 126 n.162. The court of appeals correctly concluded that the representative of the IRS Appeals Office who conducted petitioner's informal CDP hearing was properly regarded as an employee rather than an inferior officer.

2. Petitioner's contrary argument consists of an extended comparison (Pet. 23-38) between Appeals Office personnel and the Tax Court STJs who were found to be inferior officers in *Freytag*. Petitioner's comparison, however, inappropriately minimizes or overlooks critical differences between Appeals Office personnel and STJs.

a. Petitioner first suggests (Pet. 28) that Appeals Office personnel are akin to STJs because both are "mentioned in the [Internal Revenue] Code and given duties

to perform." As the court of appeals correctly noted, however, "no statute created positions in the Office of Appeals." Pet. App. 6a. Nor are those positions "'established' in any formal sense" (*id.* at 7a) by regulation or other pronouncement.[3]

Moreover, the references in 26 U.S.C. 6320(b)(3) and 6330(b)(3) to the fact that a CDP hearing will be conducted by an unspecified "officer *or employee*" (emphasis added) within the Appeals Office differ substantially from the statute at issue in *Freytag*. That law expressly authorized the Chief Judge of the Tax Court to appoint STJs and defined the scope of their duties by describing four kinds of cases to which they could be assigned by the Chief Judge—including three kinds in which they would be empowered to render final decisions. See 501 U.S. at 873 (discussing 26 U.S.C. 7443A(b)-(c) (1988)). By contrast, as the court of appeals explained (Pet. App.

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[3] Petitioner relies (Pet. 28-29) on *Willy* v. *Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005), *Holtzclaw* v. *Secretary of Labor*, 172 F.3d 872 (6th Cir. 1999) (table), *Varnadore* v. *Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998), and *Pennsylvania* v. *HHS*, 80 F.3d 796 (3d Cir. 1996), to argue that an office may be created by regulation or by delegation from a department head, rather than by a statutory reference. But the record here does not show that the positions of any Appeals Office personnel were "created" to conduct CDP proceedings.

Petitioner suggests (Pet. 36) that the Department of Justice has previously discounted the importance of whether Congress has provided for an office to be "established by law." But the opinion he cites specifically recognized that "the source of [a position's] authority, and particularly any statutory delineation by Congress, will unavoidably help to determine whether an office exists." Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause* 37, Apr. 16, 2007, www.justice.gov/olc/2007/appointmentsclausev10.pdf.

7a), Appeals Office personnel "appear simply to be types of employees used by the Commissioner pursuant to his general hiring power" under 26 U.S.C. 7804(a).

b. As the court of appeals recognized, the determination whether Appeals Office personnel exercise "significant authority" for Appointments Clause purposes depends upon three inter-related factors: (1) the significance of the matters they resolve, (2) the extent of the discretion they exercise, and (3) the finality of their decisions. Pet. App. 7a-8a. The court was willing to "assume here that the issue of a person's tax liability"—which will sometimes be at issue in a CDP hearing—"is substantively significant enough to meet" the first factor. *Ibid.* The court also (albeit without analysis) characterized decisions of Appeals Office personnel as "effective[ly] final[] * * * within the executive branch." *Id.* at 9a. Even if those assumptions are valid, the circumscribed nature of the discretion that Appeals Office personnel exercise amply supports the court of appeals' finding that "Appeals [Office] employees' authority over tax liability" is "insufficient to rank them as inferior officers." *Id.* at 12a.

The Court in *Freytag* concluded that STJs exercise significant authority under the laws of the United States. With respect to some of their functions—those in which the STJs did not make final decisions for the Tax Court—the Court in *Freytag* emphasized that the STJs still "perform more than ministerial tasks" because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." 501 U.S. at 881-882. The Court further observed that STJs "exercise significant discretion" "[i]n the course of carrying out these important functions." *Id.* at 882.

As the court of appeals explained, Appeals Office personnel lack a similar scope of discretion because they are "highly constrained" and "subject to consultation requirements, to guidelines, and to supervision" by others in the IRS. Pet. App. 9a. For example, in compromising cases under 26 U.S.C. 7122 based on doubt as to liability, an employee of the Appeals Office can accept an offer only if it is commensurate with the hazards of litigation. 26 C.F.R. 601.106(f)(2). If the determination of tax liability presents a novel, complex, or significant issue, or a lack of uniformity exists, the Appeals Office must request advice from the Office of Chief Counsel. I.R.M. 8.6.3.5 (Oct. 26, 2007); *id.* 8.6.3.3(3) (Oct. 1, 2012). The Appeals Office must follow detailed guidelines about the acceptability of offers, see 26 C.F.R. 601.106(f)(9)(viii)(c); I.R.M. 8.23.1 (Sept. 13, 2011), and it must obtain the approval of the delegate of the Treasury General Counsel (*i.e.*, IRS Division Counsel) in order to compromise an unpaid tax liability of $50,000 or more. 26 U.S.C. 7122(b); I.R.M. 33.3.2.1(3) (Nov. 4, 2010).

c. The court of appeals' discussion of the constraints on Appeals Office discretion is significantly bolstered by the third relevant factor (*i.e.*, the finality of Appeals Office decisions), which the court addressed only briefly. The court of appeals' operating assumption about the "effective finality" of the Appeals Office's determinations (Pet. App. 9a) substantially overstated the effect of those determinations as to both tax liability and other issues. Such determinations are effectively final only in the sense that they generally will not be revisited if the taxpayer chooses to accept the Appeals Office's decision. The taxpayer, however, may appeal an unfavorable decision. 26 U.S.C. 6330(d)(1). Equally importantly, whether adverse to the taxpayer or not, such decisions can be

revisited by the Appeals Office itself (26 U.S.C. 6330(d)(2)), and in many instances they are not binding on other parts of the IRS or the Executive Branch.

As the Tax Court explained, even when Appeals Office decisions about tax liability are favorable to the taxpayer, they have "at most a limited 'finality' within the agency." Pet. App. 74a. Such decisions do not even bind the IRS Office of Chief Counsel, which speaks for the agency in recommending defense of a refund suit or requesting that a counterclaim be made. 26 U.S.C. 7403; 28 U.S.C. 520; I.R.M. 34.8.2.11.5(4) (Aug. 11, 2004). Nor do the Appeals Office's liability determinations bind the Department of Justice, which has the authority to defend or settle refund and collection suits. 28 U.S.C. 516; 26 U.S.C. 7122. Similarly, when the Appeals Office's liability determinations are unfavorable to the taxpayer, they are subject to *de novo* review in court, see *Jones* v. *Commissioner*, 338 F.3d 463, 466 (5th Cir. 2003), and there are "several contexts in which the IRS may take a position different from that reflected in the CDP determination," Pet. App. 74a; see generally *id.* at 62a-77a. For example, the National Taxpayer Advocate may issue a Taxpayer Assistance Order overriding a levy permitted by the Appeals Office. *Id.* at 66a; see 26 U.S.C. 7811(b); 26 C.F.R. 301.7811-1(c). IRS Collections personnel may forgo a levy or withdraw or release a lien that has been sustained by the Appeals Office, and they may choose to accept a new proposal from the taxpayer, even one that was submitted in the CDP proceeding. Pet. App. 65a-66a. Petitioner is therefore wrong in casually describing (Pet. 35) an Appeals Office determination as "the final ruling of the agency before court review."

In this regard, Appeals Office personnel differ in a critical respect from the STJs at issue in *Freytag*. As this Court explained, STJs were authorized to render final decisions in declaratory-judgment proceedings and limited-amount tax cases pursuant to 26 U.S.C. 7443A(b)(1)-(3) (1988). See *Freytag*, 501 U.S. at 873, 882. As petitioner notes (Pet. 35), in certain limited-amount tax cases there can be no appeal from the STJ's decision by either side (see 26 U.S.C. 7463(b)), rendering such decisions final in every sense. In that respect, STJs exercised authority materially greater than the Appeals Office personnel at issue here.

d. The court of appeals was also correct in concluding (Pet. App. 11a) that, for purposes of Appointments Clause analysis, Appeals Office personnel do not exercise "procedural powers" comparable to those exercised by STJs. Even when assisting Tax Court judges to reach final decisions in cases that STJs could not decide themselves, the STJs in *Freytag* "perform[ed] more than ministerial tasks" because they "exercise[d] significant discretion" in the course of "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." 501 U.S. at 881-882. CDP hearings, by contrast, are not "trials at all." Pet. App. 11a. Instead, they are informal, nonadversarial proceedings in which the taxpayer has an opportunity "to use argument and information to claim more favorable treatment" than he has previously received from the IRS. *Ibid.*

In an attempt to illustrate the discretion of Appeals Office personnel, petitioner points out (Pet. 32) that those employees are required to "balance[]" the need for efficient tax collection with a concern about minimizing

the intrusiveness of collection actions. As the court of appeals pointed out, however, such balancing is the "mundane and practical concern[] that any creditor faces," not the type of significant decision that can be made only by an officer of the United States. Pet. App. 12a.

Moreover, the paradigmatic resolution of a CDP hearing—a policy decision about whether to accept a settlement proposal—is simply not comparable to the STJs' power to "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881-882. The decision whether to accept a settlement proposal likewise is not analogous to the STJs' ability to make decisions for the Tax Court that could not be appealed by either side and were thus unquestionably final and unreviewable. Petitioner has identified no reservoir of such discretion in Appeals Office personnel conducting CDP hearings.

The Court's reasoning in *Freytag* therefore does not compel a result different from that reached by the court of appeals here. To the contrary, the court of appeals had ample grounds for distinguishing Appeals Office personnel from Tax Court STJs. The very few individuals who serve as STJs have authority and discretion well beyond that which has been given to the hundreds of employees in the Appeals Office—both inside and outside the CDP process (see Pet. App. 63a)—who determine and settle tax liability. Appeals Office personnel act pursuant to advice, direction, and guidance from IRS publications, supervisors, and attorneys outside the Appeals Office itself, and often without binding the agency to their decisions.

3. Petitioner acknowledges that the decision below does not conflict with any ruling of another circuit. Pet.

22. He suggests, however, that "there is confusion in the D.C. Circuit" about who is an inferior officer. Pet. 34. Any such intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision that petitioner invokes, *Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012), reveals no such confusion. To the contrary, that case was argued in the court of appeals the day after this case; two of the three judges in this case sat in *Intercollegiate Broadcasting System* as well; and the same judge wrote the court of appeals' opinions in both cases. See *id.* at 1332, 1334; Pet. App. 1a, 2a. Although one of the panels found an Appointments Clause violation and the other did not, that fact does not suggest intra-circuit confusion, since the cases involve different agency officials with distinct responsibilities.

Finally, an amicus suggests that a circuit split is unlikely to arise in light of 26 U.S.C. 7482(b)(1), which makes the D.C. Circuit the fallback venue for review of Tax Court decisions when venue is not proper in any other circuit. See Ctr. for Fair Admin. of Taxes Amicus Br. 20-22. But, as the amicus acknowledges (at 21-22), the fallback venue provision would be unnecessary in any case involving a redetermination of tax liability, and regional circuits have often entertained appeals in CDP cases even without a challenge to the underlying tax liability. Moreover, the government has taken the position that "the proper Circuit to review the Tax Court's decision in a CDP proceeding * * * is the court that would have venue over an appeal from a Tax Court decision on the underlying tax liability." Gov't Br. at 37, *Barringer* v. *United States Tax Court*, 408 Fed. Appx. 381 (D.C. Cir. 2010) (No. 09-1266). That would often be the circuit

in which the taxpayer resides. 26 U.S.C. 7482(b)(1). There is accordingly no basis here to depart from the Court's usual certiorari criteria.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2012