No. _____

In the

Supreme Court of the United States

Organic Cannabis Foundation, LLC,
DBA Organicann Health Center,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is 26 U.S.C. § 6213(a)'s deficiency petition (90-day) Filing Deadline jurisdictional (such that it is not subject to equitable tolling) under current Supreme Court case law?

II. In basing its opinion on a statement on an internet website of which it took judicial notice, *sua sponte*, without affording the parties an opportunity for hearing or supplemental briefing, did the United States Court of Appeals for the Ninth Circuit deny Petitioner due process under the Fifth Amendment?

CORPORATE DISCLOSURE STATEMENT

The Petitioner entity does not have a parent corporation or any publicly held company owning 10% or more of the corporation's stock.[1]

[1] As a matter of clarification, the Petitioner is a California limited liability company wholly owned by Northern California Small Business Assistants, Inc., a California corporation.

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Petitioner Organic Cannabis Foundation, LLC, DBA Organicann Health Center ("Organicann") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Organic Cannabis Found., LLC v. Comm'r*, 962 F.3d 1082 (9th Cir. 2020) (Callaghan, J.). Pet. App. 1. The order of the Court of Appeals denying rehearing and rehearing en banc is reported at *Organic Cannabis Found., LLC v. Comm'r*, 2020 U.S. App. LEXIS 27583 (2020) (Bybee, N. R. Smith & Collins, JJ.). Pet. App. 29. The Order of the United States Tax Court is reported at Tax Ct. No. 10593-15 (2017). Pet. App. 32.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit issued its opinion and judgment June 18, 2020. Pet. App. at 1. On August 28, 2020, the Court of Appeals denied Petitioner's petition for rehearing or rehearing en banc. Pet. App. at 29.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix. Pet. App. 38**.**

STATEMENT OF THE CASE

This case presents the question of whether the 90-day deadline for filing a

petition with the United States Tax Court set forth in Internal Revenue Code [2] § 6213(a) (hereinafter the "Filing Deadline")[3] is jurisdictional. Under that section, a taxpayer who receives an Internal Revenue Service ("IRS")[4] notice of deficiency has 90-days within which to petition the Tax Court for review. The court below, following earlier *circuit court* decisions, held the Tax Court's Filing Deadline jurisdictional. However, those decisions were rendered prior to *Kontrick v. Ryan*, 540 U.S. 443 (2004), where this Court clarified that, henceforth, filing deadlines should almost never be treated as jurisdictional. And today there are only two exceptions to this Court's current jurisprudence that filing deadlines should almost never be treated as jurisdictional: a "clear statement" exception and a stare decisis exception. In affirming the Tax Court's dismissal of Petitioner's petition for redetermination of a notice of deficiency for lack of jurisdiction because said petition was received by the Tax Court one day after the Filing Deadline, the Ninth Circuit erroneously relied on both exceptions in holding § 6213(a)'s Filing Deadline jurisdictional and not subject to equitable tolling. However, for reasons discussed in the argument below, neither of those exceptions apply, and the Ninth Circuit's determination that they do conflicts with this Court's recent precedent.

This case also raises important Fifth Amendment due process issues. The Ninth Circuit determined that, despite failing to include Petitioner's P.O. Box

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[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended (hereinafter, the "Code").

[3] For the sake of clarity, § 6213(a) states that the Filing Deadline is 150 days if the notice of deficiency is addressed to a person outside the United States.

[4] Petitioner refers to Respondent-Appellee, Commissioner of Internal Revenue, as the "IRS" for convenience. Also, with the exception of direct quotes, for convenience, references to the "Secretary" in the Code and Regulations have been changed to the "IRS" in the discussion below.

number on the envelope containing the notice of deficiency, the notice was not misaddressed. In making this determination, the Ninth Circuit did not address the positions taken by either party, but took judicial notice, *sua sponte*, of a U.S. Postal Service website that suggests that a "ZIP+4" in the address, "… will *likely* include the actual P.O. Box number …. " Pet. App. 27 (emphasis added). The Ninth Circuit then treated this website assertion as an incontrovertible "fact" and based its opinion on that purported "fact" without giving the parties any opportunity to refute it or otherwise provide contrary evidence on the issue. As set forth in greater detail in the argument below, the Ninth Circuit's *sua sponte* resolution deprived Petitioner of its rights to due process. For these reasons, this Court should grant certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

The IRS proposed deficiencies and penalties in excess of $1,000,000 for Petitioner's tax years 2010 and 2011. According to IRS's mail log, the address on the envelope carrying the notice of deficiency identified the taxpayer, followed by a "care of" name, followed by the city, state and ZIP code, but omitted the taxpayer's P.O. Box number (Appellee Br. 65), which omission presumably not only delayed delivery of the notice of deficiency to Petitioner (ER 88), but was in contravention of § 6212(b)(1), because the notice was not sent to Petitioner's last known address.

The notice of deficiency was dated January 22, 2015, and identified April 22, 2015, as the last day to file a petition for redetermination with the Tax Court. (ER 88.) Petitioner prepared its Tax Court petition, in which it challenged both the applicability and the constitutionality of § 280E. (Tax Ct. Pet. 12-26.)

On April 21, 2015, Petitioner sent its petition to the Tax Court by FedEx overnight delivery. (ER 88.) Petitioner selected the FedEx overnight delivery option guaranteeing the earliest possible delivery, which FedEx marketed under the name "FedEx First Overnight." (ER 72, 83-84.) When FedEx attempted to deliver the petition to the Tax Court on April 22, 2015, FedEx could not access the Tax Court due to "some plausible reason like construction, or some sort of police action (perhaps the [FedEx] representative said the access was blocked because of a safety threat)." (ER 89.) FedEx successfully delivered the petition on April 23, 2015, the day after the Filing Deadline expired. (ER 88.)

Notwithstanding the provisions of § 6214(a), which specifically grants the Tax Court jurisdiction to hear "deficiency" cases,[5] on July 29, 2016, more than fifteen months after Petitioner's petition was filed with the Tax Court, the IRS moved to dismiss Petitioner's case on the ground that its petition was not timely filed. (ER 87.) Petitioner also moved to dismiss the case, but on the ground that the notice of deficiency was invalid because, in contravention of § 6212(b)(1), the IRS did not properly address the notice to Petitioner at its last known address. (ER 87); Cf. *Napoliello v. Comm'r*, 655 F.3d 1060, 1063 (9th Cir. 2011) ("A determination that the Tax Court lacks jurisdiction because of an invalid notice strips the IRS of

[5] As a matter of clarification, it should be noted that, as a practical matter, the basis of the Tax Court's jurisdiction to hear this case is the "gist" of this petition—Petitioner's position being that § 6214(a) specifically grants the Tax Court jurisdiction to hear "deficiency" cases, whereas the IRS, the Tax Court and the Ninth Circuit have all taken the position that the Filing Deadline set forth in § 6213(a) is jurisdictional.

power to assess taxes based on that notice"). On July 25, 2017, the Tax Court granted the IRS motion and dismissed Petitioner's case for lack of jurisdiction.

On October 18, 2017, Petitioner timely filed with the Tax Court a notice of appeal to the United States Court of Appeals for the Ninth Circuit (ER 91.) The Ninth Circuit had jurisdiction under § 7482(a)(1), (b)(1)(B). The Ninth Circuit affirmed the Tax Court's dismissal for lack of jurisdiction because Petitioner's petition for redetermination of a federal income tax deficiency was not timely filed (Pet. App. 26), and held that, because § 6213(a)'s Filing Deadline is jurisdictional, equitable exceptions such as equitable tolling and waiver do not apply. Pet. App. 3. Additionally, after searching the U.S. Postal Service's website to determine that, "the ZIP+4 Code will *likely* include the actual P.O. Box number in the +4 part of the ZIP Code" (Pet. App. 27) (emphasis added)), the Ninth Circuit found that the notice of deficiency was not misaddressed, and rejected Petitioner's contentions that said notice was invalid under § 6212(b)(1) because it was not properly addressed to Petitioner at its last known address. Pet. App. 3.

On August 3, 2020, Petitioner timely filed a petition for rehearing and rehearing en banc. That petition was denied. Pet. App. 29**.**

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DETERMINATION THAT THE (90-DAY) FILING DEADLINE SET FORTH IN INTERNAL REVENUE CODE § 6213(a) IS JURISDICTIONAL AND NOT SUBJECT TO EQUITABLE TOLLING IS CONTRARY TO SUPREME COURT PRECEDENT AND POSES A QUESTION OF NATIONAL SIGNIFICANCE WHICH COULD HAVE PRECEDENTIAL VALUE CONCERNING THE JURISDICTION OF THE TAX COURT.

This Court has endeavored to "bring some discipline" to the use of the term "jurisdictional" as the consequences that attach to the "jurisdictional" label may be drastic. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Hence, this Court has routinely granted review to consider whether a statutory filing deadline or other procedural proscription is jurisdictional.[6]

Section 6213(a) sets forth the Filing Deadline for filing a Tax Court petition. A separate Code section, § 6214(a), specifically contains the jurisdictional grant. This Court has recently held that statutory deadlines are presumptively nonjurisdictional and are subject to equitable tolling unless Congress has made a clear statement that the deadline is jurisdictional. *Kwai Fun Wong*, 575 U.S. at 409. Congress must clearly state that a threshold limitation on a statute's scope shall count as jurisdictional (*Gonzalez*, 565 U.S. at 141) and absent such a clear

[6] See e.g., *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843 (2019); *Hamer v. Neighborhood Hous. Servs*, 138 S. Ct. 13 (2017); *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013); *Gonzalez*, 565 U.S. at 139-141; *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan, supra*, 540 U.S. at 452; *Becker v. Montgomery*, 532 U.S. 757 (2001); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

statement, courts shall treat the time restriction as nonjurisdictional. *Sebelius,* 568 U.S. at 153.

The Ninth Circuit's holding that § 6213(a)'s Filing Deadline is jurisdictional and not subject to equitable tolling is contrary to both (i) this Court's current approach, which distinguishes jurisdictional limits from case-processing rules, and (ii) this Court's recent holdings that statutory filing deadlines and claim-processing rules are presumptively nonjurisdictional and subject to equitable tolling unless (a) Congress has made a clear statement that a deadline is jurisdictional (*Kwai Fun Wong*, 575 U.S. at 407-408), or (b) a "long line of this Court's decisions left undisturbed by Congress attached a jurisdictional label to the prescription." *Fort Bend County*, 139 S. Ct. at 1849 (internal quotation marks omitted). As such, the Ninth Circuit's ruling warrants this Court's review. The jurisdictional and equitable tolling questions presented, and their implications for the functioning of the Tax Court, are matters of national significance which could have precedential value.

Under this Court's current jurisprudence, there are only two exceptions to the rule that filing deadlines should almost never be treated as jurisdictional: a "clear statement" exception and a stare decisis exception.

a. **The Clear Statement Exception Only Applies if Congress Makes a "Clear Statement" to the Effect a Filing Deadline is Jurisdictional.**

Under this Court's current approach, filing deadlines are almost never jurisdictional. *Kwai Fun Wong*. 575 U.S. at 408. The Government must "clear a high bar to establish that a statute of limitations is jurisdictional." *Id.* at 409. While this Court has acknowledged that filing deadlines can be jurisdictional if Congress

makes a "clear statement" to that effect, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id*.

Congress must clearly state that a threshold limitation on a statute's scope shall count as jurisdictional. *Gonzalez*, 565 U.S. at 141. Absent a "clear statement," courts should treat time restrictions as nonjurisdictional. *Sebelius*, 568 U.S. at 153. While Congress is not required to "incant magic words," traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences. *Kwai Fun Wong,* 575 U.S. at 410.

There simply is no clear statement indicating that § 6213(a)[7] is intended to limit the Tax Court's jurisdiction to hear petitions to those filed within 90 (or 150) days after the deficiency notice is mailed. Section 6213(a) is entitled "Time For

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[7]Section § 6213(a) provides:

> [1] Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in § 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. [2] Except as otherwise provided in §§ 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. [3] Notwithstanding the provisions of § 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. [4] The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. [5] Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(Sentence numbers inserted for clarity.)

Filing Petition And Restriction On Assessment," and does not speak to restricting the power of the Tax Court in any of its five sentences. The first sentence provides that a taxpayer "may" file a petition during the 90-day period following the issuance of a notice of deficiency. See *Sebelius*, 568 U.S. at 154. (finding that use of the word "may" was "less jurisdictional" than another statute which used the word "shall").

The remaining sentences in § 6213(a) do nothing to "connect" this Filing Deadline to the jurisdictional grant contained in § 6214(a). *Gonzalez*, 565 U.S. at 145 (refusing to find that a statute was jurisdictional even where the section requiring a certificate of appealability contained a cross-reference to the section granting jurisdiction). The second sentence states that the IRS may not assess or collect a deficiency unless a notice of deficiency has been mailed to the taxpayer, and the IRS may not assess or collect a deficiency during the 90-day filing period or while a Tax Court proceeding is pending. The third sentence allows a taxpayer to bring a proceeding to enjoin improper assessment or collection of a deficiency. The fourth sentence clarifies that the Tax Court *lacks* jurisdiction to enjoin a proceeding or order a refund unless a petition is timely filed. Finally, the fifth sentence provides that any petition filed with the Tax Court on or before the last day specified for filing in the notice of deficiency shall be treated as timely filed. None of this language even suggests, let alone clearly dictates, that Congress intended the Filing Deadline to be jurisdictional.

The text of § 6213(a) relating to the Filing Deadline (essentially, the first sentence) speaks only to timeliness, not to the Tax Court's power to hear the case. *Kwai Fun Wong,* 475 U.S. at 410-411. The Tax Court is specifically granted

jurisdiction to hear deficiency cases in § 6214(a), and that section fails to mention either the Filing Deadline or § 6213(a). Only the fourth sentence of § 6213(a) uses the word "jurisdiction," and that reference is in the context of clarifying the Tax Court's lack of jurisdiction regarding certain injunctions or refund matters which are not at issue in this case. Further, in that fourth sentence, which was added in 1988, as part of the Omnibus Taxpayer Bill of Rights, more than sixty years after § 274(a) of the Revenue Act of 1924[8], the predecessor of the first sentence of § 6213(a), was enacted, Congress prospectively amended § 6213(a) to specify that the Tax Court can have injunctive powers. Technical and Miscellaneous Revenue Act of 1988, H.R. 4333, 100th Cong. (1988); § 6243(a). Since the Tax Court's authority to enjoin the IRS was added to the Code long after the predecessor of the first sentence of § 6213(a) was first enacted (in 1924), the fourth sentence cannot be read to imbue the first sentence (which, on its face, states nothing more than a mere filing deadline) with jurisdictional consequences. Pet. App. 21; *Kwai Fun Wong,* 475 U.S. at 410-411.

Similarly, noting (i) that § 274(a) of the Revenue Act of 1924 (the "1924 Act"), the predecessor of the first sentence of § 6213(a) which defines the Filing Deadline,

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[8] Section 274(a) of the Revenue Act of 192**4** allowed a taxpayer to petition the Board of Tax Appeals to challenge a deficiency determination. It provided:

> SEC. 274 (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

was enacted two years before § 274(e) of the Revenue Act of 1926[9] (the predecessor of § 6214(a)), which granted the Board of Tax Appeals "jurisdiction to redetermine the correct amount of the deficiency," and (ii) that said § 274(e) did not refer to § 274(a), or the filing deadline set forth therein, it follows that, when enacted, the filing deadline spelled out in § 274(a) of the 1924 Act, was not "imbued… with jurisdictional consequences." Pet. App. 21**;** *Kwai Fun Wong,* 475 U.S. at 410-411.

In like fashion, noting that § 6213(a)'s second and third sentences derive from the 1926 Act (§ 274(a)[10]), enacted two years after enactment of § 274(a) of the 1924 Act, neither of those sentences can possibly be read to imbue the filing deadline spelled out in § 274(a) of the 1924 Act "with jurisdictional consequences," at least

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[9] Section 274(e) of the Revenue Act of 1926 (the "1926 Act") granted the Board of Tax Appeals jurisdiction to redetermine the correct amount of the deficiency. It provided:

> SEC. 274 (e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

[10] Section 274(a) of the Revenue Act of 192**6** provided:

> SEC. 274 (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), `the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

not at the time § 274(a) of the 1924 Act was enacted. Pet. App. 21**;** *Kwai Fun Wong,* 475 U.S. at 410-411.

Further evidence that none of the aforementioned additions to the tax law under the 1926 Act were intended to imbue the filing deadline spelled out in § 274(a) of the 1924 Act "with jurisdictional consequences" is the fact that all of these provisions were enacted when Congress was concerned with making the Board of Tax Appeals (the "Board") more court-like. "Although Congress was unwilling to transform the Board into a court, an effort was made in the 1926 Act to accord the Board more judicial attributes." Harold Dubroff & Brant J. Hellwig, The United States Tax Court: An Historical Analysis 122 (2d ed. 2014). No doubt, this explains why the *separate provision* giving the Board "jurisdiction" (§ 274(e) of the 1926 Act) was first added to the tax law in 1926. With respect to the injunctive remedy adopted as what are now the second and third sentences of § 6213(a), that was added because one district court had held that there was no injunctive remedy under the 1924 Act if the IRS prematurely assessed a deficiency while the Board was considering the case. *Id*. at 136 n.109.

The Ninth Circuit starts its analysis of the recent Supreme Court jurisprudence addressing when statutory deadlines should be deemed jurisdictional by referencing the Seventh Circuit's decision in *Tilden v. Commissioner*, 846 F.3d 882, 884 (7th Cir. 2017). In *Tilden*, the Commissioner confessed error and the Court held that the Tax Court wrongly dismissed a petition where the parties had agreed to facts that showed that the petition was timely. *Tilden's* analysis of whether § 6213(a)'s time limit was jurisdictional was poorly reasoned and not necessary to

its decision. Relying on dicta in the Tax Court's decision in *Guralnik v. Commissioner*, 146 T.C. 230, 231 (2016), which involved § 6330(d)(1), not § 6213(a), and stressing that § 6213(a) has long been held by several *circuit courts* to be jurisdictional, the *Tilden* court characterized § 6213(a) as jurisdictional because the word "jurisdiction" is used in that section, albeit in a separate sentence about the Tax Court's ability to enjoin collection, more than 175 words and 2 sentences after the sentence establishing the Filing Deadline. *Tilden*, 846 F.3d at 886 (emphasis added).

The Ninth Circuit then purports to apply "traditional tools of statutory construction" to support its conclusion ". . . that Congress has indeed done 'something special' to 'plainly show' that § 6213's time limit is 'imbued… with jurisdictional consequences.'" Pet. App. 21; *Kwai Fun Wong,* 575 U.S. at 410. First, the Ninth Circuit states that § 6213(a) uses the "magic word 'jurisdiction,'" albeit, "…with respect to *one* aspect of the Tax Court's power concerning deficiency redeterminations…" Pet. App. 22 (emphasis in original). Addressing, in turn, each of the first four sentences of § 6213(a) (which include an aggregate of 282 words), the Ninth Circuit agrees with the Seventh Circuit's assertion in *Tilden* that it is "very hard" to read the *fourth sentence* of § 6213(a) in a way that merely strips the Tax Court of jurisdiction to enjoin the collection actions referred to in the second sentence. Pet. App. 23. "By also specifying that the Tax Court lacks 'jurisdiction' to issue such an injunction 'unless' a [timely] petition has been filed, § 6213(a) <u>seems</u> clearly to reflect an understanding that the manner in which the Tax Court *acquires* jurisdiction over a deficiency dispute is through the filing of a 'timely

petition.' I.R.C. § 6213(a)." Pet. App. 23 (emphasis in original, but added to "seems").

Such a holding is not only contrary to *Gonzalez*, 565 U.S. at 146-147, which instructs courts not to treat time periods *adjacent* to jurisdictional provisions as jurisdictional absent a "clear statement," but, on its face, the Ninth Circuit's use of the word "*seems*" shows that Congress has *not* done "'something special' to 'plainly show' that § 6213(a)'s time limit is 'imbued… with jurisdictional consequences.'" Pet. App. 21; *Kwai Fun Wong,* 575 U.S. at 410.

Suggesting that the fourth sentence of § 6213(a) *seems* to reflect "an understanding" that the manner in which the Tax Court acquires jurisdiction over a deficiency dispute is through the filing of a "timely petition," the Ninth Circuit states its reading of the statute in this fashion is "strongly confirmed" by how the second sentence's "no-collection" prohibition is phrased. Pet. App. 23. On this point, the Ninth Circuit suggests that, if § 6213(a) is not jurisdictional, the no-collection prohibition provided in the second sentence would lapse, subject to revival if the Tax Court accepts a late-filed petition, a "discontinuity" the Ninth Circuit says the statute does not contemplate. Pet. App. 24. However, there is no such "discontinuity." The second sentence's "no-collection" prohibition is unconditional—if a petition (timely or not) has been filed with the Tax Court, "no levy or proceeding in [*any*] court for its collection shall be made, begun, or prosecuted until …the decision of the Tax Court has become final." § 6213(a). And while it might be argued that, if a petition is not timely filed, the Tax Court (still) does not have jurisdiction "to enjoin violations of that prohibition against collection–thereby necessitating a

separate court proceeding…" Pet. App. 24 (emphasis in original), during the sixty years preceding the amendment of § 6213(a) which granted the Tax Court power to enjoin such violations, separate proceedings were *required* to do so, and there is nothing in the legislative history pertaining to the amendment of § 6213(a) which suggests that Congress was attempting to eliminate the need for separate actions to enjoin such violations.

Possibly more pointedly, if the Filing Deadline is jurisdictional, contrary to the Ninth Circuit's hypothetical, the Tax Court would lack jurisdiction to accept a petition filed after the Filing Deadline. Hence, there would be no "discontinuity" as there could be no "revival." In contrast, if the Filing Deadline is not jurisdictional, and the Tax Court can equitably toll the Filing Deadline (as it has when, for example, there has been a national disaster or other (significant) event which makes the Tax Court inaccessible on the last day of the Filing Period (*Guralnik,* 146 T.C. at 243)), the Tax Court's acceptance of a petition after expiration of the Filing Period would deem the petition as timely and, pursuant to the fourth sentence of § 6213(a), allow the Tax Court to enjoin any collection activity the IRS might have commenced. This result, which would facilitate judicial economy, is much more *clearly* contemplated under the Code than the Ninth Circuit's convoluted attempt to "tie" the prohibition against collection in the second sentence of § 6213(a) to the Filing Deadline set forth in the first sentence of that section.

The Ninth Circuit then contends that, if § 6213(a) is not jurisdictional, a dismissal for late-filing would have preclusive effect under § 7459(d).[11] That this would occur is not certain as nothing in the Code would preclude a taxpayer from either contesting the liability in Bankruptcy Court or paying the tax and suing the government for a refund in district court or the Court of Federal Claims if a petition is dismissed as untimely. If, however, the Ninth Circuit is correct about this "preclusive effect", resolution of the issue involves policy arguments better addressed by Congress than the courts. (Appellant Reply Br. 26.) More pointedly, like each of the other, aforementioned, strained constructions the Ninth Circuit has asserted, its suggestion that, if § 6213(a) is not jurisdictional, a dismissal for late-filing would have preclusive effect under § 7459(d) does not *plainly show* that the Filing Deadline is intended to have jurisdictional consequences.

b. The Stare Decisis Exception Does Not Apply to Circuit Court Rulings.

As the last ground for its decision that the Filing Deadline in the *first sentence* of § 6213(a) is jurisdictional, the Ninth Circuit notes, "… the "'historical treatment" of the provision at issue,' [cite omitted] further confirms that § 6213(a) imposes a jurisdictional time limit. As noted earlier, the *circuits* have uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since at least 1928." Pet. App. 25 (emphasis added). However, setting aside the fact that the vast

[11] Section 7459(d) essentially says that the Tax Court's dismissal of a petition shall be considered the Tax Court's decision that the deficiency is the amount determined by IRS, "unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction."

majority of those circuit court rulings precede this Court's recent jurisprudence addressing when statutory deadlines and claim-processing rules should be deemed jurisdictional, the Ninth Circuit disregards the distinction between appellate court and Supreme Court precedent clarified in *Fort Bend County*. *Fort Bend County,* 139 S. Ct. at 1849. In other words, as this Court has never ruled on whether § 6213(a)'s Filing Deadline is jurisdictional nor, since *Kontrick,* 540 U.S. at 455, has it held that Congress clearly stated an intent that any claims processing rule is jurisdictional, it is somewhat misleading to suggest that the aforementioned long-settled *circuit court* treatment of § 6213(a) as jurisdictional should be followed merely because Congress has not addressed it.

This Court has never ruled on the jurisdictional nature of § 6213(a)'s Filing Deadline. Accordingly, the stare decisis exception cannot apply here. "[T]he Court has stated it would treat a requirement as jurisdictional when a long line of *Supreme Court* decisions left undisturbed by Congress attached a jurisdictional label to the prescription." *Fort Bend County,* 139 S. Ct. at 1849 (emphasis added).

This Court has issued seven other opinions (none acknowledged by the Ninth Circuit) that describe the *stare decisis* exception as only being applicable to a long line of Supreme Court opinions. Thus, the Ninth Circuit's reliance on this exception is actually in conflict with eight of this Court's recent opinions. Following are pertinent quotes from the seven other opinions:

1) "[R]elying on a long line of *this Court's decisions* left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time

limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a)."

Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen.Comm. of Adjustment, 558 U.S. 67, 82 (2009) (citing *John R. Sand, 552 U.S. at 132* and *Bowles, 551 U.S. at 209-211*)(emphasis added).

2) *"Bowles* stands for the proposition that context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."

Reed Elsevier, Inc, 559 U.S. at 168 (emphasis added).

3) "[C]ontext, including *this Court's interpretation* of similar provisions in many years past, is relevant." [*Reed Elsevier*, *Inc.*, 559 U.S. at 168]. When "a long line of *this Court's decisions* left undisturbed by Congress," [*Union Pac. R.R., 558 U.S.* at 82], has treated a similar requirement as "jurisdictional," we will presume that Congress intended to follow that course.

Henderson, 562 U.S. at 436 (citing *John R. Sand, 552 U.S. at 133-134*; emphasis added).

4) We have also held that "context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." [*Reed Elsevier, Inc*, 559 U.S. at 168]. Here, however, even though the requirement of a COA (or its predecessor, the certificate of probable cause (CPC)) dates back to 1908, Congress did not enact the indication requirement until 1996. There is thus no "long line of *this Court's decisions* left undisturbed by Congress" on which to rely. [*Union Pac. R.R.*, 558 U.S. at 82].

Gonzalez, 565 U.S. at 142 n.3 (emphasis added).

5) "We consider 'context, including *this Court's interpretations* of similar provisions in many years past,' as probative of whether Congress intended a

particular provision to rank as jurisdictional. [*Reed Elsevier, Inc.*, 559 U.S. at 168]."

Sebelius, 568 U.S. at 153-154 (emphasis added).

6) "What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from *this Court's prior rulings*, not from Congress's choice of wording."

Kwai Fun Wong, 575 U.S. at 416 (emphasis added).

7) In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including *this Court's interpretations* of similar provisions in many years past,' as probative of [Congress' intent]." [*Sebelius*, ***568 U.S*** at 153-154 (quoting *Reed Elsevier, Inc.*, 559 U.S. at 168)].

Hamer, 138 S. Ct. at 20 n.9 (emphasis added).

Further, in her concurring opinion in *Reed Elsevier*, *Inc.*, 559 at 173-174, Justice Ginsburg (and two other Justices) explicitly rejected the idea of a *stare decisis* exception applicable to circuit court of appeal opinions: "[I]n *Bowles* and *John R. Sand & Gravel Co.,* … we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.' *Amicus* cites well over 200 opinions that characterize § 411(a) as jurisdictional, but not one is from this Court…." (emphasis in original; citations omitted).

c. The Tax Court has equitably tolled filing periods, power it would not have if filing periods are jurisdictional.

Finally, in deciding whether § 6213(a)'s Filing Deadline is jurisdictional and not subject to equitable tolling, how the Tax Court operates should not be overlooked. For example, in *Guralink*, 146 T.C. at 231, where the Tax Court, *in dicta*, stated that FedEx First Overnight was not a "designated delivery service," the Tax Court nonetheless extended the § 6330(d) 30-day filing period, holding that a petition which arrived one day late was timely because the clerk's office was inaccessible on the day the petition was due because of a snowstorm. Following its rules, which closely parallel the Federal Rules of Civil Procedure, the Tax Court concluded it had jurisdiction to extend the filing period. As nothing in the Tax Court rules or the Code specifically state the Tax Court can extend filing deadlines, to do so the Tax Court had to rely on equitable tolling, power it would not have had if the timing statute is jurisdictional.

Review is warranted because the Ninth Circuit's decision that § 6213(a)'s Filing Deadline is jurisdictional does not follow this Court's jurisprudence. Whether the Filing Deadline in § 6213(a) is jurisdictional is a question of national significance which could have precedential value concerning the ability of taxpayers to contest a proposed (and potentially erroneous) assessment in the only available pre-payment forum other than Bankruptcy Court—the United States Tax Court.

II. THE NINTH CIRCUIT DENIED PETITIONER DUE PROCESS BY BASING ITS DETERMINATION THAT THE NOTICE OF DEFICIENCY WAS PROPERLY ADDRESSED ON A WEBSITE OF WHICH IT TOOK JUDICIAL NOTICE, *SUA SPONTE*, WITHOUT AFFORDING PETITIONER THE OPPORTUNITY TO BE HEARD, RAISING IMPORTANT CONSTITUTIONAL DUE PROCESS QUESTIONS.

According to the IRS' mail log, the address on the envelope carrying Petitioner's notice of deficiency included the name of the taxpayer, followed by a "care of" name, followed by the city, state and ZIP code, but the P.O. Box number was omitted. Hence, Petitioner argued that: (i) the notice was not sent in accordance with § 6212(b)(1), because it was not sent to Petitioner's last known address; and (ii) the improper address caused a delay in delivery to the prejudice of the Petitioner.[12] IRS argued that, under Tax Court precedent, the notice was valid since Petitioner received it with more than 30 days left to petition *and no prejudice was caused* by an incorrectly addressed envelope (emphasis added) (Appellee Br. 65.) In lieu of addressing either position, the Ninth Circuit took judicial notice, *sua sponte*, of a U.S. Postal Service website statement that a "ZIP+4 Code" in the address was "*likely* to include the actual P.O. Box number in the +4 part," and ruled that the envelope containing the notice of deficiency intended for the Petitioner was not misaddressed because the address included the ZIP+4 code. Pet. App. 27.

There are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, namely, where proper resolution is beyond

[12] Such prejudice being evidenced by the fact that Petitioner's petition for redetermination of a federal income tax deficiency, delivered the day after the Filing Deadline expired, was deemed to have been filed late and dismissed. Pet. App. 26.

any doubt, or where "injustice might otherwise result." *Singleton v. Wulff,* 428 U.S. 106, 121 (1976); citing *Turner v. City of Memphis*, 369 U.S. 350 (1962), *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

Neither of the circumstances the *Singleton* court relied on to "justify" resolution of an issue not passed on below were present in this case, yet, without giving the parties notice or an opportunity to be heard, the Ninth Circuit based its decision that the deficiency notice was not misaddressed on the website's statement that a "ZIP+4 Code" in the address is *likely* to include the addressee's P.O. Box number. Addressing, in turn, each of the aforementioned circumstances the *Singleton* court relied on to "justify" resolution of an issue not passed on below, first, proper resolution of the issue pertaining to the Petitioner's proper address was not assured beyond any doubt by the Ninth Circuit's decision to take judicial notice of the statement on the postal service's website. To quote the Ninth Circuit's opinion, the Postal Service's website stated that, "[T]he ZIP +4 Code will *likely* include the actual P.O. Box number in the +4 part of the ZIP Code." Pet. App. 27 (emphasis added). "Likely" simply does not equate to "beyond any doubt." While most dictionaries[13] define "likely" as probable (having a possibility of occurrence of greater than 50%), they define the phrase "beyond any doubt" as "certain," "without question," "definite," and "not to be contradicted or disproved."[14] In short, saying a

[13] *Likely*, BLACK'S LAW DICTIONARY (4th ed. 1968); Cambridge Dictionary (2021), https://dictionary.cambridge.org/us/dictionary/english/likely; Google, Definitions from Oxford Languages (last visited January 15, 2021), http://google.com (search "likely"); Dictionary.com (2021), https://www.dictionary.com/browse/likely?s=t.

[14] Merriam-Webster, beyond doubt (last visited January 20, 2021), https://www.merriam-webster.com/dictionary/beyond%20doubt; Collins Dictionary, beyond doubt (last visited January 20,

ZIP +4 code will *likely* include the actual P.O. Box number is not the same as saying a ZIP +4 code will indubitably, unquestionably, or undoubtedly include the actual P.O. Box number.

Nor was the Ninth Circuit's reliance on the Postal Service's website necessary to ensure that "injustice might otherwise result." Quite to the contrary, the Ninth Circuit's one-sided determination of a material fact "likely" to occur without affording Petitioner opportunity to be heard on the issue was inconsistent with the Fifth Amendment and a denial of Petitioner's right to due process. Although this Court has yet to directly address the issue of whether appellate *sua sponte* factual determinations violate due process, as early as 1940, this Court has accepted certiorari on the question of whether an appellate court could decide a case "on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence." *LeTulle v. Scofield*, 308 U.S. 415, 416 (1940) (decided on other grounds). This case is an excellent vehicle the Court can utilize to consider the question, and review is warranted.

The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. The deprivation of life, liberty or property by adjudication is required to be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *Lachance v. Erickson*,

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2021), https://www.collinsdictionary.com/us/dictionary/english/beyond-doubt; Google, Definitions from Macmillan Dictionary (last visited January 15, 2021), https://google.com (search "beyond any doubt").

522 U.S. 262, 266 (1998) ("[t]he core of due process is the right to notice and a meaningful opportunity to be heard"). Actions by appellate courts constitute "governmental actions that are subject to these due process guarantees." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930) (analyzing state action as denial of the Due Process Clause of the Fourteenth Amendment).

The form of due process required is determined by examining the competing interests at stake, along with the promptness and adequacy of later proceedings. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). This examination involves weighing three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the Government's interest, including the administrative burden that additional procedural requirements would impose. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Addressing the three *Mathews'* factors in turn, the Ninth Circuit's *sua sponte* decision to take judicial notice of a statement on a postal service website denied Petitioner a significant private interest, namely, its due process rights. The "core" and very "root" of the due process clause is the right to notice and a meaningful opportunity to be heard. *Lachance*, 522 U.S. at 266; *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). By *sua sponte* taking judicial notice of information listed on a website which, on its face, did not state that a ZIP+4 address always or invariably includes the P.O. Box number, to determine that a ZIP+4 address without a P.O. Box number is the same as a ZIP+4 address with a P.O.

Box, the Ninth Circuit deprived Petitioner of its right to be heard on that issue (a significant private interest), a result which the Ninth Circuit could have avoided by remanding the case to Tax Court to take additional evidence on the matter.

Second, the risk of erroneously depriving Petitioner of its due process rights was beyond doubt because the statement of which the Ninth Circuit took judicial notice *sua sponte*, and on which it based its determination that the notice of deficiency was not improperly addressed, was merely to the effect that a "ZIP+4" in the address, "… will *likely* include the actual P.O. Box number …. " Pet. App. 27 (emphasis added). And while Petitioner acknowledges that Fed. R. Evid. 201(b), quoted by the Ninth Circuit, provides that "judicial notice may be taken of official information that is posted on a government website and *that is 'not subject to reasonable dispute*,'" (emphasis added), recalling the aforementioned definitions of "likely" and "beyond any doubt," the most that can be said for the statement of which the Ninth Circuit took the judicial notice is that, while a ZIP +4 code will *likely* include the actual P.O. Box number, the possibility a ZIP +4 code will not include the actual P.O. Box number is not subject to reasonable dispute. To the contrary, it is not beyond any reasonable doubt that not every ZIP +4 code will include the actual P.O. Box number. The Ninth Circuit could have easily avoided the issue by remanding the case to Tax Court to take additional evidence on the matter.

Finally, providing notice and an opportunity to be heard on the issue would *not* have substantially impaired the Ninth Circuit's interest in efficiency, and would *not* have imposed an administrative burden. In fact, this Court has not merely

indicated a preference for requesting supplemental briefing when a court raises a new issue *sua sponte*, *Trest v. Cain*, 522 U.S. 87, 92 (1997), but has expressed a clear disfavor of courts considering arguments outside of those advanced by the parties. Consider *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal…, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id*., at 243.

"Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *James Daniel Good Real Prop*., 510 U.S. at 53; citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951).

Circuit courts have determined similarly. Notably, the Ninth Circuit has acknowledged that ruling *sua sponte* is not the norm. *Hall v. City of Los Angeles*, 697 F. 3d 1059, 1071 (9th Cir. 2012) (citing *Laboa v. Calderon*, 224 F.3d 972, 985 (9th Cir. 2000)).

With respect to taking judicial notice, *sua sponte*, of websites (as occurred in this case), in *Pickett v. Sheridan Health Care Ctr*., 664 F.3d 632, 648 (7th Cir. 2011), the Seventh Circuit stated, "[g]iven that the internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites. See further, Fed. R. Evid. 201(e), which echoes

the sentiment that parties are entitled to be heard, "[i]f the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard."

The Ninth Circuit determined the notice of deficiency was not misaddressed, not based on evidence in the record or arguments made by the parties, but by making a one-sided (*sua sponte*) determination based on a judicially noticed statement on a website which, on its face, suggested it was only "likely" to be true. Doing so without affording Petitioner the opportunity to be heard was a denial of Petitioner's rights to due process. Review by this Court is warranted to determine whether Petitioner was denied due process under these circumstances.

CONCLUSION

For the foregoing reasons, the Court should grant Organic Cannabis Foundation, LLC, DBA Organicann Health Center's Petition for Writ Of Certiorari to Review the Judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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