Docket No. 20-1267

IN THE SUPREME COURT OF THE UNITED STATES

RONALD E. BYERS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the Supreme Court of the United States denies a taxpayer a certiorari writ in a case begun in the United States Tax Court, 26 U.S.C. § 7481(a)(2)(B) provides that the Tax Court's decision "shall become final."

The first question presented is:

1. Is U.S.C. § 7481(a)(2)(B), which applies the Supreme Court of the United States' power to deny a taxpayer a certiorari writ to achieve United States Tax Court decision finality, jurisdictional?

The United States Tax Court has held that 26 U.S.C. § 7481 authorizes a "fraud on the court" exception to the finality of its decisions. The D.C. Circuit Court of Appeals has not decided whether to recognize that statutory exception. Other Circuit courts recognize it.

The second question presented is:

2. Must a party who moves the United States Tax Court for post-decision relief—while its decision is on review before this Court—satisfy the "fraud on the court" exception to U.S.C. § 7481(a)(2)(B) decision finality?

PARTIES TO THE PROCEEDING

The Petitioner is Ronald E. Byers, who was both the petitioner in the United States Tax Court and the appellant in the D.C. Circuit Court of Appeals.

The Respondent is the Commissioner of Internal Revenue, who was both the respondent in the United States Tax Court and the appellee in the D.C. Circuit Court of Appeals.

No other parties are, or were, involved in the proceeding.

RELATED PROCEEDINGS

Supreme Court of the United States:

Ronald E. Byers v. Commissioner of Internal Revenue, Docket No. 14-74, (October 6, 2014) [order denying certiorari petition]; (December 15, 2014) [order denying certiorari rehearing petition].

United States Court of Appeals (D.C. Circuit):

Ronald E. Byers v. Commissioner of Internal Revenue, Docket No. 12-1351, (January 17, 2014) [opinion affirming U.S. Tax Court summary judgment-based decision].

United States Tax Court:

Ronald E. Byers v. Commissioner of Internal Revenue, Docket No. 3032-10L (January 30, 2012) [opinion that the Commissioner of Internal Revenue is entitled to summary judgment]; (February 13, 2012) [summary judgment-based decision entered for the Commissioner].

TABLE OF CONTENTS

Table of Contents (cont'd):

Page

TABLE OF AUTHORITIES

Page

Cases:

Table of Authorities (cont'd):

Table of Authorities (cont'd):

Page

Rules:

Other Authority:

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The Court is petitioned to review its own power to render a United States Tax Court decision final. The courts below concluded that the Court's certiorari denial power, under 26 U.S.C. § 7481(a)(2)(B), is jurisdictional: it strips the Tax Court of jurisdiction to consider pending post-decision motions. That statute, however, reads like a non-jurisdictional congressional prescription.

The Court's further review is warranted because it would clarify its recent jurisdictional versus non-jurisdictional case line.

Ronald E. Byers therefore respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the D.C. Circuit Court of Appeals is unpublished. The supplemental memorandum opinion of the United States Tax Court is published at T.C. Memo 2019-76 (slip opinion).

JURISDICTION

The D.C. Circuit Court of Appeals entered its order on April 17, 2020. It then denied Mr. Byers' petitions for panel and en banc rehearing on July 29, 2020.

Mr. Byers mailed his certiorari petition to the Court by its December 28, 2020 due date. *See* S. Ct. Rules 13.1, 29.2, 30.1; U.S. Supreme Court March 19, 2020, dated order (generally extending certiorari petition due date "to 150 days from the date of the...order denying a timely petition for rehearing.").

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

(1) Section 7481 of Title 26 of the United States Code provides in pertinent part:

> "The decision of the Tax Court shall become final-
>
> "...Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals...."

26 U.S.C. § 7481(a)(2)(B).

(2) Section 7453 of Title 26 of the United States Code provides:

> "Except in the case of proceedings conducted under section 7436(c) or 7463, the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the Federal Rules of Evidence."

(3) Rule 162 of the United States Tax Court Rules of Practice & Procedure provides:

> "Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

STATEMENT

The questions that this petition presents arise from this Court's orders in a simultaneous related proceeding.

In those orders, the Court denied Mr. Byers a certiorari writ in a case where the D.C. Circuit Court of Appeals had affirmed the United States Tax Court's summary judgment-based decision. Before this Court so acted, the Tax Court had filed Mr. Byers' motion for leave to file a motion to vacate the same decision. One month after this Court denied Mr. Byers a certiorari writ, the Tax Court summarily denied his pending leave motion. Mr. Byers appealed.

After a case remand, the Tax Court opined that "the case had become final" when this Court denied Mr. Byers certiorari. The D.C. Circuit then concluded that when the Tax Court ruled on Mr. Byers' motion, it could not grant him relief because it "lacked jurisdiction." That is, "unless an exception for fraud on the court applies."

Mr. Byers now petitions this Court to review the D.C. Circuit's order, which (a) construes 26 U.S.C. § 7481(a)(2)(B) as a jurisdiction-stripping statute, unless one (b) shows "fraud on the court" occurred.

A. Statutory and Rule Background

This petition maintains that 26 U.S.C. § 7481(a)(2)(B), which applies the Court's certiorari denial power to effect U.S. Tax Court decision finality, is non-jurisdictional. This petition also illustrates that both 26 U.S.C. § 7453 and Rule 162 of the U.S. Tax Court Rules of Practice & Procedure demonstrate how 26 U.S.C. § 7481(a)(2)(B) is non-jurisdictional.

That statutory and rule background is—

1. Section 7481 of Title 26 of the United States Code (the Internal Revenue Code) provides several instances when a United States Tax Court decision "shall become final." Many of those instances involve this Court's powers to hear and to decide petitions and cases.

In one instance, a U.S. Tax Court decision "shall become final...[u]pon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals." 26 U.S.C. § 7481(a)(2)(B).

For section 7481 purposes, the Internal Revenue Code does not define the term "final." The section 7481 text does not use the term "jurisdiction" or "jurisdictional."

The Tax Court does not consider the section 7481 term "final" to mean irrevocable. Nor do many federal courts of appeal. The Tax Court, and those appeals courts, have concluded that a "fraud on the court" exception to U.S. Tax Court decision finality exists.

In contrast, as its operative order below acknowledges, the D.C. Circuit has not recognized a "fraud on the court" exception to U.S. Tax Court decision finality. See *Byers v. Commissioner*, Dkt. No. 15-1100, order dated April 17, 2020 (stating "[t]his court need not decide at this juncture whether it recognizes such an exception.").

2. Unlike proceedings in a United States District Court, proceedings in the United States Tax Court are not governed by the Federal Rules of Civil Procedure. Instead, the Internal Revenue Code directs the U.S. Tax Court to make its own practice and procedure rules.

Section 7453 of the Internal Revenue Code directs that U.S. Tax Court proceedings "shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the Federal Rules of Evidence."

"At a minimum," 26 U.S.C. § 7453 authorizes the Tax Court to issue rules that are "reasonably necessary to the orderly functioning of its own practice." *Daccarett-Ghia v. Commissioner of Internal Revenue*, 70 F. 3d 621, 625 (D.C. Cir. 1995).

3. One rule that the Tax Court issued under its 26 U.S.C. § 7453 authority is Tax Court Rule 162. That rule applies to "any" motion to vacate or revise a Tax Court decision. Generally, Rule 162 requires that such a motion be filed within 30 days of the Tax Court has entered its decision. That is, unless the Tax Court shall otherwise "permit."

B. Material Background Facts

After an adverse United States Tax Court tax deficiency decision, see *Byers v. Commissioner of Internal Revenue*, T.C. Memo. 2007-331, Mr. Byers owed the United States for four periods of assessed federal income taxes and related amounts. When it did not receive full payment, the Internal Revenue Service issued Mr. Byers a Final Notice of Intent to Levy under 26 U.S.C. § 6330(a).

The Final Notice informed Mr. Byers that the IRS would collect the unpaid taxes and related amounts from him by levy on his assets. According to the Final Notice, for each of the four tax periods Mr. Byers owed a substantial "Late Payment Penalty."

The Final Notice also offered Mr. Byers the right to request, within 30 days, a Collection Due Process levy hearing before the IRS Office of Appeals. See 26 U.S.C. § 6330(b)(1). Mr. Byers timely requested a Collection Due Process levy hearing.

The IRS Office of Appeals duly held Mr. Byers' Collection Due Process levy hearing. At its conclusion, that Office issued Mr. Byers a statutory Notice of Determination. *See* 26 C.F.R. § 301.6330-1(e)(3)

Q&A-E8(i). In its Notice of Determination, the IRS Office of Appeals sustained the IRS's intended levy action.

The Notice of Determination also told Mr. Byers that he had the right, within 30 days, to appeal the IRS Office of Appeals' levy determination to the United States Tax Court. See 26 C.F.R. § 301.6330-1(e)(3) Q&A-E8(i).

C. Prior Proceedings

Mr. Byers timely petitioned the United States Tax Court for review of the IRS Office of Appeals' Collection Due Process levy determination. *See* 26 U.S.C. § 6330(d)(1).

During the Tax Court proceedings, Mr. Byers served the Commissioner with formal admission requests. See Tax Court Rule 90. In one admission request response, the Commissioner admitted, without qualification, that each "Late Payment Penalty" shown on his Final Notice of Intent to Levy is an assessed 26 U.S.C. § 6651(a)(3) tax penalty. That penalty amounts to twenty-five percent of each deficiency assessment that the IRS seeks to collect from Mr. Byers by levy.

Ultimately, the Commissioner moved the Tax Court for summary judgment on all issues. Over Mr. Byers' objections, the Tax Court granted that motion and entered its decision. The Tax Court then denied Mr. Byers' timely motion to vacate its decision.

Mr. Byers then appealed the Tax Court's summary judgment-based decision to the D.C. Circuit Court of Appeals. After briefing and oral argument, that court affirmed the Tax Court's decision. Mr. Byers then petitioned for panel and en banc rehearings, which petitions the D.C. Circuit denied.

At that time, Mr. Byers' 90-day period to seek a certiorari writ began to run. During this period, however, he had another Collection Due Process hearing pending before the IRS Office of Appeals that would lead him to file this certiorari petition.

Mr. Byers' other Collection Due Process hearing involved the same taxes and tax periods that were at issue in his Collection Due Process case that was then in its 90-day certiorari period. The hearing and the case differed only in their IRS tax collection actions. The Collection Due Process hearing reviewed a Notice of Federal Tax Lien that the IRS had recently filed against Mr. Byers. See 26 U.S.C. § 6320(a). Mr. Byers' pending Collection Due Process case, as described above, reviewed a Final Notice of Intent to Levy. See 26 U.S.C. § 6330(a).

During Mr. Byers' Collection Due Process lien hearing, his IRS Office of Appeals hearing officer disclosed to him some startling information. That is, the IRS had not assessed against Mr. Byers any "Late Payment Penalty" under 26 U.S.C. § 6651(a)(3) for either of the four tax periods also at issue in his pending Collection Due Process levy case. That authoritative information belied the Commissioner's key filings in Mr. Byers' Tax Court case.

As it turned out, the Commissioner had obtained the Tax Court's summary judgment award through substantive false statements. In his formal admission responses, the Commissioner falsely stated that he had assessed against Mr. Byers each 26 U.S.C. § 6651(a)(3) "Late Payment Penalty" that his Final Notice of Intent to Levy sought to collect. In his summary judgment motion, the Commissioner falsely stated that, after his diligent search through the administrative record, he could not find any genuine issue of material fact that would prevent his receiving summary judgment on all issues. When the Tax Court ruled on the Commissioner's summary judgment motion, it relied on the Commissioner's false admission response and his false motion statement. See Tax Court Rule 121(a).

At first, Mr. Byers was at a loss about what to do with the new evidence that his IRS Office of Appeals' Collection Due Process lien hearing officer had disclosed to him. He then decided to take a two-pronged approach.

First, Mr. Byers petitioned this Court for a writ of certiorari. He asked the Court to review the D.C. Circuit's judgment that had affirmed the Tax Court's summary judgment-based decision.

Second, Mr. Byers moved the Tax Court for leave to file a late motion to vacate its summary-judgment based decision. He informed the Tax Court about his newly-discovered evidence. He characterized the Commissioner's actions during his Tax Court case as "fraudulent." He called the Tax Court's attention to his related pending certiorari petition. And he even mentioned potential decision finality under

26 U.S.C. § 7481(a)(2)(B). On August 19, 2014, the Tax Court filed Mr. Byers' leave motion and lodged his decision vacatur motion; it would not act on those motions anytime soon.

Instead, this Court beat the Tax Court to the docket sheet—twice. It denied Mr. Byers' certiorari petition on October 6, 2014. He then filed a certiorari rehearing petition. The Court denied that petition on December 15, 2014.

D. Present Proceedings

The Tax Court would keep Mr. Byers' post-decision motions before it, without action, for 148 days. Twenty-nine days after this Court denied his certiorari bid, the Tax Court issued its order on Mr. Byers' leave motion. The ruling: "DENIED." (Reproduced literally).

But Mr. Byers' litigation efforts continued. He appealed the Tax Court's summary denial order to the D.C. Circuit Court of Appeals.

On appeal, the Commissioner moved for summary affirmance. Mr. Byers objected. He also sought a record remand. His remand request urged that the D.C. Circuit direct the Tax Court to state whether its one-word order was a ruling on the merits or on its jurisdiction. The D.C. Circuit denied the Commissioner's summary affirmance motion, granted Mr. Byers' record remand request, and remanded the case. The D.C. Circuit's remand order directed the Tax Court to " to clarify the legal grounds and reasoning underlying its January 13, 2015 order denying [Mr. Byers'] motion for leave to file a motion to vacate."

On remand, the Tax Court issued a supplemental memorandum opinion. The Tax Court opined that it generally "lacks jurisdiction to vacate a decision once it becomes final." The Tax Court then noted that it and "some Courts of Appeals recognize an exception to the finality rule if there has been fraud on the court."

As the Tax Court saw it, when it denied Mr. Byers' leave motion, "the case had become final." Yet the Tax Court concluded that it could apply the "fraud on the court" exception to its decision finality; that is, if Mr. Byers' leave motion, or his underlying vacatur motion, "show that [the Commissioner] engaged in fraudulent conduct that was intended to mislead the Court and that the fraudulent conduct materially affected the outcome of the case."

The Tax Court, though, found that Mr. Byers "has not shown that [the Commissioner] intended to conceal information or mislead the Court or that [the Commissioner] committed fraud on the Court." Thus, the Tax Court concluded, Mr. Byers "failed to establish a prima facie case for granting the motion underlying his motion for leave, and the motion for leave was properly denied." As a result, the Tax Court ordered that Mr. Byers' August 19, 2014 filed leave motion "remains denied."

Dissatisfied with the Tax Court's opinion and order, Mr. Byers appealed the order to the D.C. Circuit Court of Appeals. Again, the Commissioner moved for summary affirmance. This time, the D.C. Circuit granted the Commissioner's summary affirmance motion.

The D.C. Circuit's order drew two legal conclusions key to this petition:

(1) under 26 U.S.C. § 7481(a)(2)(B), the Tax Court's summary judgment-based decision "became final" on December 15, 2014, when this Court denied Mr. Byers a certiorari writ; the Tax Court therefore could not then grant Mr. Byers post-decision relief as it "lacked jurisdiction"; and

(2) the D.C. Circuit need not decide whether it recognizes the "fraud on the court" exception to 26 U.S.C. § 7481 Tax Court decision finality: Mr. Byers' August 19, 2014 Tax Court filings have "not demonstrated that fraud on the court occurred in this case."

Mr. Byers now seeks this Court's further review.

REASONS FOR GRANTING THE PETITION

In recent years, this Court has recognized that a question of exceptional national importance is whether a federal statute speaks in jurisdictional, or in non-jurisdictional, terms. This petition asks the Court to decide whether a statute in which Congress invokes the Court's own certiorari denial power is jurisdictional or non-jurisdictional.

The Court has said that it must "bring some discipline" to the use of the term "jurisdictional." *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Both courts below concluded that 26 U.S.C. § 7481(a)(2)(B), which applies this Court's certiorari denial power to U.S. Tax Court decision finality, is "jurisdictional." Consequently, they decided, in each case this Court's statutory power strips the Tax Court of its jurisdiction to hear all pending post-decision matters. But given the Court's recent jurisprudential trend, 26 U.S.C. § 7481(a)(2)(B) is non-jurisdictional.

I. The Questions Presented Warrant Further Review

Until recently, "jurisdiction" had become a term of "many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). Now, though, this Court has chosen to both clarify and narrow what the term "jurisdiction" means. See *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1849-50 (2019) (collecting cases). The Court's granting this petition would bring more than only "some discipline" to the use of the term "jurisdictional." All concerned with law and order in this Republic would take notice if the Court fastened the non-jurisdictional label to a statute that invokes the Court's own power.

A. The finality statute that invokes the Supreme Court of the United States' certiorari denial power in cases that involve United States Tax Court decisions, 26 U.S.C. § 7481(a)(2)(B), is non-jurisdictional.

When Congress does not clearly say that a statutory matter is "jurisdictional," that statutory matter is non-jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). This "clear statement rule" applies even when the statutory matter invokes the Supreme Court of the United States' certiorari denial power.

Within 26 U.S.C. § 7481, Congress describes several instances when a United States Tax Court decision "shall become final." One instance is when this Court denies certiorari "if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals." 26 U.S.C. § 7481(a)(2)(B).

In 26 U.S.C. § 7481(a)(2)(B), Congress did not make a clear statement that its provisions are jurisdictional. Of course, Congress need not "incant magic words in order to speak clearly." *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013). Yet Congress can satisfy this Court's "clear statement" rule here only if § 7481(a)(2)(B) "expressly refers to subject-matter jurisdiction or speaks in jurisdictional terms." *Musacchio v. United States*, 136 S. Ct. 709, 717, (2016) (citations and quotation omitted) (finding 18 U.S.C. § 3282(a) non-jurisdictional).

The Tax Court decision finality provision in 26 U.S.C. § 7481(a)(2)(B), however, does not mention jurisdiction. See *Musacchio, supra*, 136 S. Ct. at 717. Nor does it speak in jurisdictional terms. See

Id. Congress therefore did not make a clear statement that 26 U.S.C. § 7481(a)(2)(B) is jurisdictional. See *Arbaugh, supra*, at 515-16.

The courts below did not attempt to look for Congress's clear jurisdictional statement. For the D.C. Circuit's part, it concluded:

(a) the Tax Court's summary-judgment based decision became "final" when this Court denied Mr. Byers a certiorari writ, and

(b) the Tax Court "therefore lacked jurisdiction to grant a motion to vacate" its decision when it ruled on his post-decision leave motion.

No legal analysis. One authority. A cite to 26 U.S.C. § 7481(a)(2)(B).

Moreover, the D.C. Circuit's undisciplined jurisdictional conclusion came in an order that ruled on a summary affirmance motion. That motion is granted only when "[t]he merits of the parties' positions are so clear as to warrant summary action." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Under that standard, though, any D.C. Circuit summary action should have been reversal.

At best, when 26 U.S.C. § 7481(a)(2)(B) provides that "...the decision of the Tax Court shall become final...." it seems to employ mandatory language. Such mandatory language (if that is what it is), though, does not make 26 U.S.C. § 7481(a)(2)(B) jurisdictional. See *Musacchio, supra,* at 717.

Anyway, 26 U.S.C. § 7481(a)(2)(B) lacks mandatory language. For when Congress plainly says there that a United States Tax Court decision is "final," it does not mean that decision is irrevocable. Indeed, several federal courts of appeals, and the United States Tax Court, have so held. In fact, both courts below concluded that Mr. Byers lost his case because he failed to show that the Tax Court's decision was *not* irrevocable. As its term "final" does not mean irrevocable, for that reason too, 26 U.S.C. § 7481(a)(2)(B) is non-jurisdictional.

Congress did not satisfy the "clear statement" rule when it invoked the Court's certiorari denial power in a statute, 26 U.S.C. § 7481(a)(2)(B), that provides when a U.S. Tax Court decision becomes final. As a result, "courts should treat [26 U.S.C. § 7481(a)(2)(B)] as non-jurisdictional in character." *Fort Bend County, Texas v. Davis,* 139

S. Ct. 1843, 1850 (2019) (citing and quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006)). The Court should use this case, which involves its own power, to instruct that its *Arbaugh* case line is command, not suggestion.

B. Because 26 U.S.C. § 7481(a)(2)(B) is non-jurisdictional, it cannot cause the Supreme Court of the United States' certiorari denial power to strip the United States Tax Court of its post-decision jurisdiction.

Absent Congress's clear statement that 26 U.S.C. § 7481(a)(2)(B) is jurisdictional, the Court's certiorari denial power invoked there is not a United States Tax Court jurisdiction-stripping power.

Indeed, the Tax Court is an Article I court. 26 U.S.C. § 7441. As such, the Tax Court is said to have a "strictly limited jurisdiction." *Bartman v. Commissioner*, 446 F.3d 785, 787 (8th Cir. 2006) (quoting *Kelley v. Commissioner*, 45 F.3d 348, 351 (9th Cir. 1995)). No court, however, questions that the Tax Court's strictly limited jurisdiction includes the power to hear a case matter post-decision.

Further, U.S.C. § 7481(a)(2)(B) does not clearly state that the Tax Court loses its post-decision jurisdiction once this Court exercises its certiorari denial power in the same case. For good reason too.

In such a two-sided case, the Court's certiorari denial power will end litigation that seeks review of the Tax Court's decision on a pre-decision record. Yet that power will not affect the Tax Court's jurisdiction to decide pending post-decision motions that seek relief based on events that occurred or were discovered post-decision.

To amplify the point, the Article I United States Tax Court possesses the power to prescribe its own rules of practice and procedure. See 26 U.S.C. § 7453. Under that statute, the Tax Court prescribed its Rule 162. Tax Court Rule 162 allows a party to file a motion to vacate, or revise, his Tax Court decision. His motion may seek a new or further trial. He must file his motion within 30 days after the Tax Court has entered its decision; unless, that is, "the [Tax] Court should otherwise permit."

As 26 U.S.C. § 7453 expressly authorizes the Tax Court's rulemaking power, its Rule 162 is akin to a legislative regulation. That Rule therefore has "the force and effect of law."

Taken together, 26 U.S.C. §§ 7481(a)(2)(B) and 7453, plus Tax Court Rule 162, preserves, rather than defeats, the Tax Court's post-decision jurisdiction. Both 26 U.S.C. § 7453 and Tax Court Rule 162 vest the Tax Court with jurisdiction to resolve post-decision matters brought before it in a case while its decision is before this Court. In turn, 26 U.S.C. § 7481(a)(2)(B) allows this Court to wield its certiorari denial power in that same case without stripping the Tax Court of its jurisdiction to resolve those post-decision matters.

In recent years, the Court has sought "'[t]o ward off profligate use'" of the term "jurisdiction." *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 (2019) (citing and quoting *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013)). So courts' traditional construction tools "must plainly show" that Congress meant for a statute to have "jurisdictional consequences." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015). But those tools show that Congress has not satisfied the "clear statement" rule in 26 U.S.C. § 7481(a)(2)(B). The Court therefore should review Congress's invocation of its own certiorari denial power in that statute and hold that 26 U.S.C. § 7481(a)(2)(B) is non-jurisdictional.

II. The Decision Below Is Incorrect

The D.C. Circuit below incorrectly assumed that 26 U.S.C. § 7481(a)(2)(B) is jurisdictional. As a result, Mr. Byers could prevail in his case only if he were a better prophesier than he was a pro se. But he required not tea leaves, but leaves: leave to amend his post-decision motions or leave to file his decision vacatur motion.

A. If a taxpayer moves the United States Tax Court for post-decision relief, while that decision is before this Court, he need not show that the "fraud on the court" exception to statutory Tax Court decision finality applies.

As the D.C. Circuit below saw it, when this Court denied Mr. Byers' certiorari bid, he had but one option. He had to show the Tax Court in his post-decision relief motions that the "fraud on the court" jurisdictional exception to its 26 U.S.C. § 7481(a)(2)(B) decision finality applied.

One problem:

Mr. Byers had already filed and lodged his post-decision relief motions—nearly four months before the Court denied his certiorari bid; well before the Tax Court's decision was even arguably final.

So Mr. Byers could have prevailed on his Tax Court post-decision relief motions only if he anticipated in them that—

(1) this Court would deny his certiorari bid;

(2) this Court would beat the Tax Court to the docket sheet, it would enter its certiorari denial order before the Tax Court could enter its motion relief order; and

(3) he must show that the Commissioner committed fraud on the court, to avoid 26 U.S.C. § 7481(a)(2)(B) Tax Court decision finality and its concomitant jurisdictional bar.

Well, this Court did warn litigants that the jurisdictional consequences to them could be "drastic." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

Yet Mr. Byers did not need to suffer any jurisdictional consequences. His post-decision relief motions presented the Tax Court with newly-discovered evidence. Those motions showed the Tax Court how, could Mr. Byers have been aware of that evidence then, he would have used it to defeat the Commissioner's summary judgment motion "on all issues in this case."

When Mr. Byers filed and lodged his post-decision relief motions, he was not obliged to say in them anything more than he did. He did not then need to, as the D.C. Circuit below concluded, "demonstrate[ ] that fraud on the court occurred in this case." Indeed, any Tax Court decision finality, or jurisdictional, issue was then speculative or unripe.

The courts below committed harmful error when they insisted that Mr. Byers' pre-certiorari denial post-decision motions were obliged to argue a speculative or unripe issue. The Court should now remedy that error.

Each court below had a correct way to address Mr. Byers' motions. In fact, they had two correct ways.

B. The courts below should have permitted Mr. Byers to amend his post-decision motions to show that the Commissioner had obtained a summary judgment-based decision by committing fraud on the court.

In the law, too, "timing is everything."

The D.C. Circuit below concluded that Mr. Byers "has not shown that [the Commissioner] intentionally misled the Tax Court with respect to the formal assessment status of a failure-to-pay penalty charged to [Mr. Byers] pursuant to 26 U.S.C. § 6651(a)(3)." But the timing of Mr. Byers' post-decision motions to the Tax Court is everything.

Again, when he filed and lodged his post-decision motions, Mr. Byers was not obliged to show that anyone had "intentionally misled" anyone else. If, however, Mr. Byers *later* became obliged to show that the Commissioner had intentionally misled the Tax Court on a material matter, then the courts below had a simple solution available to them. Either court could have permitted Mr. Byers to amend his post-decision motions. He then could have made the, procedurally proper, showing that the Commissioner had obtained a summary judgment-based decision through fraud on the court.

One of the courts below should have granted Mr. Byers leave to amend his post-decision motions. This Court can ensure that it does so.

Or it can do something else.

C. The courts below should have granted Mr. Byers' post-decision motions for leave and for decision vacatur.

The Tax Court's decision below rests on a summary judgment award. Mr. Byers' post-decision relief motions, however, showed the Tax Court newly-discovered evidence that unearthed a genuine disputed issue of material fact.

As the D.C. Circuit framed that genuine disputed issue of material fact, "the formal assessment status of a failure-to-pay penalty charged to [Mr. Byers] pursuant to 26 U.S.C. § 6651(a)(3)." Make that four such issues, one for each of the four tax periods involved.

Those penalties' respective formal assessment status is a genuine issue because the Commissioner intends to collect them from Mr. Byers by levy action. But administrative assessment must precede administrative collection. See 26 U.S.C. §§ 6201(a), 6203, 6303(a), 6331(a).

On that penalty assessment issue, the D.C. Circuit's conclusion below was limited. It concluded merely that the Commissioner had not "intentionally misled" the Tax Court about the issue. That conclusion implies that Mr. Byers had shown the Tax Court that the Commissioner was never entitled to summary judgment "on all issues."

But for the D.C. Circuit's "drive-by jurisdictional ruling," see *Steel Co. v. Citizens for a Better Environment*, 523 US 83, 91 (1998)), Mr. Byers would have prevailed below on the merits. This Court should ensure that he prevails there, on that ground, now.

CONCLUSION

1. The Court should grant this petition for a writ of certiorari, then order full briefing and oral argument by Mr. Byers' stand-by U.S. Supreme Court Bar counsel.

2. As an alternative, the Court should grant this petition for a writ of certiorari, vacate the D.C. Circuit Court of Appeals' order, and remand the case to that Court with instructions to order full briefing.

3. As a second alternative, the Court should grant this petition for a writ of certiorari, vacate the D.C. Circuit Court of Appeals' order, and remand the case to that Court with instructions that it (a) vacate the Tax Court's motion order, (b) direct the Tax Court to grant Mr. Byers leave to either (i) file his vacatur motion or (ii) amend his post-decision motions, and (c) remand the case.

Respectfully submitted:

Date: Dec. 26th, 2020

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