NO._____

IN THE

Supreme Court of the United States

CHARLES J. WEISS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

26 U.S.C. § 6330, enacted as part of the *Taxpayer Bill of Rights III (1998)*, requires that IRS send to all taxpayers written notice at least 30 days before taking any levy action. The purpose of the notice is to afford all taxpayers at least 30 days in which to request an appeals hearing, which timely request will stay the levy and provide judicial appeal rights. Petitioner received such a notice. The notice *twice* informed him that he had "*30 days from the date of this letter*" in which to request an appeal. (Emphasis supplied.) The IRS, however, used a different date, the mailing date, that was not given to Petitioner, when calculating that 30-day period.

The question presented is: under the notice prong of the *Fifth Amendment* due process clause and the statute itself, whether the IRS notice means what it says – as the 3rd, 9th, and 11th Circuits recognized and the D.C. Circuit previously agreed – that the 30 days runs from "*the date of this letter*," or whether it means what the D.C. Circuit held in this case: that the 30 days runs from *the date of IRS' mailing of the letter,* a date undisclosed to and unknown by Petitioner

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Weiss respectfully submits this petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings below.

OPINIONS BELOW

The District of Columbia Circuit's opinion is unreported and is dated May 22, 2018. (Pet. App. 1-9) The Circuit court's orders denying the petition for hearing and for rehearing *en banc* are unreported and are dated July 27, 2018. (Pet. App. 41-44) The opinion of the Tax Court is reported at *Weiss v. Commissioner*, 147 T.C. 179 (2016) (Pet. App. 11-40).

JURISDICTION

The District of Columbia Circuit opinion was filed on May 22, 2018. The Circuit court denied the petition for rehearing and for rehearing *en banc* on July 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The *Fifth Amendment* to the U.S. Constitution, 26 U.S.C. § 6330, and relevant provisions of 26 C.F.R.

§ 301.6330-1, hereafter the Treasury regulation or "Reg," are set forth in the Appendix.

INTRODUCTION

This case is about the *Fifth Amendment* due process right to adequate notice and a statute that expressly requires the same notice. This case arose from an act of "bait and switch" by the IRS. The IRS typed one date on a statutorily-required notice ("the Notice"), and twice told Petitioner to count 30 days from that date to determine his deadline to request a hearing. The IRS, though, counted 30 days from a different date, the mailing date, without telling Petitioner the mailing date. The question is whether the 30-day window starts on the date in the Notice, or on the different date of mailing that Petitioner never knew. The D.C. Circuit held that the mailing date controls even though Petitioner never knew that date.

The statute reads at § 6330(a)(2): "The notice required under paragraph (1) shall be [delivered one of three ways] not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period." But § 6330(a)(3)(B) requires that "the right of the person to request a hearing during the 30-day period under paragraph (2)" "shall" be included in the Notice "in simple and nontechnical terms."

The question then is: is the date actually printed on the statutorily-required IRS notice the "simple and nontechnical" language mandated by the statute, and the date that triggers the statutory 30-

day period - as Petitioner argues - or does an undisclosed and unknown date different than the one printed on the notice satisfy that phrase in the statute and trigger the 30-day period? There is ambiguity between those two parts of the statute when the mailing date and the notice date are different; thus, one turns first to rules of statutory construction and second to the implementing regulation for clarification.

If the rules of statutory interpretation do not resolve the ambiguity - which they should here, including the rule of "the last provision in point of arrangement must control" - it is the taxpayer, not the IRS, arguing for application of the Treasury regulation that implements the statute. The regulation reads: "The taxpayer must request the CDP hearing within the 30-day period commencing on the day after the date of the CDP Notice" and "the CDP hearing must be requested during the 30-day period that commences the day after the date of the CDP Notice." Reg §§ 301.6330-1(b)(1) and (c)(1). [1] Petitioner argued below and continues to argue: the language in the regulation clearly means the date printed on the Notice controls. It was the only date known to Petitioner; thus, it was impossible for Petitioner to calculate the 30-day deadline using any other date.

The Tax Court, however, in effect held that Congress did not intend that the language in the qualifying phrase "simple and nontechnical terms" in § 6330(a)(3) be enforced; i.e., that Congress did not

[1] Pet. App. 54

intend that the Notice "shall" include the operative date. The Tax Court held that it does not matter if the Notice and mailing dates do not match, and it does not matter if a taxpayer is not told the mailing date. (Pet. App. 36-38).

On appeal, the D.C. Circuit praised Petitioner's argument ("The taxpayer's position has the advantage of common sense.") and chastised the government, saying about the government (emphasis supplied):

1) "The IRS further *cavalierly* dismisses any reliance that the taxpayer may have placed on its *misleading document*."

2) "The IRS also argues that 'taxpayers are charged with knowledge of the law . . . .' *Id.* at 12:50-55. *Hardly a helpful suggestion* when the issue at hand is the interpretation of a statute."

3) "... a government agency [IRS] *that seems not to care whether it provides the citizenry with notice of their rights and liabilities*, we must decide whether the date on the notice or the date of mailing governs."

(Pet. App. 7-8.) But in the same breath, the D.C. Circuit affirmed the Tax Court, stating (emphasis added):

> *We further hope that few agencies will be as careless with dates and especially with the*

> *rights of the citizens as the IRS in this case.* Nonetheless, unattractive as the position of the IRS may be, it does comport with the language of the statute and the apparent meaning of the word "send." We therefore affirm the decision of the Tax Court. (*Id.*)

The obvious problem is that the circuit court (and the Tax Court before it) is disrespectful of the right to adequate notice guaranteed by *Fifth Amendment* due process and set forth in the words of § 6330 itself. The court disregarded fundamental fairness, the rule that statutes be construed so as to give effect to all words (not just some of them), logic, rational reasoning, justice, and everything else that American jurisprudence is supposed to uphold. The obvious problem is that an entire subsection of § 6330 and of the Treasury regulation have been rendered meaningless by the IRS and both courts below.

The name of the administrative hearing at issue is (emphasis added): "Collection *Due Process* Hearing." It is difficult to overstate the absurdity of the circuit courts' interpretation of a statute that creates the "Collection *Due Process* Hearing." The court has unmoored due process notice itself, and unmoored the statute, from any rational anchor. It is not an exaggeration to say that under the circuit court's construction: (1) the IRS literally does not have to provide in a statutorily-required due process notice, when the 30-day statutory window begins for a due process hearing request; and (2) whatever date is typed on a statutorily-required due process notice is legally irrelevant. Literally, that is what the D.C.

Circuit held. Corollary: no taxpayer can rely on the information required to be sent by the IRS under the due process hearing statute, because no date therein will necessarily start the due process statutory period. Every taxpayer must instead engage in Sherlock Holmes sleuthing to figure out the actual start of a statutory period according to the IRS, because somehow sleuthing is what Congress meant when it said, "The notice required under paragraph (1) shall include in simple and nontechnical terms...." Never mind that the Notice twice says "30 days from the date of this letter."

This Court's review is warranted to reconcile the D.C. Circuit's decision with the decisions of the 3rd, 9th, and 11th circuits (and trial courts), to put due process notice into a "due process hearing," and to bring sanity into the Congressional mandate that the taxpayer "shall" be informed of the operative date "in simple and nontechnical terms...." Said another way, this Court should decide whether the notices that the IRS sends to any/all taxpayers with respect to a due process hearing can be and should be taken at face value -- or whether they mean nothing, because statutory clocks are triggered by undisclosed, hidden information that only Sherlock Holmes might ever discover before time runs out.

STATEMENT OF THE CASE

A. Factual Background And The Nature Of Two Types Of IRS Hearings.

Petitioner was assessed federal income tax debts. The statute of limitations for collection ("SOL") of those debts was due to expire in July 2009.[2] In February 2009, an IRS revenue officer mailed him a levy notice ("Notice") per the requirement of 26 U.S.C. § 6330. (*Id.*) That Notice twice gave him "30 days from the date of this letter" in which to request a "Collection Due Process Hearing" ("CDPH") to discuss alternatives to a levy. The statute also provides that a timely request for a CDPH tolls the SOL[3]. Treasury regulations and the IRS' Internal Revenue Manual both give taxpayers an alternative: request a hearing after the 30th day and receive a substantially similar hearing called an "Equivalent Hearing" ("EH"), that does not toll the SOL. If the taxpayer requests a hearing after the statutory 30-day period, the IRS must notify him that his request was untimely, and offer him an EH[4]. In terms of how these two hearings are held and what can be discussed, an EH is equivalent to a CDPH.[5] But, an EH decision is not appealable to the Tax Court[6]. To balance that loss of

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[2] Pet. App. 15, 20.

[3] Pet. App. 51, § 6330(e).

[4] Pet. App. 55-56, Reg. § 301.6330-1(c)(2), Q&A-C7.

[5] Reg § 301.6330-1(i) and Q&A-I12.

[6] Pet. App. 51-52, § 6330(e)(1); *see also* Reg § 301.6330-1(g)(3), Example (1).

judicial review, the SOL is not tolled.[7] Petitioner counted 30 days from the only date printed on his Notice, and mailed his request for a hearing *after* "30 days from the date of this letter." Petitioner intended to be late; he did not want to toll the SOL and he wanted to request, and thought that he was requesting, an EH.[8]

As stated, under § 6330(e) the suspension or non-suspension of the SOL for collecting the debt depends solely upon the timeliness of the hearing request as measured by the 30-day period beginning ... beginning when?

Petitioner says it begins on the only date provided in the Notice, per § 6330(a)(3)(B), "simple and nontechnical terms," and per the language "30 days from the date of this letter." He relied on the date in the Notice/letter and he mailed what he thought was an untimely hearing request. He wanted to be untimely because: (1) requesting a CDPH is optional; no statute requires that any taxpayer ever request a hearing; (2) he did not want to toll the SOL; and (3) he wanted an EH. He thought the statute was going to run out in a few months. Tolling it at the proverbial "11th hour" would be against his self-interest, but getting an EH was in his best interest. So he wanted the EH set forth by the Secretary of the Treasury in the Treasury regulation (discussed *infra*), and set forth by the Commissioner of the Internal Revenue

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[7] Reg §§ 301.6330-1(g)(1); (g)(2) Q&A-G1 and Q&A-G2; (i)(1) and (2), Q&A-13.

[8] Pet. App. 4, 7, 22 & 39.

Service in the Internal Revenue Manual (discussed *infra*). That is why he was late on purpose – or so he thought.[9]

B. IRS' Decision After The Collection Due Process Hearing.

Petitioner received his hearing in January 2010 (after the SOL would have expired). Later, when the hearing officer issued a formal written decision, Petitioner learned that the hearing officer used the undisclosed, and unknown by Petitioner, mailing date of the Notice to measure the 30 days, rather than the date printed on the Notice, and by that measurement Petitioner's request was timely.[10] A timely request meant he was afforded a CDPH, which meant the SOL was tolled, which meant his tax debts were still collectible.

C. Proceedings In The Tax Court.

Petitioner appealed the IRS decision to the Tax Court. The Notice states (emphasis added): (1) Petitioner must request a CDPH "*within 30 days from the date of this letter;*" (2) "To preserve your right to contest Appeals' decision ... you must send us the completed Form 12153 *within 30 days from the date of this letter;*" and (3) "Letter Date: 02/11/2009," typed in the upper right-hand corner. (Pet. App. 57, 58.) Two IRS publications regarding levies and the right to a hearing, plus the Form 12153, were mailed in the same envelope as the Notice. Those IRS publications

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[9] Pet. App. 22 & 39.

[10] Pet. App. 22.

also directed Petitioner to follow the date on/of his Notice. At trial the IRS officer who mailed that envelope testified that those enclosures were intended to inform Petitioner of his rights; and, further, that the IRS intended that he rely on them. Nothing in the Notice or in those accompanying documents gave Petitioner: (1) any reason to doubt the information and instructions provided, or (2) any indication that the mailing date might be different than the date on the Notice.

At trial, the revenue officer who prepared and mailed Petitioner's Notice further testified that he does not know or follow the statute, § 6330, but he knows and follows the Internal Revenue Manual, and further, that he knows the Manual required that the mailing date "must" match the date on the Notice.[11] But he intentionally did not make them match. His reason: he wanted to "save paper and ink." Printing a new Notice with the correct date was not warranted because, to him, the word "must" in the Manual means "should." With that excuse he literally admitted that he just did not feel like taking the time to do what the law and applicable procedure required him to do, for the purpose of fulfilling the *Fifth Amendment* and statutory due process rights of a United States citizen under his care.

Nonetheless, the Tax Court affirmed that the undisclosed and unknown mailing date, not the conspicuous date printed on the Notice, started the 30-day clock. The Tax Court effectively held that the

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[11] See IRM 5.11.1.2.2.1 (03-21-2008) and IRM § 5.11.1.3.3.3 (11-09-2017)

words, "The notice required under paragraph (1) shall include in simple and nontechnical terms ... the right of the person to request a hearing during the 30-day period under paragraph (2)" in § 6330(a)(3)(B)[12] are irrelevant. That subsection might as well not exist. The court held that the statutory window begins on the mailing date even if nobody tells the taxpayer what that date is, and even if the IRS tells the taxpayer to rely on a different date.[13]

D. Proceedings In The District Of Columbia Circuit.

Petitioner appealed that decision to the District of Columbia Circuit, which affirmed with no analysis of the *Fifth Amendment*, with no mention of due process, with only partial analysis of the statute, and with no analysis of the regulation or of anything else (e.g., the Internal Revenue Manual, the Chief Counsel opinion, or the Treasury Inspector General for Tax Administration's report, all discussed *infra*). The circuit court based its entire opinion on one word, the word "sent." The circuit court held that the 30-day statutory window begins on the date that the IRS "sends" -- that is, mails -- the statutory Notice.[14] The court held that the statutory window begins on the mailing date even if nobody tells the taxpayer what that date is, and even if the IRS tells the taxpayer to rely on a different date. The court in effect held as irrelevant: (1) the date typed on the face of the

[12] Pet. App. 46-47.
[13] Pet. App. 37-38.
[14] Pet. App. 8.

Notice/letter; (2) the plain language twice contained in the Notice, "30 days from the date of this letter"; and (3) the requirement in the statute that the Notice "shall include in simple and nontechnical terms"[15] the date that starts the 30 days. There was no mention of due process. Those words in the statute might as well not exist.[16]

Petitioner petitioned for a rehearing or a rehearing *en banc*, but his petitions were denied.[17] Petitioner now timely appeals to this Court.

REASONS FOR GRANTING THE WRIT

I. The District Of Columbia Circuit's Decision Denied Petitioner His *Fifth Amendment* And Statutory Rights To Due Process.

The question presented is one of great importance because it concerns a naked deprivation of the notice prong of due process – notice and opportunity to be heard – that is guaranteed by both the *Fifth Amendment* and § 6330.

Due Process under the *Fifth Amendment* has two elements: notice and opportunity to be heard.[18]

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[15] Pet. App. 46.
[16] Pet. App. 8.
[17] Pet. App. 41-44.
[18] *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (Due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections); *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (ditto).

While § 6330(a)(2) requires the first element (the Notice itself), the actions of the IRS and the circuit court below wholly eliminated it by the IRS giving Petitioner only one date, and saying later that it was not the correct date for counting the relevant 30 days, and then by the court holding that it was unfortunate that Petitioner relied on that wrong date.

That is not an exaggeration. This case is actually about a taxpayer who was given one, and only one, date from which to count the statutory 30-day window for requesting a "Collection Due Process Hearing" (that is the actual name of the hearing). If he requested a hearing within that 30-day period, he would toll the statute of limitations for collection of his debt.[19] Petitioner did not want to toll the statute of limitations for collection of his debt. He wanted the statute to run out -- and it would run out in just a few months.[20] He instead wanted the other hearing called an "Equivalent Hearing" (the EH) that does not toll collection. The only way to get that other hearing is by requesting it after the 30th day. So that is what Petitioner wanted to do, and waited to do, and believed he did, and in fact did according to the face of the Notice/letter: "30 days from the date of this letter." He requested a hearing *after* the 30th day counting from the *only* date on his Notice/letter.[21]

Due process requires more than just "sending" the Notice under § 6330(a)(2), as the circuit court

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[19] Pet. App. 51.
[20] Pet. App. 15, 20, 39.
[21] Pet. App. 39.

decided.[22] Due process also requires that the Notice adequately describe the legal rights and options available to the parties. *Dealy v. Heckler*, 616 F.Supp. 880, 886 (W.D. Mo. 1984) ("Adequate notice requires accuracy in the description of legal rights and options available to parties."). Thus, misleading Notices, as here, violate due process. *See* e.g., the violations of due process in *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (agency notice incorrectly informed claimant he had a right to submit evidence within 60 days); *Butland v. Bowen*, 673 F.Supp. 638, 641(D. Mass. 1987) (notice misinforming claimant she could file another claim for Social Security benefits at any time); *Noah v. McDonald*, 28 Vet. App. 120, 132 (2016) (VA's inaccurate, misleading notice gave significantly less time than allowed to respond).

Dealy is particularly on point. The court there specifically held that a Notice "serv[ing] to mislead and deceive" a disability applicant by denying him the "right to make an intelligent and informed decision" violates due process. *Dealy* at 887. This is exactly what happened in the present case: it was impossible for Petitioner (or any taxpayer) to count 30 days from an undisclosed date, and "to make an intelligent and informed decision" based on an undisclosed date.

In this case the circuit court held Petitioner made his request within the 30 days because the 30 days did not start on the date in his notice. It started on some other day (the mailing date) that was never given to or known by Petitioner. In short – the first element of due process is the right to be informed, but

[22] Pet. App. 8.

this taxpayer was not informed, because this taxpayer was given false information and told to rely on it.

Petitioner argued to the D.C. Circuit that it is self-evident that a taxpayer has to know when to begin counting 30 days under the statute. He cannot know whether he has elected a CDPH with tolling, or an EH without tolling, if he does not know when the 30 days starts (or, more properly, when it ends). To say that it starts on a date *not given to him*, is self-evidently a violation of the "notice" prong of due process.

That argument was ignored by the court. Instead, the circuit court based its holding on the unreasonable proposition that Congress intended that a taxpayer calculate the 30-day period for a "Due Process Hearing" on the basis of a mail date that the IRS never tells him, rather than from the one date that is actually provided to him – for a "Due Process Hearing."

The circuit court also ignored the fact that § 6330 was adopted along with the "Taxpayer Bill of Rights," 26 U.S.C. § 7803, as part of the *Taxpayer Bill of Rights III (1998)*[23]. The purpose and intent of that act was, literally, to curb IRS' abuses, to inform taxpayers, and to protect the rights of taxpayers.[24]

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[23] Also known as the *Internal Revenue Service Restructuring and Reform Act of 1998* (P.L. 105-206, 112 Stat. 685), the act was signed into law on July 22, 1998.

[24] *See*, e.g., *Dalton v. Commissioner*, 682 F.3d 149, 154-55 (1st Cir. 2012) (goal was to safeguard taxpayers in tax collection

And in point of fact, the first "right" in the Taxpayer Bill of Rights is the right to be informed.[25] As the version of IRS Publication 1 at the time in question promised, "IRS employees will explain and protect your rights as a taxpayer throughout your contact with us." The current version of Publication 1 presents the entire Taxpayer Bill of Rights, and under the first right it explains: "Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence." With that goal of accurate information and explanations in mind, Congress created inside § 6330 the so-called "Collection Due Process Hearing." ("CDPH") This hearing has an obvious due process element: before the IRS can levy, it must give a taxpayer a clear opportunity to discuss and dispute the matter at a hearing. That opportunity comes by mailing the aforementioned Notice that informs the taxpayer in "simple and nontechnical terms" of his right to request a hearing within 30 days. *See* § 6330(a)(3)(B). But the circuit court was not interested in that process due.

This Court should grant this writ so as to undo the circuit court's objectively incorrect decision.

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matters); *Davis v. Commissioner*, 115 T.C. 35, 37 (2000) ("Congress enacted § 6330 to provide additional protections for taxpayers in tax collection matters.").

[25] *See* 26 U.S.C. § 7803(a)(3): "In discharging his duties, the Commissioner [of Internal Revenue] shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including – (A) the right to be informed, ..."

II. The District Of Columbia Circuit's Decision Did Not Follow The Rules For Interpreting Statutes.

A. The Circuit Court Failed To Apply The Rules For Interpreting Statutes Recently Affirmed By This Court In *Marinello v. United States.*

The question presented is one of singular importance because the D.C. Circuit's interpretation is objectively not what Congress intended, and it is objectively inconsistent with the rules of statutory interpretation reaffirmed by this Court earlier this year in *Marinello v. U.S.*, 138 S.Ct. 1101 (2018). In *Marinello*, the issue before this Court was, as it is here, that of statutory interpretation of the Internal Revenue Code. This Court examined the meaning of the individual words in the statute, the meaning of the words as a phrase, the context within the statute in which those words and phrases appear, the legislative history behind the statute, and the context of that statute within the full Revenue Code.

The rule reaffirmed in *Marinello* is that the interpretation of a statute cannot rely on one word or phrase in one part of a statute, but must give effect to all of its terms and provisions, and not render any of its provisions meaningless. *Marinello* at 1107. However, the circuit court in the case at bar decided congressional intent solely on the isolated word "sent" in § 6330(a)(2),[26] and in doing so it literally made (a)(3)(B) meaningless. The circuit decision ignores

[26] Pet. App. 8.

(a)(3)(B) completely when determining congressional intent as to what day starts the 30-day period where the mail and Notice dates do not match. It is not an exaggeration to say that the circuit court rendered § 6330(a)(3)(B) meaningless to the whole of the statute -- and the whole purpose of the statute, which is to set the start date for the 30-day period for requesting a "*due process* hearing" and give the taxpayer clear notice of that date.

Before *Marinello*, this Court had plainly put forth the same rule of law regarding isolated words in *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995) (defining the term "prospectus" in the Securities Act of 1933). Resolution of *Gustafson* turned on the interpretation of a statute, where one party's argument "rest[ed] to a significant extent on § 2(10), or, to be more precise, on one word of that section." *Gustafson* at 573. "The flaw in Alloyd's argument," this Court said, "is its reliance on one word of the definitional section in isolation." *Id*. at 574. The statute must be read in its entirety, this Court said, *id*.

That was Petitioner's argument in the D.C. Circuit. Petitioner argued that the phrase "simple and nontechnical terms" and the mandate that the 30-day period be "specified in the Notice" necessarily mean that whatever date is in the Notice must start the 30-day period, because otherwise the taxpayer is not told the period, and that is a plain deprivation of due process. But the D.C. Circuit ignored that argument.

This Court also applied that same principle of interpretation in *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93 (2012). In *Roberts* the subparagraph provision of the statute at issue was "indeterminate" when read in isolation; that is, it was subject to more than one interpretation. But "[s]tatutory language, however, cannot be construed in a vacuum," this Court said. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts* at 100 (internal quotation omitted). So this Court read the subparagraph in the context of the rest of the statute, and found that the reading being promoted by petitioner Roberts "renders it entirely superfluous in all but the most unusual circumstances." *Id*. at 103 (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001)). That was unacceptable to this Court, because statutes must be interpreted so as to form a coherent regulatory scheme. *Id*. at 103.[27]

Again, the circuit decision below ignored that rule of interpretation.

Recognizing that the *Marinello* case concerned a criminal statute and the instant case is civil, the principle expressed by this Court is nonetheless apt

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[27] *See also TRW* at 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); *Dole v. USW*, 494 U.S. 26, 35 (1990) (give effect "to every word and clause"); *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (treat no sentence or word as "superfluous, void, or insignificant").

for the issue here because in this case there was arbitrary decision making by a government officer:

> Regardless, to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing "policemen, prosecutors, and juries to pursue their *personal predilections*," *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), which could result in the *nonuniform execution of that power across time and geographic location*. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we "cannot construe a criminal statute on the assumption that the Government will '*use it responsibly*.'"

Marinello at 1108-09 (emphasis added) (internal citations omitted). But the necessary premise of the circuit court's decision is that Congress intended to allow IRS to pull a *bait and switch* on taxpayers by giving them one date, telling them to rely on that one date, and then switching it out for a different (and never disclosed) date. In other words, the circuit court believed that Congress intended that IRS deprive taxpayers of adequate "notice" before a "due process hearing."

It is not even remotely reasonable to conclude, as the circuit court did below, that Congress intended such behavior from the IRS. Yet, that is the holding of the D.C. Circuit, all because of one word - "sent" - read in isolation in the statute. This Court should grant this writ so as to correct the D.C. Circuit and forestall other circuits from ignoring that clear line of cases discussed, *supra.* Otherwise, borrowing words from *Marinello*, IRS officers are permitted to pursue their personal predilections, resulting in the arbitrary and nonuniform execution of power all across the country, because, as this Court recognized, no one should assume that IRS officers will use power responsibly.

This Court should grant the petition and remand to the D.C. Circuit for statutory interpretation in light of this Court's recent decision in *Marinello.*

B. The Circuit Court Failed To Apply The Rule Of "Last Provision In Point Of Arrangement Must Control."

The question presented is one of singular importance because the D.C. Circuit's interpretation is objectively not what Congress intended, and it is objectively inconsistent with the rules of statutory interpretation previously affirmed by the D.C. Circuit. The D.C. Circuit previously held that, "The established rule is that if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." *Lodge 1858, Am. Fed'n*

of Gov't Emp. v. Webb, 580 F.2d 496, 510 (D.C. Cir. 1978), cert. denied sub nom. *Lodge 1858, Am. Fed'n of Gov't Emp. v. Frosch*, 439 U.S. 927 (1978) (overturning a decision voiding NASA employment contracts). The conflict in *Lodge* was over two subparagraphs of a federal statute regarding the hiring of civil service employees. Those subparagraphs seemed to be in conflict. The D.C. Circuit there – but not in the case at bar – resolved the problem by giving precedence to the "last provision in point of arrangement." If the D.C. Circuit had applied that same rule to the case at bar, it would have said that § 6330(a)(3)(B) is the "last provision in point of arrangement" and thus it "must control" over (a)(2). *Lodge* at 511.

That would mean that the "simple and nontechnical" date typed on Petitioner's Notice under (a)(3)(B) triggered Petitioner's 30-day statutory period, not the date of mailing under (a)(2).

Accord: *U.S. v. Moore*, 567 F.3d 187, 191 (6th Cir. 2009) (holding that because the last provision controls, there was no inconsistency and no ambiguity in the statute); *U.S. v. Daniels*, 279 F. 844, 849 (2d Cir. 1922) (reconciling competing sections of Naval Justice Act; "It is a cardinal rule of construction that effect is to be given, if possible, to every word, clause, and sentence of the statute. [citations omitted]. It is the duty of the court so far as practicable to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each. [citations omitted] In the consideration of irreconcilable conflicting provisions,

if both were enacted at the same time, the last in order of arrangement controls.").

III. The District Of Columbia Circuit's Decision Is An Outlier That Conflicts With Cases In The 3rd, 9th, And 11th Circuits, As Well As Its Own Precedent.

In holding that Congress intended that taxpayers be bound by, and must somehow calculate, the 30-day period under § 6330 from a purposefully undisclosed mailing date of the statutory Notice instead of the date actually disclosed and known to a taxpayer, the circuit decision here has turned § 6330 on its head. The decision stands alone as an outlier in ascribing an intent to Congress that admittedly does not make sense - "The taxpayer's position has the advantage of common sense."[28] - and that is clearly inconsistent with the express language of the statute when read as a whole, as well as with the decisions of other courts that have discussed § 6330 in the context of the start date of the 30-day period and/or in the context of Congress' purpose and intent in adopting the law. *See*, e.g., *Romano-Murphy v. C.I.R.*, 816 F.3d.707, 711 (11th Cir. 2016) ("A taxpayer has the right to request a [CDP] hearing during the 30-day period [provided by the notice]."); *U.S. v. Beeman*, 2010 WL 653062, *6 (W.D. Pa. 2010), aff'd 388 Fed.Appx. 82 (3d Cir. 2010) (Notice must indicate "in simple and nontechnical terms" a "specified time period"); *Hughes v. U.S.*, 953 F.2d. 531, 536 (9th Cir. 1992) (IRS Notice under § 6303(a) must provide taxpayers with all the information required by the

[28] D.C. Circuit opinion, Pet. App. 8.

statute); *Kuretski v. C.I.R.*, 755 F.3d 929, 934 (D.C. Cir. 2014) ("the IRS must give thirty days' notice"; hearing can be requested "during those 30 days" provided to the taxpayer), cert. denied,135 S.Ct. 2309 (2015).

See also Hoffman v. U.S., 209 F.Supp.2d. 1089, 1094 (W.D. Wa. 2002) (requisite information must be included in IRS Statutory Notice and Demand); *Kelly v. U.S.*, 209 F.Supp.2d 981, 991 (E.D. Mo. 2002) (Notice must comply with all of the requirements of § 6330(a)(3)); *Gafford v. Commissioner*, T.C. Memo. 2016-40, *7 ("If the taxpayer does not request a section 6330 hearing within 30 days of the date of the written § 6330 notice, ..."); *Andre v. Commissioner*, 127 T.C. 68, 71 (2006) (Congress intended that CDP Notices provide taxpayers with a definite 30-day window; "No fewer than four times, [the Treasury regulations] state or imply that there is a definite window within which a taxpayer has to ask for his hearing.").

This Court should grant this writ so as to clarify for all circuits what § 6330 actually means: to wit, the Notice "shall" in "simple and nontechnical terms" inform the taxpayer of the date from which he must count 30 days.

IV. The District Of Columbia Circuit Failed To Apply The Treasury Regulation, Internal Revenue Manual, Chief Counsel Notice, And The Treasury Inspector General for Tax Administration's Report.

A. The circuit Court Failed To Apply The Treasury Regulation.

This year this Court revisited the premise of this Court's *Chevron* [29] deference given federal regulations, *Epic Systems Corp,*[30] but found in that case - after employing *Chevron* analysis - that there was no deference to be given because this Court found no conflict between two statutes, and thus no "unresolved ambiguity" for a federal agency to address. This case differs: a single statute arguably contains an ambiguity, and before looking at any regulations a court must determine congressional intent using traditional tools of statutory construction, including those recently utilized by this Court in *Marinello, supra.* That process begins with the statute's language, as discussed, *supra.*[31] In § 6330, if the mail and Notice dates do not match, arguably there is conflict between what the statute intends under (a)(2) versus what it intends under (a)(3)(B): § 6330(a)(2) implies application of a (here unknown) mailing date, but (a)(3)(B) requires that the triggering date be disclosed to the taxpayer within the Notice itself. Petitioner's first argument, *supra*, is

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[29] *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-843 (1984)

[30] *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612, 1630 (2018)

[31] *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it."); *Watt v. Alaska*, 451 U.S. 259, 265 (1981) ("the starting point in every case involving construction of a statute is the language itself.").

that the only interpretation consistent with due process, established principles of statutory interpretation, and prior case law, is that the Notice date controls. However, in the event that this statute is not deemed clear and unambiguous, then under *Chevron* [32] the ambiguity must be decided by consideration of and deference to the agency's regulations. But the circuit court below skipped that required process. If the circuit court had acknowledged the statutory ambiguity and considered the regulation, then it would have easily concluded *that the regulation agrees with Petitioner's position*.

That means the decision below is wrong.

The IRS promulgated regulations to implement § 6330, at 26 C.F.R. ("Reg") § 301.6330-1. Specifically, Reg §§ 301.6330-1(b)(1) and (c)(1)[33] provide that the 30-day period runs from "the day after the date of the CDP Notice." Given that regulation (emphasis supplied):

> Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." [citation omitted] If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." [citations omitted] But if Congress

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[32] *See also Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) (the question becomes whether the Treasury regulations fill the gap consistent with permissible construction of the statute).

[33] Pet. App. 54.

> has not specifically addressed the question, *a reviewing court must respect the agency's construction of the statute* so long as it is permissible.

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). The D.C. Circuit failed to even mention, let alone consider, the agency's construction of the statute, i.e., the regulation. Yet, this Court said, "A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). And Petitioner has argued from the beginning that the regulation at issue does just that. When the regulation states that "[t]he taxpayer must request the CDP hearing within the 30-day period commencing on the day after the date of the CDP Notice,"[34] it is obvious that "CDP Notice" is the document that the taxpayer received in the mail. Therefore, the date "of" is the date written on that document, and as noted already that document - twice - reads: "30 days from the date of this letter." (This segues into the Internal Revenue Manual requirement, discussed in the next section, that the Notice date "must" be the same as the mailing date.)

The Tax Court erred by focussing on only one word in the regulation: "These provisions refer, not to

[34] Pet. App. 54-56.

the date *on* the CDP Notice, but to the date *of* the CDP Notice." [35] This tunnel vision failed to plumb the regulation's "true nature" and "merely examin[ed] an isolated word out of context, which may have been chosen improvidently." *GE Co. v. U.S.*, 929 F.2d 679, 680 (Fed. Cir. 1991). *The circuit court did not even get that far*, for it erred by not even looking at the regulation.

B. The Statute Mandates Deference To The Internal Revenue Manual.

Congress's adoption of § 6330(c)(1) [36] - "The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." - codified the established rule that, "where rights of individuals are affected, it's incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).[37]

This rule was contradicted by the D.C. Circuit without even a syllable addressing it.

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[35] Pet. App. 32 (emphasis in the original).

[36] Pet. App. 48.

[37] *See also*: *Massachusetts Fair Share v. Law Enforcement Assistance*, 758 F.2d 708, 711 (D.C. Cir. 1985) (requiring firm adherence to self-adopted rules); *Romano-Murphy,* 816 F.3d at 718 (11th Cir. 2016) (duty to follow IRS' rules not limited to formal regulations); *U.S. v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) (IRS must scrupulously observe rules, regulations, or established procedures even if not formally labeled a regulation or adopted per the APA).

Where a word has commonplace meaning, without limiting definition or contrary legislative history, its common and ordinary usage is persuasive.[38] And administrative procedures are the "[m]ethods and processes before administrative agencies as distinguished from judicial procedure, which applies to courts."[39] That said, the Internal Revenue Manual (IRM) matters because the concurring opinion in *Trout v. Commissioner*, 131 T.C. 239, 257-262 (2008) noted that the IRM outlines; e.g., "business rules and administrative procedures," plus "operating policies and procedures for use by all IRS offices." *Id.* at 261, n.5. Accord: *Wadleigh v. Commissioner*, 134 T.C. 280, 295, n.14 (2010).

While the IRM does not have the force of law, it is persuasive authority because it reflects the Commissioner's intent. [40] The IRM contains procedures that the IRS intends its personnel to follow. [41] Indeed, the revenue officer who prepared and mailed the levy notice at issue testified that he follows *only* the IRM. He does not follow the statute

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[38] *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (the common and ordinary meaning of a word should at least be persuasive of its meaning as used in the Internal Revenue Code).

[39] Black's Law Dictionary 46 (6th ed. 1990).

[40] *Romano-Murphy*, 816 F.3d at 719.

[41] *Trout*, at 261. Accord: *Gurule v. Commissioner*, T.C. Memo. 2015-61, at *8, n.9 ("The Commissioner's internal procedures, as reflected in the IRM, do not have the force of law, and deviation from them does not necessarily render the Commissioner's action invalid. [citation] Nevertheless, the IRM can be persuasive authority, see [citation], and a review of relevant IRM provisions is instructive in ascertaining the procedures the IRS expects its employees to follow."); *King v. Commissioner*, T.C. Memo. 2015-36, at *24, n.16 (ditto).

or the treasury regulations, nor is he even familiar with the statute or the regulations.

> Q: You say you're going by the IRM when you carry out your functions; is that right?
> A: Yes.
> ...
> Q: Do you have familiarity with the regulations under -- under Section 6330?
> A: No.
> Q: You do not?
> A: No. Again, I do not go -- do not review the code on a daily basis.
> Q: I'm sorry?
> A: I do not review the code on a daily basis.
> Q: Okay. I'm talking about the regulations now, not the code. I'm talking about the regulations under 6330. Are you familiar with the regulations?
> A: No.

(Trial transcript pp. 75 & 77.) So, when IRS mandates through IRM § 5.11.1.2.2.2 (03-21-2008), in bold[42], "**Caution:** The date on the [CDP Notice] must be the date it is…mailed…to the taxpayer" (emphasis in the original), one would rightly expect that the dates must match. And therefore, the date "on" the levy notice will be "the date of the CDP Notice" because there is no different date, because the IRM so states, and the revenue officer tasked with handling this taxpayer's statutorily-required levy and due-process

[42] The current version is IRM § 5.11.1.3.3.3 (11-09-2017). It reads the same.

hearing notice testified in court that he follows the IRM and nothing but the IRM.

The clear reason for the IRM requirement that the Notice date be the legally operative date is the agency's recognition that matching the two dates is required in order to assure that IRS comply with the Congressional mandate: that a taxpayer be informed of the correct date as required by § 6330(a)(3)(B).

C. Case Law Mandates That Deference Be Given To The Chief Counsel Notice And The Treasury Inspector General for Tax Administration's Report.

An agency's construction of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (courts must give deference to an agency's interpretation of its own rules and regulatory schemes). A court "affords great deference to an agency's interpretation of its own regulation." *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260 (D.C. Cir. 2005).[43] Because the date when the 30-day period begins to run is a creature of the Commissioner's regulations, his consistent

[43] Accord: *Via Christi Hospitals Wichita v. Burwell*, 820 F.3d 451, 456 (D.C. Cir. 2015) ("Because the bona fide sales rule is a creature of the Secretary's [of the Dept. of Health] own regulations, her interpretation of it is controlling unless plainly erroneous or inconsistent with the regulation.") (Internal quotation to *Auer* omitted.)

interpretation controls under *Auer*. And, agency guidance is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The amount of deference depends on the guidance's persuasiveness, this Court said, *Skidmore* at 140, but surely deference to the Chief Counsel advice/guidance and to the IRM is proper.[44] The IRM was discussed, *supra,* and its plainly-stated requirement is buttressed by the opinion of the the IRS Chief Counsel, in Chief Counsel Notice CC-2006-019 (Aug. 18, 2006), describing that Appeals must verify compliance with the Regulations and IRM.

In other words, the Chief Counsel's interpretation of "the date of the CDP Notice" outside of this litigation shows that the applicable date is the one on the piece of paper (the Notice) because that is what both the Regulations and the IRM say.

One month later, the Treasury Inspector General for Tax Administration (TIGTA) issued a Final Audit Report[45] on September 20, 2006, presenting findings and a recommendation that were

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[44] *See*, e.g., *Davis v. Commissioner*, 716 F.3d 560, 569, n.26 (11th Cir. 2013) (private letter rulings are persuasive authority regarding interpretation of tax statutes); *Glass v. Commissioner*, 471 F.3d 698, 709 (6th Cir. 2006) (IRM persuasive authority refuting the Commissioner's argument); *Wells Fargo & Co. & Subs. v. Commissioner*, 224 F.3d 874,886 (8th Cir. 2000) (Technical Advice Memoranda and Private Letter Rulings provide evidence of the proper construction of the statute); *Romano-Murphy*, 816 F.3d at 719 (relying on two Chief Counsel Advices interpreting the tax statute).

[45] TIGTA, Final Audit Report: Office of Appeals Should Continue to Strengthen and Reinforce Procedures for [CDP] Cases, Ref. No. 2006-10-123, pp.6-7,8 (Sept. 20, 2006)

later adopted by IRS: (1) "Appeals used a date other than the levy notification date provided to the taxpayer to determine timeliness;" (2) "This practice contradicts the instructions provided to the taxpayer;" (3) "To ensure taxpayer rights are protected, Appeals should use the same information provided to taxpayers [the Notice date] when classifying hearing requests [as a CDPH or EH];" (4) "Recommendation 1:...Appeals should review current procedures to ensure the process for ensuring the timeliness of CDP requests is consistent with the information provided to taxpayers [that is, the Notice date]." The report unequivocally shows that "the date of the CDP Notice" means the date typed on the CDP Notice.

This case should have ended right there, but the circuit court gave not a word to this when issuing its objectively wrong opinion. It did not perform the statutory interpretation required by *Marinello* and its predecessors, nor did it perform *Chevron* analysis, nor did it apply *Auer* or *Skidmore* deference. This Court should grant this writ to correct this gross error.

V. The Question Presented Is Important Because The Decision Affects All Taxpayers.

The question presented is one of singular importance because the decision below was wrongly decided and results in a blatant deprivation of the notice prong of *Fifth Amendment* due process, as well as specific taxpayer protections set forth in 26 U.S.C. § 6330, for all taxpayers. These resulting deprivations

can happen to any taxpayer because the statute is general and, like the *Fifth Amendment*, it applies to all taxpayers. Review is warranted to prevent any further deprivations of due process to taxpayers.

As explained, *supra*, the D.C. Circuit ignored well established (and recently reaffirmed) cardinal rules of statutory interpretation to adopt an objectively erroneous reading of § 6330 that does not make sense of its text, structure, purpose, or its interpretation by the IRS outside of this litigation. The D.C. Circuit also adopted a reading of § 6330 in conflict with other circuits – 3rd, 9th, and 11th circuits – that discussed which date starts the 30-day period under § 6330, and its own precedent in *Kuretski v. C.I.R.*, 755 F.3d. 929, 934 (D.C. Cir. 2014).

The circuit court performed no statutory interpretation as required by *Marinello* and its predecessors, nor did it apply the rule that the "last provision in point of arrangement" controls. It simply ignored the conflict between (a)(2) and (a)(3)(B) instead of performing a *Chevron* analysis. The circuit court failed to follow this Court's *Chevron* directive: accord deference to the IRS regulation in order to resolve the ambiguity as to which date applies under § 6330 to commence the 30-day period. Also, it refused to give *Skidmore* or *Auer* deference to IRS and Treasury Department internal reports and manuals. Review is warranted to prevent such future legal errors.

And at its core, the D.C. Circuit court's decision is irrational because the court held in effect that: (1)

Congress adopted § 6330(a)(3) with the intent to provide a definite 30-day window in the Notice; yet (2) at the same time Congress intended that an undisclosed and unknown mailing date begins that definite window. To reiterate, in this country - where due process is the foundation of our legal system, - it is unimaginable that Congress intended that under a statute specifically enacted to curb IRS abuse, to inform and protect all taxpayers, and to provide due process protections for all taxpayers, that the IRS will: (1) provide taxpayers with a date for calculating a time period; (2) twice instruct them to rely on that date; and (3) apply a different and undisclosed date.

This Court should grant review to make it clear that the statutory requirement - that in "simple and nontechnical terms" IRS "shall" provide taxpayers with a pre-levy notice which contains the starting date for the 30-day period - means just what it says: the date *on* the Notice controls. That "30 days from the date of this letter" means just what it says: thirty days from the date *on* the letter, not 30 days from the unknown date that the letter was mailed. A notice which affirmatively misleads - as is the case here - clearly violates the constitutional guarantee of due process.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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