No. 14-622

IN THE
Supreme Court of the United States

PETER KURETSKI AND KATHLEEN KURETSKI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Respondent does not dispute that the question presented—whether the President's removal power over Tax Court judges violates the Constitution's separation of powers—is an important one. Nor does respondent identify any reason unique to this case that would prevent the Court from answering the question. Instead, respondent spends all but three paragraphs of his brief in opposition defending the decision below on the merits. And on the merits, respondent quietly admits his real position: nearly 25 years later, the Executive Branch still cannot accept the reasoning of the majority opinion in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), preferring the reasoning of the concurrence in that case. See Opp. 15 n.3. But *Freytag* is binding law, and the D.C. Circuit's decision is irreconcilable with it. To resolve the square conflict between a decision of this Court and the government's (thus-far prevailing) position on a nationally significant issue, this Court should grant certiorari.

A. Respondent Does Not Dispute The Importance Of The Question Presented

1. Respondent contends that the opinion below "does not conflict with any decision of this Court." Opp. 8. To be sure, this Court has not previously been asked to decide the specific question whether the separation of powers precludes the President from removing Tax Court judges. Nonetheless, the court of appeals' opinion is clearly contrary to this Court's *ratio decidendi* in *Freytag*. The court of appeals ruled that the Tax Court "exercises Executive authority." Pet. App. 3a. That ruling

cannot be reconciled with this Court's conclusion, following an exhaustive examination of the "the Tax Court's . . . constitutional status and its role in the constitutional scheme," that the Tax Court "exercises judicial, rather than executive, legislative, or administrative, power." 501 U.S. at 890-91. Likewise, the court of appeals went astray in asserting that "Tax Court judges do not exercise the 'judicial power of the United States' pursuant to Article III." Pet. App. 27a. That statement, too, cannot be reconciled with this Court's statement in *Freytag* that the Tax Court "exercises . . . the judicial power of the United States," "to the exclusion of any other function." 501 U.S. at 891. The conflict between *Freytag* and the opinion below is plain.

In an effort to minimize this conflict, respondent contends cagily that this Court's decision in *Freytag* was something less than "sound," and that the concurring opinion was "more sound." Opp. 15 n.3. The concurrence's reasoning "reflect[ed] the position that the government took in that case," the government notes, *id.*—signaling that the government takes the same Executive Branch-aggrandizing position today, *despite having lost the battle 25 years ago*. To the extent the Executive Branch believes (and indeed suggests) that *Freytag* should be overruled—and is already litigating in the lower courts as if it had been—the need for this Court's review is only heightened. It is, of course, the sole prerogative of *this Court* to overrule its own decisions.

Respondent disputes that the separate concurrence in *Freytag* recognized the very inconsistency between the President's removal power and the Tax Court's exercise of the "judicial power"

that is the subject of this petition. Opp. 15. But it is clear that the concurring Justices objected to the majority's reasoning precisely because, in their view, the "judicial power" cannot be exercised by someone subject to removal by the President: "How anyone with these characteristics can exercise *judicial* power 'independent . . . [of] the Executive Branch' is a complete mystery." *Freytag*, 501 U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment) (quoting the Court's opinion). Unlike respondent, the Justices who joined the *Freytag* concurrence understood that Section 7443(f) is incompatible with the Tax Court's exercise of the "judicial power." That is precisely why the government urged the view of judicial power that the concurrence accepted—and that the majority did not. And it is why the government, in its coy footnote, acknowledges that in defending Section 7443(f) on the merits in this Court, it would seek to change this Court's precedent rather than live with it. That admission confirms the conflict between the decision below and *Freytag*—and the compelling importance of the question presented.

2. Respondent's remaining objections provide no basis to conclude that this case is an unsuitable one in which to resolve that important question. Respondent argues that the petition should not be granted because this case is a "poor vehicle" for resolving any tension between the holdings of *Freytag* and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), observing that petitioners' own claim involves a public right that could be adjudicated by a non-Article III judge. Opp. 19-20. In respondent's view, however, *every* case that comes before the Tax Court involves public rights, *id.* at 19 n.6; if respondent is

correct (he is not, see Pet. 23-24; *infra* at 8-9), then no better vehicle ever will arrive.

Respondent argues that even though the D.C. Circuit has exclusive jurisdiction over cases like this one except where an exception applies, see Pet. 29, the question presented *could* arise in another court of appeals and this Court should await a split in authority. Opp. 20-21. This Court, however, often hears structural constitutional issues without waiting for disagreement among lower courts. For example, the petition was granted in *Free Enterprise Fund* despite the petitioners' acknowledgement that no split in the lower courts existed. As the petitioners correctly explained, "none of the Court's cases on the Constitution's structural protections have, so far as we can discern, involved such a split," in light of their rarity and the importance of the issues involved. See Pet. at 13-14, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861). That was certainly true in *Freytag* itself—the Court granted certiorari without waiting for a split to develop, even though a related case was pending in another circuit. See Pet. at 7-8, *Freytag* v. *Comm'r*, 501 U.S. 868 (1991) (No. 90-762) (arguing in alternative that petition should be held over until related case is resolved). Respondent provides no reason why this Court should wait for a split before addressing the pure legal question posed by this case.

Respondent's final observation—that severing and striking down Section 7443(f) would be a novel remedy, Opp. 21—carries no weight whatsoever. First, what remedy should be imposed has no bearing on the petition's certworthiness. Respondent does not argue that severability somehow precludes

an effective remedy or makes the dispute non-justiciable. Second, severing the unconstitutional part of a statute (and no more) is a commonplace, not an "unprecedented remedy," *id.* See *Alaska Airlines, Inc.* v. *Brock,* 480 U.S. 678, 684 (1987). That this Court has not previously severed an unconstitutional *removal provision*—but has previously severed unconstitutional *no-removal* provisions—derives from the particular facts of cases that have come before this Court, rather than from some particular legal significance of removal provisions like Section 7443(f). Respondent cites *Bowsher* v. *Synar*, 478 U.S. 714 (1986), as if it showed that removal provisions cannot be severed—but the reason the Court did not sever the removal power in *Bowsher* was that Congress *expressly adopted a backup statute* to prevent that result, given the Comptroller General's many other duties. *Id.* at 734-36.

Just because Tax Court judges would not be removable *by the President* does not mean that they would not be removable during their finite terms. Even short of impeachment, Congress could readily legislate the same type of *judicial* removal provision it has adopted for other non-Article III judges. See, *e.g.*, 28 U.S.C. § 176 (removal of Court of Federal Claims judges by Federal Circuit); *id.* § 631(i) (removal of magistrate judges by district court); *id.* § 152(e) (removal of bankruptcy judges by judicial council). If the requested relief strikes respondent as unthinkable, that is so only because respondent assumes that Tax Court judges must be accountable *to the President* in particular. The government is wrong about the remedy for the same reason it is wrong about the merits.

B. Respondent Fails To Show That Section 7443(f) Is Consistent With The Separation Of Powers

Because this case properly presents a conflict with a decision of this Court on a nationally important and recurring issue, the government's lengthy argument on the merits should be beside the point. As shown above, even if today's Court joined the Executive Branch in thinking *Freytag* wrongly decided, that would not be a reason to deny review of a decision failing to follow *Freytag*. But even taken on their own terms, respondent is wrong on the merits: Section 7443(f) is unconstitutional.

1. Respondent's principal argument on the merits is that the President must be able to remove Tax Court judges because Tax Court judges reside in the Executive Branch. Opp. 9-13. Both the premise and the conclusion are wrong.

First, the Tax Court is *not* in the Executive Branch. See generally Pet. 19-20. Respondent's assertion that *Freytag* reached its holding "without indicating that the Tax Court had ceased to be a part of the Executive Branch," Opp. 11, apparently misses this Court's statement that "[t]he Tax Court remains independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 891. Indeed, Congress changed the statute more than 45 years ago precisely to *remove* the designation of the Tax Court as a part of the Executive Branch. *Id.* at 887; Pet. 5.

Second, respondent repeats the court of appeals' error by focusing on the question *where* the Tax Court sits instead of what *power* the Tax Court exercises. This Court has long rejected the

proposition that the separation of *powers* is limited to the separation of *branches*. *Bowsher*, 478 U.S. at 714 (Congress's removal power over congressional officer violates separation of powers where that congressional officer exercises executive power). Even where one might suppose an inter-*branch* removal power might present a constitutional problem, such as with respect to the President's removal authority over Article III judges, there is no separation of *powers* problem if the removal affects only the judges' exercise of executive power. *Mistretta* v. *United States*, 488 U.S. 361 (1989).

2. Turning to the question of what power the Tax Court exercises, respondent suggests that *Freytag*'s characterization of the Tax Court's form and function does not distinguish it from the adjudicative components of Executive Branch agencies. Opp. 10-11. But respondent ignores this Court's description of the Tax Court's "exclusively judicial role" that defines and "distinguishes it" from executive agencies, and this Court's conclusion that the Tax Court, which is "independent of the Executive . . . Branch[]," exercises neither "executive" nor "administrative" power. *Freytag*, 501 U.S. at 890-92. Notably, respondent does not dispute any of the dissimilarities identified by petitioners between Tax Court judges—which, for instance, have power to enforce their own judgments without the help of the Attorney General—and administrative law judges residing in the Executive Branch. Pet. 5-6, 8-9, 24-25. For this reason, respondent's reliance on *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013) is misplaced. Opp. 10-11. Respondent cites the Court's observation (in dicta) that when "conduct[ing] adjudications" agencies exercise "the 'executive

Power.'" *City of Arlington*, 133 S. Ct. at 1873 n.4. But this conclusion with respect to the adjudicative functions of executive agencies has no bearing whatsoever on the power exercised by the Tax Court, which this Court already has declared to be "judicial" and not executive.

Respondent argues that the Tax Court engages in one duty also shared by certain executive agencies—adjudicating "public-rights" claims. Opp. 19 n.6. But the adjudication of such claims is not an inherently "executive" act; Tax Court judges were hearing public-rights cases when *Freytag* was decided, yet the Court still held that Tax Court judges exercise only "judicial," not "executive" or "administrative," power. Moreover, as this Court has observed, Article III courts also hear public-rights cases, Pet. 23, yet a President's attempt to remove Article III judges from their role adjudicating such cases plainly would violate the separation of powers. Respondent's related assertion that the Tax Court hears *only* public-rights claims, Opp. 19 n.6, also is wrong. Pet. 23-24. Respondent contends that the public-rights doctrine covers all claims that were not "the stuff of traditional actions at common law tried by the courts at Westminster in 1789," Opp. 19 n.6 (internal quotations marks and citations omitted), but the more complete test is whether the matter in question "could have been determined exclusively by [Executive] departments," such that "it depends upon the will of [C]ongress whether a remedy in the courts shall be allowed at all." Pet. 22-23 (internal quotations marks and citations omitted). And taxation is one area where Congress *cannot* withhold all remedy. See, *e.g.*, *Reich* v. *Collins,* 513 U.S. 106, 108 (1994). Whether or not Congress could require

constitutional challenges to taxation decisions to be exhausted before an executive agency, cf., *e.g.*, *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134 (2012), has no bearing on whether all of those challenges are themselves public-rights claims.

3. Respondent argues that even if the Tax Court exercises some type of "judicial power," it is not judicial power with which the Constitution's separation of powers is concerned. Opp. 16. In particular, respondent asserts that the separation of powers is concerned solely with encroachments upon the judicial power of Article III judges. *Id.* at 12-13.

Respondent provides no basis to believe, however, that the Constitution is not just as concerned with executive encroachments upon the independence of judges who lack the salary protections and lifetime tenure of Article III judges, such as federal magistrate and bankruptcy judges and Tax Court judges, but still exercise the judicial power of the United States.[1] As *Freytag* explained, "the judicial power of the United States is not limited to the judicial power defined under Article III" such that "the power exercised by some non-Article III tribunals *is* judicial power." 501 U.S. at 889 (emphasis in original). There are not two "judicial power[s] of the United States," one protected from

[1] Respondent identifies no difference between the power exercised by judges of the Tax Court and that exercised by magistrate and bankruptcy judges. That magistrate and bankruptcy judges are appointed by Article III judges cannot distinguish them from Tax Court judges for separation-of-powers purposes because Article III judges, whose exercise of judicial power clearly implicates the separation of powers, are appointed in the same manner as Tax Court judges, by the President.

executive encroachments and one in which the executive may interfere free from constitutional concerns; there is but one judicial power, which must be free from executive interference. Respondent cites a footnote in *Mistretta* for the proposition that this Court has stated that "the President may remove a judge who serves on an Article I court," Opp. 12, but *Mistretta* was citing a case concerning territorial courts. 488 U.S. at 411 n.35 (citing *McAllister* v. *United States*, 141 U.S. 174 (1891)). Territorial courts are organized under Congress's "'plenary power'" over territories and hence cannot implicate the separation of powers. Pet. 25-26 (quoting *McAllister*, 141 U.S. at 188).

Finally, respondent attempts to defend the court of appeals' comparison of Tax Court judges to judges of the Court of Appeals for the Armed Forces, who can be removed by the President consistent with the separation of powers. Opp. 17-18. Respondent repeats the court of appeals' observation that the enabling statutes of the Court of Appeals for the Armed Forces and the Tax Court are "parallel." *Id.* at 17. Looking beyond the initial provisions of the two statutes, however, the statutory schemes quickly diverge and explain why the Court of Appeals for the Armed Forces does not exercise the judicial power of the United States. Unlike the Tax Court, the Court of Appeals for the Armed Forces is located "in the Department of Defense" for administrative purposes. 10 U.S.C. § 941. Its judges must have a particular political composition, *id.* § 942(b)(3), and must work alongside the Judge Advocates General—the military's top legal officers—to survey and report annually on the military justice system. *Id.* § 946. And military justice generally has long been subject

to the supervision of the Commander in Chief. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 772 (1996) ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial."). Thus, it is no surprise that this Court previously concluded the Court of Appeals for the Armed Forces is an "Executive Branch entity." *Edmond* v. *United States*, 520 U.S. 651, 664 & n.2 (1997) (identifying 10 U.S.C. §§ 941, 946, among others, as "provisions of the [Uniform Code of Military Justice] [that] make clear that [the Court of Appeals for the Armed Forces] is within the Executive Branch"); cf. *id.* at 665-66 (distinguishing *Freytag* by noting differences between Tax Court judges and military Court of Criminal Appeals judges). No parallel requirements exist in the statutory provisions organizing the Tax Court, and Congress expressly repealed any language placing the Tax Court in the Executive Branch. See 26 U.S.C. §§ 7441-7448; Pet. 5.

The Tax Court exercises the judicial power of the United States. Unlike a territorial or military court, there is no structural reason why it belongs in the Executive Branch. The separation of powers therefore precludes empowering the President to fire the judges who decide legal disputes between taxpayers and the President's own revenue-raising subordinates.

CONCLUSION

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

Respectfully submitted.

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