No. _____

In the
Supreme Court of the United States

WILLIAM R. TINNERMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Flora v. United States*, 362 U.S. 145 (1960), this Court considered the statutory grant of original jurisdiction of, *inter alia*, "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," 28 U.S.C. §1346(a)(1), and "conclude[d] that the language of [Section] 1346(a)(1) can be more readily construed to require payment of the full tax before suit than to permit suit for recovery of a part payment." *Id.* at 150–51. Thus, for tax refund suits, the *Flora* rule requires that, before a district court has jurisdiction to entertain a taxpayer's suit, the taxpayer pay the full amount of the tax that the federal government contends is due.

The *Flora* rule has been the subject of substantial criticism for, *inter alia*, being wrong as a matter of statutory interpretation, and it concerns "a question which is of considerable importance in the administration of the tax laws." *Id.* at 147. And while recent decisions of this Court have emphasized that statutes must be construed in strict accordance with the enacted language, the *Flora* court acknowledged that its holding hinged on an interpretation in which "the statutory language is not absolutely controlling[.]" *Id.* at 151.

The questions presented are:

1. Under the language of 28 U.S.C. §1346(a)(1), is full payment of tax alleged to be owed for an entire taxable period a jurisdictional prerequisite for a district court to adjudicate a

taxpayer's refund claim of an erroneously or illegally assessed or collected tax?

2. If "no" to the above, must *Flora* be overturned by this Court?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, William R. Tinnerman, and the United States of America.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Counsel is unaware of any other proceedings to which the instant appeal is directly related.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner, William R. Tinnerman, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit (hereinafter, the "Court of Appeals") is reproduced in the Appendix herein at App. 12. The opinion of the Court of Appeals is unpublished, is cited as *Tinnerman v. United States*, No. 21-14023, 2022 WL 3654844 (11th Cir. Aug. 25, 2022), and is reproduced in the Appendix herein at App. 1-11. The denial of Petitioner's Petition for Rehearing, issued on October 28, 2022, is not officially reported and is reproduced in the Appendix herein at App. 28. The judgment of the District Court for the Middle District of Florida is reproduced in the Appendix herein at App. 26-27. The District Court's Order, cited as *Tinnerman v. United States*, No. 3:19-CV-1429-TJC-PDB, 2021 WL 4427082 (M.D. Fla. Sept. 27, 2021), is reproduced in the Appendix herein at App. 13-25.

JURISDICTION

The opinion of the Court of Appeals that affirmed the District Court's judgment was entered on August 25, 2022. A petition for panel rehearing was denied on October 28, 2022. Petitioner timely moved for an extension of time to petition this Court on January 9, 2023, which was granted by Justice

Thomas on January 13, 2023. Supreme Court Rules 13.1, 13.3, 13.5, 29.2, and 30.1. Pursuant to this Court's extension of time, confirmed by letter dated January 13, 2023, the present petition is being filed by postmark on or before February 25, 2023. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1346 confers upon the district courts original jurisdiction over:

> Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]

28 U.S.C. § 1346(a).

STATEMENT

This case comes to this Court from the Court of Appeals' affirmance of the dismissal of Petitioner's first amended complaint on the grounds that the District Court lacked subject matter jurisdiction. In Petitioner's first amended complaint, he sought the following:

> (1) judicial review of the actions the IRS took with respect to his liabilities for tax years 1999 through 2002…; (2) a refund of taxes that were allegedly assessed erroneously and collected by the Internal Revenue Service ("IRS") for tax years 1999 and 2000; and (3) a determination that the IRS's Notice of Certification of Seriously Delinquent Tax Debt to the State Department was erroneous and reversal of that certification.

Tinnerman, 2022 WL 3654844, at *1; App. 1-3

Petitioner advanced four claims for relief, two of which were dismissed as moot and are not challenged here. Regarding the remaining two claims, which sought the refund of taxes,

> [Petitioner] alleged that he was not required to file returns for 1999 or 2000 and was not notified otherwise, and he erroneously self-assessed $2,449.00 in taxes in 1999, meaning that he did not owe taxes for that year and should have had that amount refunded… [and] alleged that he had made the same mistake in 2000 and was owed a $2,629.00 refund of the amount he paid.

Id.; App. 4.

"The government responded by moving to dismiss[, *inter alia*,] because [Petitioner] had not established that the government had waived

sovereign immunity for tax suits[.]" *Id.* at *2 (citing 28 U.S.C. § 1346(a)(1))[1]; App. 4. And "the district court agreed with the government, dismissing all four claims, and denying [Petitioner's] request for leave to file a second amended complaint. [Petitioner] timely appealed." *Id.*; App. 4.

On appeal with respect to the claims at issue, the Court of Appeals affirmed the dismissal for lack of subject matter jurisdiction solely for the reason that this Court, in *Flora*, "held that the waiver of sovereign immunity provided for in [Section] 1346(a)(1) only applies when a taxpayer has paid to the IRS the full amount of the contested tax liability." *Id.* at *4 (citing *Flora*, 362 U.S. at 150–51); App. 9.

[1] Mistakenly cited as 29 U.S.C. § 1346(a)(1).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RECONSIDER ITS STATUTORY CONSTRUCTION OF SECTION 1346(a)(1) IN CONFORMANCE WITH ITS LONGSTANDING PRINCIPLE — WHICH HAS BEEN REINFORCED BY MANY POST-*FLORA* DECISIONS — THAT STATUTORY TEXT CONTROLS.

A. The *Flora* Rule, on Its Face, is Contrary to this Court's Fundamental Tenet that Statutory Construction Must Be Based on the Plain Meaning of the Enacted Language.

The *Flora* rule was wrong from issuance of *Flora v. United States*, 362 U.S. 145 (1960). And this Court's recent jurisprudence only has magnified *Flora*'s incorrect statutory interpretation of Section 1346. Indeed, Section 1346(a) provides no text-based reason to impose a full-payment prerequisite to jurisdiction and, "[a]s this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text. The Court may not 'replace the actual text with speculation as to Congress' intent.'" *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022) (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)).

The *Flora* majority went to painstaking lengths to interpret the statute to require full payment as an absolute prerequisite to district court jurisdiction. However, the plain meaning of the statutory text does not even implicitly, let alone explicitly, impose that

requirement. To have done so, though, would have been a straightforward task for Congress. For instance, Congress could have used a basic introductory qualifier such as, "after full payment," or it could have concluded the statutory subsection with the phrase, "if such amount has been fully paid."

The *Flora* Court's interpretation of the statute is based on its complicated and technical inference that Congress intended to impose a *jurisdictional* requirement, despite the fact that Congress could easily, unambiguously, and explicitly have imposed that requirement by adding a few simple words to the text. *Flora*, and the rationale underpinning it, belies this Court's fundamental jurisprudence: "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (cleaned up).

Section 1346(a)(1) uses plain terms and makes no mention of full payment. Thus, under this Court's "preeminent" approach to statutory interpretation, "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* (collecting Supreme Court cases).

Furthermore, instead of following that immutable principle of law, this Court on rehearing in *Flora* redoubled the position "recognized in the prior opinion, [that] the statutory language is not absolutely controlling, and consequently resort must be had to whatever other materials might be relevant." *Flora*,

362 U.S. at 151. In the original opinion, this Court observed, "[i]n matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958), *on reh'g*, 362 U.S. 145 (1960). Nevertheless, the opinion contended that Section 1346(a)(1) contains a "presence of ambiguity in what might otherwise be termed a clear authorization to sue for the refund of 'any sum.' Consequently, a thorough consideration of the relevant legislative history is required." *Id.* On rehearing, *Flora* delved into external sources to divine the meaning of Section 1346(a), beginning with the legislative history. *See* 362 U.S. at 151. Indeed, *Flora*'s holding required a far greater emphasis on extra-statutory sources than the text of the law itself.[2]

Despite the purported connection between the extra-statutory sources and the language of the law, *Flora*'s conclusions on rehearing prompted sharp criticism from Justice Whitaker in his dissent, as the *Flora* rule ran antithetical to this Court's central

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[2] "In the prior opinion we stated that, were it not for certain countervailing considerations, the statutory language 'might be termed a clear authorization' to sue for the refund of part payment of an assessment. It is quite obvious that we did not regard the language as clear enough to preclude deciding the case on other grounds. Moreover, it could at that time be assumed that the terms of the statute favored the taxpayer, because eight members of the Court considered the extrinsic evidence alone sufficient to decide the case against him. Although we are still of that opinion, we now state our views with regard to the bare words of the statute...." *Id.* at n. 6 (cleaned up, quoting *Flora*, 357 U.S. at 65).

canons: "[a] deep and abiding conviction that the Court today departs from the plain direction of Congress expressed in [Section] 1346(a), defeats its beneficent purpose, and repudiates many soundly reasoned opinions of the federal courts on the question presented, compels me to express and explain my disagreement in detail." *Id.* at 178 (Whitaker, *J.*, dissenting).[3]

Justice Whitaker thoroughly reasoned the ways in which *Flora* was wrongly decided. Despite the unambiguous language of statutory text,[4] Justice Whitaker proceeded

> to an examination of the history of the present jurisdictional provision, [Section] 1346(a), and the scheme of the present tax law to determine whether there is any real support for the Government's contention that a proper reading of the language of [Section] 1346(a) requires an implied qualification to its obvious self-explanatory meaning, so that full payment of an assessment, alleged to have been illegal, is made a condition upon the jurisdiction of a

[3] With whom Justices Frankfurter, Harlan, and Stewart joined.

[4] And that, upon ambiguity, "[a]lthough frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation, in this case that history is barren of any clue to congressional intent." *Id.* at 151.

> District Court to entertain a suit for refund.

Id. at 185 (Whitaker, *J.*, dissenting).

Ultimately, even after considering (and refuting) the majority's explanations relying on external sources, Justice Whitaker vigorously rejected *Flora*'s "strained interpretation of the plain words of [Section] 1346(a)[.]" *Id.* at 194 (Whitaker, *J.*, dissenting). As he put succinctly:

> English words more clearly expressive of the grant of jurisdiction to Federal District Courts over such cases than those used by Congress do not readily occur to me.
>
> It must, therefore, be concluded that there is no sound reason for implying into [Section] 1346(a) a limitation that full payment of an illegal assessment is a condition upon the jurisdiction of a District Court to entertain a suit for refund.

Id. at 197 (Whitaker, *J.*, dissenting).

Consistent with Justice Whitaker's compelling dissent, this Court's precedent long has forbidden such judicial legislation – including in the context of federal tax statutes. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). This principal applies irrespective of whether an omission is intended, especially when a

"statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Id.* at 250–51.

In *Iselin*, this Court considered the government's "argu[ment] that Congress clearly intended to tax all sales of tickets; … that this general purpose of Congress should be given effect, so as to reach any case within the aim of the legislation; and that the act should, therefore, be extended by construction to cover this case." *Id.* at 250. However, this Court explained that the text of the law is absolutely controlling:

> It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the act contains no provision referring to tickets of the character here involved; and there is no general provision in the act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations.

Id.

In the same vein, even if it is assumed *arguendo* in this case that Congress did not "purpose to exempt" from the waiver of sovereign immunity tax refund suits

absent prepayment in full, the statute "contains no provision" requiring it. *Id.* And, especially given that Section 1346(a) uses common terms applied in an ordinary context, no plain reading of it reasonably leads to the conclusion that full payment is a requirement for jurisdiction.

Rather, as this Court recently reaffirmed and elucidated, the plain, ordinary understanding of the text must apply:

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020).

In contrast, by holding that the "the statutory language is not absolutely controlling" (*Flora*, 362 U.S. at 151), *Flora* violated the foundational rule that

"[a] court's job is to interpret the words of a statute consistent with the words' ordinary meaning at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (cleaned up). Upholding this understanding of the law as written is paramount:

> Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it's a "fundamental canon of statutory construction" that words generally should be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute. Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

Id. (cleaned up).

Another recent decision of this Court is illuminating; in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019), this Court considered statutory exemptions,

> that the disclosure requirements of the Freedom of Information Act do "not

> apply" to "confidential" private-sector "commercial or financial information" in the government's possession. But when does information provided to a federal agency qualify as "confidential"? The Food Marketing Institute says it's enough if the owner keeps the information private rather than releasing it publicly. The government suggests that an agency's promise to keep information from disclosure may also suffice to render it confidential. But the courts below imposed a different requirement yet, holding that information can never be deemed confidential unless disclosing it is likely to result in "substantial competitive harm" to the business that provided it.

Id. at 2360–61.

This Court explained the longstanding statutory construction issue that led to reversal, and abrogation of decisions of courts of appeals, finding the "'competitive harm' requirement inconsistent with the terms of the statute," *id.* at 2361:

> So where *did* the "substantial competitive harm" requirement come from? In 1974, the D. C. Circuit declared that, in addition to the requirements actually set forth in Exemption 4, a "court must also be satisfied that non-disclosure is justified by the legislative

> purpose which underlies the exemption." Then, after a selective tour through the legislative history, the court concluded that "commercial or financial matter is 'confidential' [only] if disclosure of the information is likely ... (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Without much independent analysis, a number of courts of appeals eventually fell in line and adopted variants of the *National Parks* test.

Id. at 2364 (citations omitted, quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974), *abrogated by Food Mktg. Inst., supra*).

Similar to *National Parks*, *Flora* rejected the plain meaning of Section 1346(a) in favor of its inference drawn from external sources to craft an extra-textual full payment requirement. But this Court recently, frequently, and forcefully has rejected that approach as improper:

> We cannot approve such a casual disregard of the rules of statutory interpretation. In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as

> here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to "muddy" the meaning of "clear statutory language."

Id. at 2364 (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); and quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)).

Indeed, this Court explained that "*National Parks*' contrary approach is a relic from a 'bygone era of statutory construction.'" *Id.* (citation omitted). So too is the *Flora* rule. Attempting to divine legislative intentions by consulting external sources more freely, rather than determining the plain meaning of statutorily enacted laws – as was a common practice during that bygone era – is entirely unreliable.

The late Justice Scalia pertinently provided the following:

> The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself....*" *Aldridge v. Williams,* 3 How. 9, 24, 11 L.Ed. 469 (emphasis added). But not the least of the defects of legislative history

> is its indeterminacy. If one were to search for an interpretive technique that, *on the whole,* was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history. And the present case nicely proves that point.
>
> Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.

Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, *J.*, concurring).

This Court pointedly observed that "[n]ot only did *National Parks* inappropriately resort to legislative history before consulting the statute's text and structure, once it did so it went even further astray." *Food Mktg. Inst.*, 139 S. Ct. at 2364. And that is precisely what *Flora* did as well.

This Court nullified the *National Parks* test and articulated a proper standard consistent with the plain statutory language: "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366. And this Court should nullify *Flora* as well. The *Flora* rule is a relic from a bygone era that suffers from the same defect as the *National Parks* test. *Id.* at 2364. Accordingly, this

Court should grant the petition to correct the *Flora* rule's extra-statutory addition to Section 1346(a) by construing Section 1346(a) based on the statutory text itself. The preeminent canon of statutory construction, *BedRoc Ltd.*, 541 U.S. at 183, and this Court's extant precedent require no less.

B. The *Flora* Rule is Inconsistent with the Overall Statutory Scheme of the Internal Revenue Code.

The statutory language leaves no doubt that partial payment (as opposed to exclusively "full payment") is sufficient to confer jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," 28 U.S.C. § 1346(a) because there simply are no "English words more clearly expressive of the grant of jurisdiction to Federal District Courts over such cases[.]" *Flora*, 362 U.S. at 197 (Whitaker, *J.*, dissenting). Moreover, *Flora* itself noted that the legislative "history is barren of any clue to congressional intent." *Id.* at 151.

Furthermore, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme[,]" *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). And, within the "overall statutory scheme" of the Internal Revenue Code, there is no indication that full prepayment is a jurisdictional

prerequisite to a refund action. Indeed, the *Flora* rule is *inconsistent* with the "overall statutory scheme" of the Internal Revenue Code, the goal of which is not to collect a windfall, but rather to collect what is properly taxable.

That goal is articulated by 26 U.S.C. § 7803(a)(3)(C) as "the right to pay no more than the correct amount of tax[.]" And the exercise of that right, by its very nature, cannot be contingent on first paying the *incorrect* amount of tax. This reality is brought into sharper focus by the well-established presumption that the IRS's adjustments are correct, with the burden to prove otherwise being upon the taxpayer. *See Welch v. Helvering*, 290 U.S. 111, 115 (1933). Thus, in instances where the IRS incorrectly asserts a liability, the amount of which – whether one hundred or one million dollars – exceeds the correct amount of tax, the IRS should not be able to require the taxpayer to pay the entire incorrect excess amount as a perquisite for exercising his "right to pay no more than the correct amount of tax[.]" 26 U.S.C. § 7803(a)(3)(C); *accord* 26 U.S.C. § 7803(a)(3)(J) (codifying "the right to a fair and just tax system.").

This point was emphasized by Justice Whitaker, who thoroughly canvased the history of tax refund actions, when he concluded that the purpose behind Section 1346 was remedial, to afford taxpayers a meaningful recourse, as opposed to the effects of prior laws that "created the intolerable condition of denying to taxpayers any remedy whatever in the District Courts to recover amounts illegally assessed and collected[.]" *Flora*, 362 U.S. at 186 (Whitaker, *J.*,

dissenting). And Justice Whitaker observed that allowing such refund actions is fully consistent with the "overall statutory scheme" of the Internal Revenue Code:

> [I]t is undisputed that the institution of a suit for refund of a partial payment of an assessment does not stay the Commissioner's power of collection by distraint or otherwise, and a taxpayer with the property or means to pay the balance of the assessment cannot avoid its payment, except through the Commissioner's acquiescence and failure to exercise his power of distraint.

Id. at 193 (Whitaker, *J.*, dissenting) (footnotes omitted); *see also id.* at 193 n. 15 (referencing the prohibition on "restraining the assessment or collection of any tax" other than explicitly listed exceptions. 26 U.S.C. § 7421(a)). Justice Whitaker also pointedly observed the inequitable (and unintended) effects that the *Flora* rule would impose upon taxpayers who could not immediately pay the full, illegally assessed or collected amount. For instance, "taxpayers who pay assessments in installments would be without remedy to recover early installments that were wrongfully collected should the period of limitations run before the last installment is paid." *Flora*, 362 U.S. at 195–97 (Whitaker, *J.*, dissenting).

Justice Whitaker's prescience regarding the disparate adverse effect of the *Flora* rule on taxpayers who most need the benefit of Section 1346(a) – those

who cannot afford to fully pay illegally assessed or collected taxes – was, in effect, the basis of the legislative recommendation that the National Taxpayer Advocate (the "NTA") proposed in the National Taxpayer Advocate Annual Report to Congress 2018 ("NTA 2018") – "FIX THE FLORA RULE: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can[.]"[5] *See also* the National Taxpayer Advocate Annual Report to Congress 2022 ("NTA 2022").[6]

The NTA noted that the *Flora* rule adversely affects the following taxpayer rights that are codified in the Taxpayer Bill of Rights under 26 U.S.C. § 7803(a)(3):

- *The Right to Quality Service*

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[5] NTA 2018 at 364, *available at* https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1.pdf (last accessed Feb. 17, 2023).

[6] "In *Flora v. United States*, however, the U.S. Supreme Court held that, with limited exceptions, a taxpayer must have 'fully paid' the assessment (called the 'full payment rule') before suing in these courts. The full payment rule impacts whether taxpayers have the financial means to file suit and/or hire an attorney to represent them. Equal access to justice should allow taxpayers who cannot pay what the IRS says they owe to challenge an adverse determination and have the same opportunities as wealthier taxpayers who can pay." NTA 2022 at 190 (footnotes omitted), *available at* https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/02/2022-ARC_FullBook_02022023.pdf (last accessed Feb. 17, 2023).

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

NTA 2018 at 364.

"It is clear, however, that the full payment rule gives the poor who cannot pay a disputed liability less access to judicial review than wealthier taxpayers who can" (*id.*), undoubtedly contrary to the legislative intent behind enactment of Section 1346(a), which was for a "beneficent purpose[.]" *Flora*, 362 U.S. at 178 (Whitaker, *J.*, dissenting).

Indeed, these effects are not merely surprises that have only come to light in hindsight, but were predictable at the time *Flora* was decided:

> Where a taxpayer has paid, upon a normal or a 'jeopardy' assessment, either voluntarily or under compulsion of distraint, a part only of an illegal assessment and is unable to pay the balance within the two-year period of limitations, he would be deprived of any means of establishing the invalidity of

> the assessment and of recovering the amount illegally collected from him, unless it be held, as it seems to me Congress plainly provided in [Section] 1346(a), that full payment is not a condition upon the jurisdiction of District Courts to entertain suits for refund.

Id. at 195 (Whitaker, *J.*, dissenting).

At bottom, the language of Section 1346(a) could not more clearly establish jurisdiction without the condition or prerequisite of full payment. *Id.* at 197 (Whitaker, *J.*, dissenting). No legislative history even remotely suggests otherwise (*id.* at 151) and partial payment jurisdiction is entirely consistent with the context and scheme of the Internal Revenue Code "as no contradiction or absurdity is created by so doing[.]" *Id.* at 197 (Whitaker, *J.*, dissenting). This Court has the exclusive opportunity to heed Judge Whitaker's message by correcting the mistake that was made in *Flora* and by conforming the interpretation of Section 1346(a) to the language of the law:

> I think it is our duty to rely upon the words of [Section] 1346(a) rather than upon unarticulated implications or exceptions. Particularly is this so in dealing with legislation in an area such as internal revenue, where countless rules and exceptions are the subjects of

> frequent revisions and precise refinements.

Id. (Whitaker, *J.*, dissenting).

Accordingly, the petition should be granted.

II. THIS CASE PRESENTS A RECURRING QUESTION OF NATIONAL IMPORTANCE THAT REQUIRES THIS COURT'S CORRECTION OF *FLORA* TO PROPERLY APPLY OUR INTERNAL REVENUE LAWS.

Justice Whitaker's concern was not merely hypothetical, nor was it based upon rare or isolated occurrences because "not only will the words of [Section] 1346(a) be disregarded, but great hardships upon taxpayers will result, and such an intention should not lightly be implied." *Id.* at 195 (Whitaker, *J.*, dissenting). His concern proved to be absolutely correct: the extent of the courts' jurisdiction over tax refund actions "is of considerable importance" (*id.* at 147) and goes to the heart of how the internal revenue system operates on a daily basis throughout the country.

Indeed, the NTA provided real-world examples of such situations:

> **Example 1: The District Court and the Court of Federal Claims Cannot Review Claims from Those Who Cannot Fully Pay**

> In 2010, the IRS audited Ms. Jane Doe's 2007 income tax return and issued a notice of deficiency, proposing to disallow her Earned Income Tax Credit (EITC) because she had no bank account or accounting system to substantiate her earned income.7 If given an opportunity, Ms. Doe could substantiate her income in court using the testimony of customers. Because she did not understand the notice of deficiency, Ms. Doe missed the deadline for filing a petition with the Tax Court.8 Under the full payment rule, she cannot file suit in a district court or in the Court of Federal Claims before paying in full. Because she cannot afford to pay in full, she cannot get her case reviewed, and the IRS will attempt to collect the inaccurate deficiency.

NTA 2018 at 365 (footnote omitted). These situations occur frequently.[7] And this is but one of many examples of how the *Flora* rule erodes access to judicial review, especially for non-wealthy taxpayers, who necessarily suffer the negative impacts more severely.

And, as Justice Whitaker profoundly observed, it is particularly important to adhere to the law as written when "dealing with legislation in an area such as internal revenue, where countless rules and exceptions are the subjects of frequent revisions and

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[7] *See id.* at 365 n. 8 ("[l]ow income taxpayers can easily miss filing deadlines.").

precise refinements." *Flora*, 362 U.S. at 197 (Whitaker, *J.*, dissenting). Compounding the obviously unintended consequences that disproportionally affect poorer taxpayers is the effect of *Flora* on a continually expanding category of internal revenue penalties.

> Because the IRS may assess certain penalties (called "assessable penalties") before giving the taxpayer an opportunity to petition the Tax Court to review them, the rule also closes the courthouse door to those facing assessable penalties that are too large to pay—precisely the penalties that are most damaging if they are wrongly assessed.

NTA 2018 at 364. And Justice Whitaker's warnings have come to pass:

> Moreover, the problems posed by assessable penalties have grown. When *Flora I* was decided, there were only four assessable penalties, but today there are over 50. This erosion of judicial oversight is particularly inconsistent with the taxpayer's *right to appeal an IRS decision in an independent forum* and *right to a fair and just tax system*.

Id. at 365 (footnote omitted, emphasis in original). *See also id.* at 365 n. 6 ("*Compare* Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730 (1954) (reflecting three assessable penalties, codified at IRC

§§ 6672-6674), *as amended by* Pub. L. No. 84-466, § 3, 70 Stat. 90 (1956) (enacting a fourth, codified at IRC § 6675), *with* IRC §§ 6671-6725 (more than 50 present-day assessable penalties).”). And the increasing frequency of *Flora* impacting taxpayers shows no sign of abating anytime soon. *See* NTA 2022 at 190 (discussing refund litigation as one of the most litigated issues).

Given the dramatic, wide-ranging, and frequent negative effects of the *Flora* rule, the NTA’s primary recommendation to Congress was that “[a] simple solution would be to repeal the full payment rule.” NTA 2018 at 367. Alternatively, if Congress desired a more tailored approach, the NTA recommended amending Section 1346(a) to specify only limited situations in which full payment is a prerequisite to jurisdiction or expanding the jurisdiction of the Tax Court to encompass various circumstances in which the *Flora* rule precludes review. *Id.* Of course, the NTA is tasked with only proposing legislative recommendations; however, it is clear that the NTA views *Flora* as being incorrect as a matter of law as well as a matter of policy.

Thus, while the NTA nobly suggests a Congressional remedy through legislative amendment, this Court can provide a more meaningful remedy. This Court can remedy not only the unintended negative effects of the *Flora* rule but also the inconsistency between *Flora* and the Court’s precedents, by grounding the statutory construction of Section 1346(a) in the statutory text and by thus providing confidence that “the people may rely on the

original meaning of the written law." *Wisconsin Cent. Ltd.*, 138 S. Ct. at 2070.

Resultingly, this Court should grant the petition.

III. THIS CASE PRESENTS A GOOD VEHICLE.

The nature and posture of this case makes it an excellent vehicle for this Court to consider the questions presented, namely: 1) Whether *Flora* was wrong as a matter of law, and if so, 2), whether *Flora* must be overruled.

Indeed, this case squarely presents for this Court's consideration the validity of *Flora,* unburdened by any other issues. The question of whether, under the proper statutory construction, Section 1346(a) imposes a full-payment requirement to establish district court jurisdiction is the only question at issue. All other issues that may be required for the ultimate resolution of this case will be properly considered in the first instance by the trial court on remand.

Accordingly, this case presents this Court with the ideal opportunity to reconsider *Flora* and the statutory construction of Section 1346(a) in accordance with its plethora of well-elaborated recent precedents.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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