

No. 22-291

In the
Supreme Court of the United States

BRIAN McLANE
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

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

**BRIEF OF TAX FREEDOM INSTITUTE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. A rare opportunity exists to affirm the remedy Congress intended for taxpayers.....	4
II. The plain language of § 6330(c)(2)(B) impels the conclusion that Congress intended that the Tax Court determine the correct amount of tax.....	10
III. To deny Tax Court jurisdiction over Petitioner's claim of overpayment is to deny Petitioner equal protection and due process	13
CONCLUSION	15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Commissioner v. Lundy</i> , 516 U.S. 235 (1996)	5, 7
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	8
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 112 S. Ct. 2589 (1992)	10
<i>James v. Commissioner of Internal Revenue</i> , 850 F.3d 160 (4th Cir. 2017)	7-10
<i>McLane v. Commissioner of Revenue</i> , 24 F.4th 316 (4th Cir. 2022)	9-11, 13
<i>Railway Express Agency Inc. v. New York</i> , 336 U.S. 106 (1949)	15

CONSTITUTIONAL PROVISIONS

Fifth Amendment	4, 14-15
-----------------------	----------

FEDERAL STATUTES

26 U.S.C. § 6214	13
26 U.S.C. § 6320	4
26 U.S.C. § 6330	4, 8, 9

TABLE OF AUTHORITIES
(continued)

26 U.S.C. § 6330(c)(2)(A)	13
26 U.S.C. § 6330(c)(2)(B)	3, 8, 9, 10, 13
26 U.S.C. § 6512	13
26 U.S.C. § 6512(b)(1).....	6
26 U.S.C. § 6512(b)(3)(B).....	7

PUBLIC LAWS

Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, July 22, 1998, 112 Stat. 685	2, 3, 14, 15
Revenue Act of 1926, Ch. 27, 44 Stat. 9.....	6
Revenue Act of 1934, Ch. 277, 48 Stat. 680.....	6, 7
Revenue Act of 1942 Ch. 619, 56 Stat. 877.....	7

OTHER SOURCES

Dubroff, H. and B. Hellwig, <i>The United States Tax Court: An Historical Analysis</i> (2014).	6
H.R. Rep. No. 73-704 (1934).....	7

TABLE OF AUTHORITIES
(continued)

<i>IRS 2019 Data Book,</i> Publication 55-B (6-2020).	4
<i>The Oxford Dictionary and Thesaurus:</i> <i>American Edition</i> , New York: Oxford University Press, Inc. (1996)	11
<i>Webster's New Twentieth Century Dictionary,</i> <i>Unabridged</i> , William Collins and World Publishing Co., Inc., 2d ed. (1978).....	11-12

INTEREST OF *AMICUS CURIAE*¹

Tax Freedom Institute, Inc. (TFI), organized and in operation since 1993, is a national association of private practice attorneys, CPAs, and Enrolled Agents specifically engaged in representing taxpayers before the IRS, and where authorized, before the federal courts of the United States. TFI membership consists of approximately ninety legal and accounting firms, whose practices are, in large part, dedicated to:

- 1) the defense of taxpayers' rights in audits, appeals and collection matters,
- 2) tax delinquency problems resolution,
- 3) IRS abuse prevention and cure, and
- 4) criminal tax defense.

As an IRS-authorized continuing education provider, TFI develops and presents, on an ongoing basis, professional educational material designed and intended to keep its members on the cutting edge of taxpayers' rights issues and the tax policy debate. TFI presents a full two-day federal tax seminar each year.

The founder and executive director of TFI, Daniel J. Pilla, a U.S Tax Court practitioner, was a consultant to the National Commission on Restructuring the Internal Revenue Service, and he provided testimony to the Senate Finance Committee during

¹ It is hereby certified that the parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that all parties have extended written permission to file this brief; that no counsel for a party or a party to this case authored this brief in whole or in part; and that no person other than the *Amicus Curiae*, and its friends, made a monetary contribution to its preparation or submission.

its widely publicized hearings on IRS abuse in the 1990s. It was those hearings which eventually led to the *Internal Revenue Service Restructuring and Reform Act of 1998* (RRA). It is a provision of the that same RRA which is at issue here: when persons who did not receive an IRS notice of deficiency (for a year in which the IRS determined a deficiency) subsequently receive notice of lien or levy and request a hearing under the RRA to “challenge the existence or *amount* of the underlying tax liability” (emphasis added), does the right to a *de novo* Tax Court determination of that tax liability include the right to a determination of *overpayments* resulting in refunds (or credits)?

Several TFI members have been involved in cases involving *non-receipt* of a mailed notice of deficiency. Many times, there is a lack of evidence that the IRS ever mailed a required notice of deficiency to the taxpayer, thus raising the issue of the taxpayer’s right — upon otherwise receiving official notice of an IRS-determined tax liability — to be *treated the same* as taxpayers who *did* receive a notice. In their decisions in this case, the Tax Court and the Fourth Circuit summarily and without authority denied a taxpayer equal treatment, despite the RRA’s provision for challenging tax liability.

Millions of taxpayers, and TFI clients in particular, will benefit from this Court’s review and clarification of taxpayer rights and Tax Court jurisdiction under the RRA. Since the RRA was passed nearly 25 years ago, TFI is aware of no case presented to the Court like the instant case, which is directly on point.

Thus, it is likely the instant first-impression case represents a unique opportunity for this Court to survey and clarify the RRA for the TFI and its clients, nationwide tax lawyers and tax clinics, and

above all, the Tax Court, the IRS Appeals Office, and the Circuit Courts of Appeal.

SUMMARY OF ARGUMENT

The evolution of the Tax Court from inception demonstrates the growing reliance by Congress on that forum to fully determine the deficiency issues committed to its jurisdiction. Gradually, Congress bestowed jurisdiction to the Tax Court to determine, not just amounts of additional tax due when the IRS had asserted a deficiency, but overpayments when it appeared that the taxpayer had in fact overpaid the taxes due. In passing the RRA, Congress continued this jurisdiction of the Tax Court to make such determinations, but now extended it to cases wherein the first notice of a deficiency *received* by the taxpayer was actually a notice of levy or lien rather than the requisite notice of deficiency.

Petitioner sought to have the Fourth Circuit affirm his unfettered right to due process of law as set forth in the Internal Revenue Code section at issue, 26 U.S.C. §6330(c)(2)(B), which unequivocally guaranteed him in this case the right — before the IRS and in the U.S. Tax Court — to “challenge the existence or *amount* of the underlying tax liability.”

The Fourth Circuit, however, ignored the plain meaning of the statutory provision, and effectively held that Congress had created two classes of taxpayers — those who had received notices of deficiency, and could therefore have their claims of overpayment adjudicated by the Tax Court — and those whose first notice of any deficiency was a collection notice, and whose claims of overpayment were thus barred from adjudication. This distinction, created by the Fourth Circuit, and not Congress,

results in denial of equal protection under the Fifth Amendment for those who never received a notice of deficiency.

ARGUMENT

I. A RARE OPPORTUNITY EXISTS TO AFFIRM THE REMEDY CONGRESS INTENDED FOR TAXPAYERS

The RRA’s Collection Due Process (CDP) hearing procedures, codified at 26 U.S.C. §§6320 and 6330, are among the most important taxpayers’ rights in the Internal Revenue Code. The reason is the sheer number of citizens who annually face potential enforced collection action by the IRS. For example, in 2018 and 2019, respectively, there were 14.895 million and 13.185 million “taxpayer delinquent accounts” in the IRS’s collection inventory. *IRS 2019 Data Book*, Table 25, pg 60, Publication 55-B (6-2020). These delinquent accounts often led to enforcement action.

The following table, with data taken from the *IRS 2019 Data Book*, *supra*, illustrates the enforcement actions taken during those same periods:

<u>YEAR</u>	<u>LIENS FILED</u>	<u>LEVIES EXECUTED</u>
2018	410,220	639,025
2019	543,604	782,735
<i>TOTAL</i>	953,824	1,421,760

Thus, in just two years, as many as 2.3 million people were legally entitled to receive a Collection Due Process Lien (§6320) or Levy (§6330) notice, together with the unfettered right to proceed with a CDP hearing before IRS Appeals, with review, if

necessary, of the Appeals decision by the Tax Court. Given the sheer volume of cases potentially involving CDP hearing rights and remedies, any improper rule for the adjudication of such rights and remedies will deny to many the remedy fashioned by Congress.

As seen throughout the course of this case, the issue of the extent of Tax Court jurisdiction to determine overpayments when a person challenges the tax liability of any tax period pursuant to § 6330(c)(2)(B) is of concern to legal experts involved in representing or assisting many taxpayers: at the Tax Court: a brief *amicus curiae* was filed by the University of the District of Columbia David A. Clarke School of Law Tax Clinic;² at the Fourth Circuit, briefs *amici curiae* were filed by TFI and the American College of Tax Counsel; Diruzzo & Company³ of Fort Lauderdale briefed and argued McLane’s case before the Fourth Circuit *pro bono*.

Given the fact that the majority of taxpayers who challenge notices of deficiency and lien and levy notices are *pro se*, it is unlikely that another case presenting the overpayment jurisdiction of the Tax Court in the context of a CDP hearing challenge to tax liability will soon rise to this Court for adjudication and guidance. This case is a straightforward application of a remedy which Congress enacted, but which the lower courts are, in Amicus’ view, denying to those very taxpayers Congress sought to assist. Guidance is as sorely needed as it was in *Commissioner v. Lundy*, 516 U.S. 235 (1996).

² Jacqueline Lainez-Flanagan (Professor), Carlton M. Smith (former Acting Director of Harvard Federal Tax Clinic; former Director, Benjamin N. Cardozo Law School Tax Clinic) and Roxy Araghi (student).

³ Specializing in complex civil litigation; extensive experience before U.S. Tax Court.

While overpayment jurisdiction has evolved in the interest of both taxpayers and judicial efficiency, this Court has previously been required to step in and provide guidance.

The present overpayment jurisdiction of the Tax Court has evolved and been clarified by Congress and this Court over the years. Nearly a hundred years ago, the Revenue Act of 1926, ch. 27, 44 Stat. 9, provided that if a taxpayer petitioned the Board of Tax Appeals (now Tax Court) to redetermine a deficiency assertion, and the Board found that no deficiency existed, it also could determine that the taxpayer had made an overpayment of tax for the year in question. §§ 284(e), 319(c) of 44 Stat. 67, 84, now codified at I.R.C. § 6512(b)(1). Confusion arose, however, over what would happen if a taxpayer made tax payments *after* filing a petition; the Board decided any such payments would not be included for the purpose of an overpayment,⁴ naturally causing taxpayers to hold off on paying any taxes until the deficiency was completely determined, and thus potentially incurring additional penalties and interest. Congress remedied this situation with the passage of the Revenue Act of 1934, ch. 277, 48 Stat. 680. Section 504 of that Act was designed to ensure that a proceeding before the Board would result in a *complete disposition* of the case, without the taxpayer needing to attempt further legal resolution:

The amendment made confers jurisdiction upon the Board of Tax Appeals to determine not only that the taxpayer has made an

⁴ See Dubroff, H. and B. Hellwig, *The United States Tax Court: An Historical Analysis* (2014), p. 303. https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf

overpayment of tax, but also whether such overpayment is refundable, so that the proceedings before the Board may result in a complete disposition of the tax case being considered.

H.R. Rep. No. 73-704, p. 38 (1934).

In 1942, Congress amended the statute again to allow credit or refund if the mailing of the deficiency notice that resulted in the Board proceeding was within the statutory period of the overpayment. Thus, whether or not the original petition claimed an overpayment, a claim would not be time barred if it could have been validly made at the time the notice was mailed. This was codified at I.R.C. § 6512(b)(3)(B).⁵

Despite the improvement, this Court stepped in and construed the statute in *Commissioner v. Lundy* to clarify whether a two- or three-year “look-back” applied to a situation in which a notice of deficiency was mailed before a tax return was filed, and the notice was mailed more than two years after the taxes were paid.

It is this type of guidance and statutory construction sorely needed here, to clarify the overpayment jurisdiction for cases where challenges are brought to the underlying tax liability when a return was filed and a notice of deficiency was mailed, but not received.

In *Iames v. Commissioner of Internal Revenue*, 850 F.3d 160, 165-167 (4th Cir. 2017), the Fourth Circuit held that a taxpayer's prior opportunity for a conference with Appeals occurred when he appeared at the pre-assessment hearing through counsel who

⁵ Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877.

disputed his liability and requested additional documents. In the course of that decision, the Fourth Circuit, without analyzing the language of the RRA or the purposes therefore, merely pronounced:

[T]he general focus of Section 6330 [is] on the Commissioner's collection of a predetermined liability, not the *merits of that liability*. As the Supreme Court has observed, "the words of a statute must be read ... with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Congress enacted Section 6330 to make the collection process less onerous, to encourage negotiation between taxpayers and the Commissioner, and to impose a measure of procedural regularity and oversight on the Commissioner's significant and previously unfettered power to levy. Against this backdrop, Congress envisioned only limited CDP review of the taxpayer's underlying liability.

Within this collection-focused framework, liability review plays no more than a minor part: Section 6330(c)(2)(B) catches taxpayers who would otherwise fall through the cracks. After declaring broadly that a taxpayer may raise 'any relevant issue,' the statute mentions that the taxpayer can 'also' bring up liability if he did not receive an earlier chance to do so. § 6330(c)(2)(B). The text of the provision *accentuates the peripheral role Congress accorded to liability challenges* at the CDP stage. (emphases added; some citations omitted).

Id., at 165-166.

While Congress undoubtedly did not consider the liability challenge at a CDP hearing to be the *primary* avenue for challenges to the underlying tax liability (except when no other opportunity was ever afforded) it is the Fourth Circuit which has relegated the ability to challenge the tax liability to a “peripheral role,” not Congress. As Petitioner has pointed out, the language of § 6330(c)(2)(B) does not involve collection issues whatsoever, but instead provides a final *first* opportunity to obtain a hearing on the issue of the entire tax liability for the entire year in question. The Fourth Circuit, ignoring the plain language of the statute, has, in Petitioner’s case, doubled down on its own unfounded position that a liability challenge is a *peripheral* issue to the collection purpose, with the result that the IRS’ concession that taxpayer’s liability was \$0 and could not be collected caused the Tax Court to lose jurisdiction. The Fourth Circuit quotes its own opinion in *Iames*:

[S]ee Iames, 850 F.3d at 162 (“Section 6330 provides a set of procedural safeguards for taxpayers *facing* a potential levy action by the IRS ...” (emphasis added)). McLane no longer faces such an action.

McLane v. Commissioner of Revenue, 24 F.4th 316, 319 (4th Cir. 2022).

It is this position developed by the Fourth Circuit — that the IRS can simply moot any person’s challenge to the underlying liability, resulting in no determination of the exact amount of liability — which Amicus urges this Court to overturn as out of keeping with the plain statutory language, as well as the clearly articulated intent of Congress and the

remedial intent of the legislation (as Petitioner has already pointed out).

**II. THE PLAIN LANGUAGE OF § 6330(c)(2)(B)
IMPELS THE CONCLUSION THAT CONGRESS INTENDED
THAT THE TAX COURT DETERMINE THE CORRECT
AMOUNT OF TAX**

The Fourth Circuit failed in both *James* and *McLane*, *supra*, to analyze the statutory text of § 6330(c)(2)(B). Statutory construction begins with following the plain meaning of the statutory text. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).

Petitioner's position is that Congress intended for a taxpayer who never received a notice of deficiency to be afforded, in essence, a substitutionary hearing at the CDP stage — a hearing in which the Tax Court is empowered to determine the tax liability of the tax period in question as completely as it would in a deficiency.

By his petition for redress, Petitioner sought to have his unfettered right to due process of law respecting the Tax Code section at issue, 26 U.S.C. §6330(c)(2)(B), which unequivocally guaranteed\s him in this case the right — before the IRS and in the Tax Court — to “challenge the existence or *amount* of the underlying tax liability” (emphasis supplied). Recognizing this at page 318 of its opinion, but emphasizing only the phrase “underlying tax liability,” the Fourth Circuit stated:

In other words, §6330(c)(2)(B) permits [McLane] to raise in a CDP [collection due process] hearing a challenge to his “underlying tax liability” for any tax period that he has not yet had an opportunity to dispute.

McLane contends that the phrase “underlying tax liability” (a phrase Congress left undefined) confers jurisdiction on the Tax Court to determine that he overpaid and order a refund. We disagree.

By its emphasis on “underlying tax liability,” the Fourth Circuit ignores the proverbial elephant in the room: “amount of.” Obviously the words “amount of” are critical to the entire statutory phrase: “challenges to the existence or amount of the underlying tax liability.” This is because Petitioner McLane claims the Tax Court has jurisdiction to determine an *amount* of liability or overpayment, and — obviously to even the most uninitiated — the word “amount,” in plain English — and in simple mathematics and tax accounting — includes: (1) a positive number; (2) a negative number; and (3) zero.

Where Congress has not specifically provided a definition of a word, we turn to dictionary definitions. The term “amount” is defined as “the total of two or more particular sums or quantities.” *Webster’s New Twentieth Century Dictionary, Unabridged*, 2d ed. (1978). “Amount” is “a quantity, esp. the total of a thing or things in number, size, value, extent, etc.” *The Oxford Dictionary and Thesaurus: American Edition* (1996).

The term “quantity,” as used in the dictionary definitions of the word “amount,” is likewise defined as in “Math, (a) a value, component, etc., that may be expressed in numbers.” *Id.* Additionally, the term “quantity” is defined as:

... in mathematics, (a) a thing that has the property of being measurable in dimensions, amounts, etc. or in extensions of these which can be expressed in numbers or symbols....

[N]umber is a quantity ... Quantities which have the sign + prefixed to them are called *positive* or *affirmative quantities*; those to which the sign – is prefixed are called *negative quantities*. (emphasis in original)

Webster's Dictionary, supra.

Ergo, in determining the “existence or amount of the underlying tax liability” the Tax Court clearly has jurisdiction to determine an underpayment — a positive amount of liability — as well as an overpayment — that is, a negative number reflecting the “amount of underlying tax liability,” due to be returned to McLane. Instead of applying the plain language of the statutory provision, the Fourth Circuit gave short shrift to McLane’s jurisdictional arguments.

Congress did *not* use language to the effect that a taxpayer could “challenge the amount to be collected,” as the Fourth Circuit has read into and added to the provision at issue, but rather the “amount of the underlying tax liability” the entire amount for which the taxpayer is liable. The Fourth Circuit’s inapposite reading of this provision renders the result that a taxpayer will effectively be only allowed to challenge amounts the IRS alleges in its levy or lien notices, not the “existence or amount of the underlying tax liability for the tax period.” But the latter is the exact wording of the statute, and it flatly contradicts the Fourth Circuit’s erroneous conclusion that as soon as the amount shown on a lien or levy notice is conceded by the IRS, the Tax Court loses jurisdiction.

If the narrowed reading of the Fourth Circuit, in the absence of guidance from this Court, continues to be adopted by the Tax Court and other circuits, then

many more taxpayers will be denied the due process Congress intended.

**III. TO DENY TAX COURT JURISDICTION OVER
PETITIONER’S CLAIM OF OVERPAYMENT IS TO DENY
PETITIONER EQUAL PROTECTION AND DUE PROCESS**

The Fourth Circuit correctly stated that a taxpayer is provided “with the right to a CDP hearing only when the IRS seeks to enforce collection of tax liability.” *McLane*, at 318. But it is equally correct that a taxpayer is provided with a notice of deficiency only when the IRS seeks to assess a tax liability, and that a taxpayer who does not receive a notice of deficiency is entitled, through a CDP hearing, to be placed in the same position as one who received such notice. *Ergo*, the person who did not receive the notice of deficiency is afforded the same right as one who did: the right to litigate overpayment in Tax Court.

A person who receives a notice of deficiency is guaranteed the opportunity to challenge the IRS determination in Tax Court, which can redetermine the deficiency or overpayment, as the case may be. See, e.g., §§ 6214 and 6512. Section 6330(c)(2)(B) expressly provides that a person who did not receive a notice is placed on the same footing as one who did: “The person may also [in addition to collection alternatives] raise at the hearing [and subsequently in Tax Court, if necessary] the existence or amount of the underlying tax liability....”

Congress expressly provided a logical statutory scheme as follows: John Doe received a statutory notice of deficiency and had the opportunity to go to Tax Court and litigate the amount of liability, including the opportunity to litigate overpayment. If the IRS proceeds with collection against John Doe,

then he is afforded the due process available under §6330(c)(2)(A): he can seek collection alternatives only, because he already was given the opportunity to challenge the “amount” of the underlying tax liability.

Jane Doe, on the other hand, did not receive a notice of deficiency, and so, in addition to seeking collection alternatives under §6330(c)(2)(A), she has the opportunity to challenge the “amount” of the underlying tax liability in Tax Court through the avenue of a CDP hearing.

The statutory scheme thus places John and Jane on an equal footing, where, after the CDP hearing process, both have had the opportunity to litigate the amount of liability following the first notice they received of that alleged liability, including any claims of overpayment.

The decision of the Fourth Circuit, however, effectively discriminates between the two classes of taxpayers, John and Jane. Jane is not afforded the full opportunity to litigate the amount of tax liability, including any overpayment. Did Congress really intend the RRA to discriminate between taxpayers who received notices of deficiency, and those taxpayers who, through no fault of their own, did not receive notices of deficiency? Did Congress really intend the result that the privileged class (John Does) could obtain determination of overpayments in Tax Court, but the underprivileged class (Jane Does) could only obtain determination on additional amounts the IRS wanted to collect?

If the Fourth Circuit is right, and enactment of the RRA created two classes of taxpayers, as described above, then, at a minimum, rational basis review should be employed to determine if this classification meets constitutional muster, or if it is violative of the equal protection due under the Fifth

Amendment. *See, e.g., Railway Express Agency Inc. v. New York*, 336 U.S. 106 (1949). Here, Congress has stated no purpose for creating such differentiation between two classes of taxpayers, however, nor can Amicus conceive of any actual purpose in doing so.

Is there a legitimate federal government interest in differentiating between the two classes of taxpayers? Does a rational relation exist between the classification system and the stated purpose of Congress to provide due process in collection hearings? To ask these questions is the best one can do, because there is no evidence in the statutory provisions nor the Congressional record that Congress intended to place these two classes of taxpayers on an unequal footing, but rather sought to place both classes in the position that, upon their first receipt of a notice concerning tax liability, they could challenge that liability ultimately in the Tax Court. The Fourth Circuit is in error, and this Court's intervention can do much to assure that taxpayers are afforded the due process Congress intended with the RRA.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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