

No. 19-261

**In the
Supreme Court of the United States**

Steven T. Waltner and Sarah V. Waltner,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

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

**PETITION FOR REHEARING
OF PETITION FOR WRIT OF CERTIORARI**

DONALD W. WALLIS
Counsel of Record
UPCHURCH, BAILEY & UPCHURCH, P.A.
780 N. Ponce de Leon Blvd.
Post Office Drawer 3007
St. Augustine, FL 32085
(904) 829-9066
dwallis@ubulaw.com

Counsel for Petitioners
Steven T. Waltner and Sarah V. Waltner

November 5, 2019

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
PETITION FOR REHEARING OF PETITION FOR A WRIT OF <i>CERTIORARI</i>	1
FURTHER REASONS WHY THIS PETITION SHOULD BE GRANTED	1
I. The case presents public policy and constitutional issues that this Court should resolve.....	1
II. Conclusion and prayer.	8
CERTIFICATE OF GOOD FAITH AND COMPLIANCE WITH RULE 44.2.....	9

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Badaracco v. Commissioner</i> , 464 U.S. 386 (1984).....	6
<i>Baldwin v. United States</i> , Ninth Circuit Docket No. 19-402.....	1, 4, 7
<i>Chicago v. Environmental Defense Fund</i> , 511 U.S. 328 (1994).....	5
<i>National Cable & Telecommunications Ass'n v. Brand X Internet Services</i> , 545 U.S. 967 (2005)	1
<i>Solomon v. State</i> , 364 P.3d 536, 303 Kan. 512 (2015)	8
<i>United States v. Goldenberg</i> , 168 U.S. 95 (1897).....	5
<i>United States v. Hopkins</i> , 427 U.S. 123 (1976).....	5
<i>United States v. Reese</i> , 92 U.S. 214 (1875)	5
<i>Waltner v. Commissioner</i> , Ninth Circuit Docket No. 19-488.....	1, 4, 7

Other Authorities

Farina, Cynthia R., "Statutory Interpretation and the Balance of Power in the Administrative State," 89 Colum. L. Rev. 476.....	6, 7
George Anbang, Separation of Powers and the Rule of Law: On the Role of Judicial Restraint In "Secur[ing] the Blessings of Liberty," 24 Akron L.Rev. 211 (1990).....	4

TABLE OF AUTHORITIES -- Continued

J. Locke, <i>The Second Treatise of Government</i> , 71 (T. Peardon ed. 1981)	4
James Madison, <i>The Federalist No. 51</i> (C. Rossiter ed. 1961)	2
M. Vile, <i>Constitutionalism and the Separation of Powers</i> 21 (1967)	6
The Works of James Wilson, Associate Justice of the Supreme Court..., (Callahan and Company, Chicago: 1896), Andrews, J., ed., Vol. 1, <i>Lectures on Law</i> , Ch. 10, <i>Of Government</i>	2

**PETITION FOR REHEARING
OF PETITION FOR A WRIT OF *CERTIORARI***

Under Supreme Court Rule 44, Petitioners Steven T. Waltner and Sarah V. Waltner petition this Court for a Rehearing of their Petition for a Writ of *Certiorari* that this Court denied on October 11, 2019.



**FURTHER REASONS WHY THIS PETITION
SHOULD BE GRANTED**

This Court should rehear the Petition for a Writ of *Certiorari* to the Ninth Circuit in this case for the following additional substantial grounds.

I. The case presents public policy and constitutional issues that this Court should resolve.

This year, in the case below and in the cases of *Waltner v. Commissioner*, Docket No. 19-488¹ and *Baldwin v. United States*, Docket No. 19-402,² this Court has been thrice presented with examples—

¹ The Waltners, in the context of their collection due process case and a notice of appeal the Tax Court claimed it never received, seek review of the Ninth Circuit's decision that it had no jurisdiction over their appeal because a 2011 amendment to a Treasury Regulation adding restrictions to 26 U.S.C. § 7502 supplanted the common-law mailbox rule and overturned that court's prior decision in *Anderson v. U.S.*, 966 F.2d 487 (CA9 1992).

² The Baldwins, in the context of their refund action, seek review of the same mailbox rule issue that the Waltners presented in their case and on which the Court of Appeals reversed a district court ruling in their favor, and challenge the constitutionality of the *Brand X* case, on which the Ninth Circuit relied, as violative of the separation of powers doctrine. The Court of Appeals relied on its rationale in *Baldwin* when it decided *Waltner*, Docket No. 19-488.

within a single executive administrative agency, the Internal Revenue Service—of the unchecked expansion and concentration of power by the federal government’s executive branch to the point where it infringes upon the powers that constitutionally are reserved to the judicial and legislative branches.

In the confluence of these cases is this Court’s opportunity—indeed, its responsibility—to prevent further obscuration of the lines that the framers drew for the protection of the people from tyranny. Those lines, of course, are those that separate and balance the powers of our national government among its three branches. *See, e.g.*, James Madison, The Federalist No. 51, p. 321 (C. Rossiter ed. 1961) (warning against the “gradual concentration of the several powers in the same department” of government).

One of the framers of the U.S. Constitution, Pennsylvania delegate James Wilson, said:

The salutary consequence of the mutual dependency of the great powers of government is, that if one part should, at any time, usurp more power than the constitution gives, or make an improper use of its constitutional power, one or both of the other parts may correct the abuse, or may check the usurpation.

The Works of James Wilson, Associate Justice of the Supreme Court..., (Callahan and Company, Chicago: 1896), Andrews, J., ed., Vol. 1, Lectures on Law, Ch. 10, Of Government, p, 368.

These three cases are battlegrounds upon which the growth of executive branch authority—specifically that of the IRS and, in the case below, the Article I United States Tax Court—was challenged.

The framers' separation-of- powers protection against the concentration of power in one branch, department or agency was particularly dishonored and frustrated in the case below, where the Tax Court, affirmed by the Ninth Circuit Court of Appeals:

- completely relieved the Commissioner of Internal Revenue from having to carry his burden of proof of his collateral estoppel defense;
- nullified a stipulated, timely-filed, already-processed return on which a late-issued notice of deficiency was based;
- granted the Commissioner *carte blanche* to assess taxes at any time
 - (a) by resting on an impermissible and wholly subjective interpretation of an exception to the statute of limitations to which the court added language, and
 - (b) by giving no effect to the Commissioner's stipulations of fact and judicial admissions;
- allowed tax statutes to be construed liberally in favor of the government, and against the citizen, in contravention of hundreds of years of common law; and
- obliterated, on a technicality, the substantive rights of petitioners and their counsel to appeal a sanctions order.

In fact, the case below serves as a primer for how the executive branch is able to blur those lines of power sufficiently to ensure a government win at a cost that the courts are all too willing to accept: a complete deprivation of petitioners' right to due process of law.

Nowhere in the federal government are the lawmaking, law-executing and adjudicating powers

more concentrated than in the Internal Revenue Service. The strength of this concentration is enhanced by the agency's ability to rely upon the complicity of the Tax Court and upon the failure of the courts of appeals to check the Tax Court's overweening exercise of power. As illustrated by the two *Waltner* cases and the *Baldwin* case, which are currently at the door of this Court, the IRS is attempting to solidify and gain judicial approval of its ever widening and deepening incursion into the provinces of Congress and of the courts. And the Tax Court, emboldened by the Ninth Circuit, routinely exceeds its Article I jurisdiction by behaving as if it may discard the acts of Congress that are designed to restrict administrative power, and to benefit the public, whenever to do so is expedient to the interests of the Internal Revenue Service.

People are unable to regulate their behavior in society when the courts endorse an agency's addition to statutes of language that Congress chose not to include, thereby changing the fundamental meaning of those statutes.

A member of society's certainty of what he or she can and cannot lawfully do is at the heart of the vision of liberty and the rule of law which American political and legal culture has borrowed from John Locke, among others.

George Anbang, Separation of Powers and the Rule of Law: On the Role of Judicial Restraint In "Secur[ing] the Blessings of Liberty," 24 Akron L.Rev. 211 (1990), citing J. Locke, *The Second Treatise of Government*, 71, 77-78 (T. Peardon ed. 1981).

This Court has long recognized that introducing words of limitation to a statute that is perceived to be

overbroad effectively creates a new law rather than interprets an existing one and impermissibly “substitute[es] the judicial for the legislative department.” *U.S. v. Reese*, 92 U.S. 214, 221 (1875). The separation of powers doctrine prohibits courts from interfering excessively with legislative and policy functions. Adding words to a statute to effect policy is simply prohibited.

The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

U.S. v. Goldenberg, 168 U.S. 95, 103 (1897).

But it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation. As the Court of Appeals cogently put it: "Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't."

Chicago v. Environmental Defense Fund, 511 U.S. 328, 337 (1994) (internal citation omitted) (rejecting the Solicitor General's plea for deference to the EPA's statutory interpretation “which goes beyond the scope of whatever ambiguity [the statute] contains.”) *See U.S. v. Hopkins*, 427 U.S. 123, 125 (1976) (“[T]he courts should refrain from legislating by judicial fiat”)

(citation omitted). This Court already had decided in *Badaracco v. Commissioner*, 464 U.S. 386, 392 (1984) that the letter of § 6501(c)(3) was unambiguous. Therefore, the decisions of the courts below based, among other impermissible grounds, on language prominently omitted therefrom was usurpation.

A judgment is only as sound as its premises. This Court should scrutinize those premises in the case below. Based, as it was, upon the abandonment of long-standing legal principles of fairness and of statutory construction, and upon judicial and agency usurpation of legislative power, the judgment was unsound. The Tax Court's action in this case, casually affirmed by the Ninth Circuit, was "the behavior of a rogue judiciary defying legislative primacy and undermining separation of powers." Farina, Cynthia R., "Statutory Interpretation and the Balance of Power in the Administrative State," 89 Colum. L. Rev. 476.

There is an essential connection between the notion of government according to law and the concept of the functions of government.... Government according to law presupposes at least two distinct operations, the making of law, and putting it into effect.

M. Vile, *Constitutionalism and the Separation of Powers* 21 (1967).

[The notion]—that what courts, the archetypal interpreters, do when they construe a law is really no different than what legislatures, the archetypal lawmakers, do when they create a law—looks wondrous strange against the backdrop of our 200-year legal tradition. Our mainstream political thought has always included

the belief that there is and should be a real distinction between making law and interpreting law. While conceding that the dividing line may be elusive in particular cases, we have nonetheless insisted that officials in all branches of government frame their actions to respect the line's existence. To abandon that insistence now not only paves the way for agencies to obtain the power to resolve statutory ambiguity; it also invites them to wield this power in the mind-set of the Lawmaker, who recognizes only the obligation to be rational, rather than in the mind-set of the Interpreter, who feels constrained by the ideal of fidelity to the intent and purposes of the law entrusted to her keeping.

89 Colum. L. Rev. at 477-478 (discussing precept that “statutory interpretation is not a guise for flights into policy making.”).

The way in which the courts below manipulated both the established facts and the governing law was unfaithful to separation of powers theory, and it therefore thwarted the purposes that the framers intended for that structural principle to serve. Worse, it allowed “the authority of one branch [to be] transferred to another, which will now possess a dangerous concentration of government power.” 89 Colum. L. Rev. at 479.

Taken together, the *Baldwin* and *Waltner* cases, including the case below, offer the Court a bird's eye perspective on this multi-pronged usurpation of governmental power and a unique set of circumstances in which to analyze its opportunity and constitutional imperative to correct that usurpation.

[W]ithin our constitutional system, it is the duty of the courts to not only stand guard over the integrity of our governmental walls of separation, but also, as time and neglect may require, to rebuild them.

Solomon v. State, 364 P.3d 536, 551 (2015), Stegall, J. concurring (discussing separation of powers imperatives). Granting the Petition for *Certiorari* in the case below would allow this Court to reconcile the actions of the IRS, of the Tax Court and of the Ninth Circuit with separation of powers principles.

II. Conclusion and prayer.

Petitioners' Petition for Writ of *Certiorari* should be reheard and granted.

Dated: November 5, 2019.

Respectfully submitted,

DONALD W. WALLIS
Counsel of Record
UPCHURCH, BAILEY &
UPCHURCH, P.A.
780 North Ponce de Leon Blvd.
Post Office Drawer 3007
St. Augustine, FL 32085-3007
(904) 829-9066
dwallis@ubulaw.com

Counsel for Petitioners
Steven and Sarah Waltner

**CERTIFICATE OF GOOD FAITH AND
COMPLIANCE WITH RULE 44.2**

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 44.2.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 30th day of October, 2019.

s/Donald W. Wallis _____
DONALD W. WALLIS
Counsel for Petitioners