No. 24-416

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JENNIFER ZUCH

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

REPLY BRIEF FOR THE PETITIONER

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Congress enacted 26 U.S.C. 6330 to give taxpayers notice and an opportunity to be heard before the Internal Revenue Service (IRS) collects unpaid taxes by levying on their property. As the D.C. and Fourth Circuits have held, that special pre-deprivation proceeding becomes moot when the IRS no longer needs to pursue a levy. But the Third Circuit in this case openly "part[ed] ways" with those circuits, Pet. App. 27a, holding that a Section 6330 proceeding may continue even in the absence of any pending levy. Respondent's attempts to defend that decision misunderstand the text of the statute that Congress enacted. And respondent's denial of the existence of a circuit split contradicts what the decision itself acknowledges. The petition for a writ of certiorari should be granted.

A. Respondent's Efforts To Defend The Decision Below Lack Merit

As the petition explains (at 8-14), the Section 6330 proceeding in this case is moot because there is no longer a live dispute over the proposed levy that prompted the proceeding. The court of appeals' contrary decision is wrong, Pet. App. 16a-39a, and respondent's efforts to defend it lack merit.

1. Because there is no longer a live dispute over the proposed levy in this case, the Section 6330 proceeding is moot

As an Article I court, "[t]he Tax Court is a court of limited jurisdiction." *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam); see 26 U.S.C. 7441. In a Section 6330 proceeding, the Tax Court's jurisdiction is limited to reviewing a particular "determination" by the IRS Independent Office of Appeals (Appeals Office): a "determination" whether the proposed levy may proceed. 26 U.S.C. 6330(c)(3) and (d)(1). When there is no longer a live controversy over the proposed levy, there is no longer any need for such a determination, and the Section 6330 proceeding is "moot." *Willson* v. *Commissioner*, 805 F.3d 316, 321 (D.C. Cir. 2015) (citation omitted). That is so "notwithstanding the existence of other live controversies between the taxpayer and the IRS that do *not* fall within the tax court's jurisdiction" under Section 6330. *Id.* at 320.

Respondent does not dispute that there is no longer a live controversy over the proposed levy in this case. In fact, respondent acknowledges (Br. in Opp. 20) that "the IRS decided to stop pursuing the levy" after it was able to use respondent's overpayments to offset her tax liability under 26 U.S.C. 6402(a). That should be the end of the matter. Because there is no longer any need for

a determination whether the proposed levy may go forward, the Section 6330 proceeding in this case is moot.

2. Respondent's contrary arguments are unpersuasive

In concluding that the Section 6330 proceeding in this case is not moot, the court of appeals held that (a) the Tax Court still has jurisdiction to consider respondent's "underlying tax liability," Pet. App. 26a (citation omitted), and (b) the IRS's exercise of statutory authority to offset respondent's tax liability was "invalid," *id.* at 25a. Respondent's arguments in support of the first holding lack merit, and respondent does not even attempt to defend the second holding.

a. The Tax Court lacks jurisdiction to consider "the underlying tax liability" when there is no live dispute over the proposed levy

Respondent contends (Br. in Opp. 12) that "Section 6330 authorizes the Tax Court to review the Appeals Office's determination of a taxpayer's underlying liability and to issue declaratory relief accordingly, notwithstanding the IRS's decision to stop pursuing a levy." That is incorrect. The only determination that Section 6330 authorizes the Tax Court to review is the Appeals Office's "determination" whether a proposed levy may proceed. 26 U.S.C. 6330(c)(3) and (d)(1). Here, for example, the "Notice of Determination" issued by the Appeals Office specifies that the Office "has determined to sustain the action (levy)." Pet. App. 61a, 64a (capitalization altered). And the only relief that Section 6330 authorizes upon review of that determination is rejection of the proposed levy. See *Willson*, 805 F.3d at 321.[1]

[1] Section 6330(e)(1) is not to the contrary. That provision merely authorizes the Tax Court to enjoin "the beginning of a levy or proceeding during" the pendency of a Section 6330 proceeding. 26 U.S.C.

Of course, in "determin[ing]" whether a proposed levy may proceed, the Appeals Office may consider various subsidiary issues, including "challenges to the existence or amount of the underlying tax liability * * * if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. 6330(c)(2)(B) and (3).[2] But the text of Section 6330 makes clear that when there is no longer any live dispute over the proposed levy, there is no longer any jurisdiction to consider challenges about those subsidiary issues. The statute does not identify them as freestanding issues, but rather as ones that "[t]he determination" about the proposed levy "shall take into consideration," 26 U.S.C. 6330(c)(3)—confirming that when the "proposed levy is moot," a taxpayer "has no independent basis" to continue pursuing those challenges, *Greene-Thapedi* v. *Commis-*

6330(e)(1). Contrary to respondent's suggestion (Br. in Opp. 23), Section 6330(e)(1) does not authorize the Tax Court to "declare [a taxpayer's] liability"—let alone authorize that court to issue any relief in the absence of a pending levy.

[2] Like the court of appeals, respondent characterizes her challenge to the IRS's allocation of estimated payments in this case as a challenge to "the underlying tax liability." 26 U.S.C. 6330(c)(2)(B); see Br. in Opp. 14, 19; Pet. App. 17a-19a. The government disputes that characterization; in its view, respondent's challenge presents an "issue relating to the unpaid tax," 26 U.S.C. 6330(c)(2)(A), which a taxpayer could raise in the course of a live controversy over a proposed levy even if the taxpayer had previously received a "statutory notice of deficiency," 26 U.S.C. 6330(c)(2)(B). See Gov't C.A. Supp. Br. 24-25. This dispute over the characterization of respondent's challenge, however, has no bearing on the correct answer to the question presented. Even under respondent's characterization of her challenge, the Section 6330 proceeding in this case is moot because a taxpayer may challenge "the underlying tax liability" only in connection with a determination about a proposed levy. See Pet. 10-11.

sioner, 126 T.C. 1, 8 (2006). And Congress's use of the phrase "*underlying* tax liability" reinforces the inference that jurisdiction exists only in connection with a pre-deprivation determination about a proposed levy. 26 U.S.C. 6330(c)(2)(B) (emphasis added); see Pet. 11. Respondent therefore errs in asserting (Br. in Opp. 18) that "[n]othing in § 6330 purports to condition the Tax Court's ongoing jurisdiction on the IRS's continued pursuit of a levy."

Contrary to respondent's contention (Br. in Opp. 15-16), the statutory history and context undermine, rather than support, her interpretation of Section 6330. Congress enacted Section 6330 on the view that "[d]ue process" warrants giving taxpayers notice and an opportunity to be heard before the IRS engages in a particular type of collection action: a levy on a taxpayer's property. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, Tit. III, § 3401(b), 112 Stat. 747. When the IRS decides that it no longer needs to levy on the taxpayer's property, that rationale for a pre-deprivation proceeding no longer applies.

Congress's 2006 amendment to Section 6330 does not suggest otherwise. Section 6330(d)(1) originally granted both the Tax Court and district courts jurisdiction to review the Appeals Office's determinations, depending on the type of tax at issue. 26 U.S.C. 6330(d)(1) (Supp. IV 1998). The 2006 amendment simply revised Section 6330(d)(1) to make the Tax Court the sole court with jurisdiction to review those determinations. Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 1019. Nothing about that amendment suggests that a Section 6330 proceeding may continue without any live dispute over a proposed levy.

Respondent attempts to analogize Section 6330 to federal statutes that make "jurisdiction 'depend upon the state of things at the time of the action brought.'" Br. in Opp. 16 (brackets and citation omitted). But those analogies fail because Section 6330 limits the Tax Court's jurisdiction to review of a particular kind of "determination": a "determination" whether the proposed levy may proceed. 26 U.S.C. 6330(c)(3) and (d)(1). When there is no longer any need for such a determination, the Section 6330 proceeding is moot.

Finally, respondent invokes "the presumption favoring judicial review of administrative action." Br. in Opp. 23 (quoting *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020)). But that presumption is inapplicable here because the government's interpretation of Section 6330 does not eliminate judicial review. See Pet. 14. As respondent acknowledges, taxpayers in her position may still "head to court" by filing a refund suit—the traditional mechanism for disputing the assessment or collection of a federal tax, and the one that is available whether or not there was ever a proposed levy to trigger Section 6330. Br. in Opp. 4; see, *e.g.*, *id.* at 2 (acknowledging that "taxpayers can file refund suits anyway"); *id.* at 13 (acknowledging that "the taxpayer can separately sue the government for a refund under [26 U.S.C.] 7422").

b. The Tax Court lacks jurisdiction to review offsets in a Section 6330 proceeding

In concluding that the Section 6330 proceeding in this case is not moot, the court of appeals also held that the IRS's exercise of statutory authority to offset respondent's tax liability was invalid. Pet. App. 19a-25a. Respondent makes no attempt to defend that holding, see Br. in Opp. 3-4, 13, 18-19, and for good reason. As the pe-

tition explains (at 12-14), no statute grants the Tax Court jurisdiction to review the IRS's exercise of statutory authority to credit a taxpayer's overpayments against her tax liability. And in any event, even if the Tax Court had such jurisdiction, and even if the offsets were invalid, there would still be no live controversy over whether the proposed levy may proceed—as would be required for the Tax Court to be able to consider respondent's challenge to "the underlying tax liability." 26 U.S.C. 6330(c)(2)(B); see Pet. 10-11, 13. The court of appeals' attempt to avoid a mootness problem by deeming the offsets invalid therefore fails.

B. Respondent's Attempts To Minimize The Need For This Court's Review Are Unavailing

1. As the petition explains (at 14-16), the Third Circuit's decision in this case conflicts with decisions of the D.C. and Fourth Circuits.

a. The Third Circuit itself recognized that its decision "part[s] ways" with the D.C. Circuit's decision in *Willson* v. *Commissioner*, *supra*. Pet. App. 27a. Respondent nevertheless denies the existence of a conflict, asserting (Br. in Opp. 12) that *Willson* "held only that a § 6330 proceeding becomes moot if the IRS decides to stop pursuing the levy *and* no dispute about the taxpayer's liability remains." But that is not what *Willson* held. Rather, as the decision below acknowledged, *Willson* held that "there is 'no appropriate course of action for the Tax Court to take but to dismiss a case as moot' when the IRS withdraws its proposed levy." Pet. App. 27a (quoting *Willson*, 805 F.3d at 321) (brackets omitted). That holding cannot be reconciled with the Third Circuit's view that the Section 6330 proceeding in this case "is not moot" even though the IRS withdrew its proposed levy. *Id.* at 2a.

Respondent is thus wrong in contending (Br. in Opp. 12-13) that the D.C. Circuit would be "free to agree with the Third Circuit in a future case *with* a liability dispute." Though *Willson* involved a "continuing controversy" over whether the taxpayer was entitled to a "return" of certain funds, 805 F.3d at 318, the D.C. Circuit held that the Section 6330 proceeding was moot in "the absence of a pending levy," *id.* at 321. The D.C. Circuit explained: "With no levy being placed upon Willson's property, there was no actual case in controversy regarding his appeal of such a levy action." *Ibid.* (brackets, citation, and ellipsis omitted). That holding makes clear that the outcome of this case would have been different if it had arisen in the D.C. Circuit. And the fact that *Willson* turned on "the absence of a pending levy" forecloses any possibility that the D.C. Circuit might agree with the Third Circuit in a future case. *Ibid.*

Respondent's own arguments in support of the decision below highlight the conflict with *Willson*. In defending the Third Circuit's decision, respondent argues that the government is "incorrect" that "the 'only relief that Section 6330 authorizes is rejection of a proposed levy.'" Br. in Opp. 23 (quoting Pet. 14 n.2). The D.C. Circuit in *Willson*, however, agreed with the government that the rejection of a proposed levy is "all the relief that section 6330 authorizes the tax court to grant." 805 F.3d at 321. *Willson* thus held that a Section 6330 proceeding is moot when "[t]he IRS no longer seeks to levy on [the taxpayer's] property," *ibid.*—a holding that directly conflicts with the Third Circuit's decision below.

b. The Third Circuit also recognized that its decision in this case "part[s] ways" with the Fourth Circuit's decision in *McLane* v. *Commissioner*, 24 F.4th 316, cert. denied, 143 S. Ct. 408 (2022). Pet. App. 27a. Yet respond-

ent denies the existence of that conflict as well. Contrary to respondent's contention (Br. in Opp. 3), however, *McLane* did not "hold only that a § 6330 Tax Court proceeding becomes moot when the government stops pursuing the levy *and* the parties don't dispute the underlying tax liability." Instead, *McLane* held that a Section 6330 proceeding is moot when a taxpayer "no longer faces" a levy. 24 F.4th at 319. That holding contradicts the Third Circuit's decision in this case, which held that a Section 6330 proceeding "is not moot" even though respondent no longer faces a levy. Pet. App. 2a.

Respondent likewise errs in asserting (Br. in Opp. 12-13) that the Fourth Circuit would be "free to agree with the Third Circuit in a future case *with* a liability dispute." After all, *McLane* itself was a case with a liability dispute: The taxpayer "contend[ed] that the phrase 'underlying tax liability' * * * confer[red] jurisdiction on the Tax Court to determine that he overpaid and [to] order a refund." 24 F.4th at 318. But whereas the Third Circuit found "nothing in § 6330(c)(2)(B) to suggest that a taxpayer's right to challenge the existence or amount of her underlying tax becomes moot once the levy is no longer being enforced," Pet. App. 26a-27a, the Fourth Circuit in *McLane* found just the opposite—namely, that "[t]he phrase 'underlying tax liability' does not provide the Tax Court jurisdiction over independent overpayment claims when the collection action no longer exists," 24 F.4th at 319. Because the Fourth Circuit construed that phrase more "narrowly" than the Third Circuit did in this case, Pet. App. 27a, the conflict between the circuits is square.

Attempting to distinguish *McLane* on its facts, respondent notes that the taxpayer in that case sought a refund for the first time in the Tax Court. Br. in Opp. 29

(citing *McLane*, 24 F.4th at 318). But that fact played no role in the Fourth Circuit's reasoning. Instead, the Fourth Circuit held that "the 'taxpayer was permitted to challenge the amount of his underlying liability in the [Section 6330] hearing . . . *only* in the context of determining whether the collection action could proceed.'" *McLane*, 24 F.4th at 319 (citation omitted). And because the taxpayer "no longer face[d] such an action," the Section 6330 proceeding was moot. *Ibid.*

2. As the petition explains (at 16), the Third Circuit's decision in this case also conflicts with decisions of other circuits recognizing that the Tax Court possesses only that jurisdiction expressly authorized by Congress. Respondent contends (Br. in Opp. 30-31) that none of those other decisions addressed whether the Tax Court has jurisdiction to review offsets in a Section 6330 proceeding. But each of the other circuits' decisions recognized that the Tax Court may exercise jurisdiction only to the extent expressly authorized. See Pet. 16. And respondent makes no attempt to reconcile that fundamental principle with the decision below—which, as respondent acknowledges (Br. in Opp. 3), held that "the Tax Court has 'implicit' jurisdiction to review IRS offsets in § 6330 proceedings."

3. Finally, respondent asserts (Br. in Opp. 11-12) that the question presented "rarely arises and is of little practical importance to the workable administration of the tax laws." That is incorrect. As the petition explains, there are tens of thousands of Section 6330 proceedings each year, see Pet. 16-17, and the question presented arises each time "there is no longer a live dispute over the proposed levy that gave rise to [such a] proceeding," Pet. I. Contrary to respondent's contention (Br. in Opp. 32-33), moreover, the decision below threatens signifi-

cant practical consequences—not only by expanding the scope of Section 6330 proceedings far beyond what Congress contemplated, see Pet. 17, but also by embracing a theory of "*implicit*" Tax Court jurisdiction unbounded by any statutory text, Pet. App. 20a.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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*Acting Solicitor General**

DECEMBER 2024

* The Solicitor General is recused in this case.