APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3094

Charles V. Schneider

Appellant

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(010660-17)

JUDGMENT

Before KELLY, WOLLMAN, and GRASZ, Circuit Judges.

The appeal is dismissed as moot.

March 19, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3094

Charles V. Schneider

Appellant

v.

Commissioner of Internal Revenue

Appellee

Appeal from The United States Tax Court
(010660-17)

ORDER

The petition for rehearing is denied as overlength.

June 10, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, DC 20217 PA

CHARLES V. SCHNEIDER,)
Petitioner(s)) Docket No. 10660-17L
v.)
COMMISSIONER OF INTERNAL REVENUE,)
Respondent)

ORDER AND DECISION

This collection review case is an appeal of the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination), of the Internal Revenue Service (IRS) Office of Appeals (Appeals), sustaining the proposed levy to collect petitioner's unpaid Federal income tax, including penalties and interest, for taxable year 2011. Petitioner timely filed a petition with the Court. This case is before the Court on respondent's Motion for Summary Judgment and for Penalty Under Section 6673, filed on December 1, 2017, pursuant to Rule 121.[1] Respondent attached the Declaration of Shaina Boatright, senior attorney for respondent, with attached exhibits in support of the motion. On December 11, 2017, petitioner filed an objection to respondent's motion.

Background

The record establishes and/or the parties do not dispute the following information. Petitioner resided in the State of Missouri at the time that the petition was filed with the Court.

Petitioner did not file a Federal income tax return for 2011. As a result, respondent prepared a substitute for return for petitioner pursuant to section 6020(b), and mailed a notice of deficiency for 2011 to petitioner on September 2, 2014. On December 8, 2014, petitioner timely filed a petition with this Court at Schneider v. Commissioner, Docket No. 29122-14, seeking review of the notice of deficiency. In his petition, petitioner challenged the proposed deficiency, asserting that he is not liable for income tax because the amounts received by him were not taxable income. On September 1, 2016, in Schneider v. Commissioner, Docket No. 29122-14, the Court granted respondent's motion for summary judgment and imposed a penalty of $2,500

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[1] Unless otherwise specified, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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under section 6673. The Court also ordered and decided that for 2011 there was (1) a deficiency in tax due of $7,606; (2) an addition to tax due under section 6651(a)(1) of $1,711.35; (3) an addition to tax due under section 6651(a)(2) of $1,026.81; and (4) an addition to tax due under section 6654(a) of $150.58. Pursuant to the Court's order and decision, respondent assessed the income taxes, additions to tax and section 6673 penalty determined by the Court plus interest.

On November 10, 2016, respondent mailed petitioner a Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing (final notice). See sec. 6330(a). On December 1, 2016, petitioner timely filed a Form 12153, Request for a Collection Due Process or Equivalent Hearing (CDP hearing), in which he challenged the levy proposed by respondent for 2011. In his Form 12153 petitioner requested a face-to-face CDP hearing in Kansas City, Missouri, and declined to provide a telephone number, writing instead "Written Correspondence Only". On January 18, 2017, Settlement Officer Monica Garcia (SO Garcia) was assigned to petitioner's case.

On January 27, 2017, SO Garcia mailed petitioner a letter advising him that Appeals had received his Form 12153 and would hold a correspondence hearing with him. SO Garcia informed petitioner that a face-to-face hearing would be held to discuss potential collection alternatives only if he provided her with a signed, completed, and substantiated Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and signed tax returns for taxable years 2012, 2013, 2014, and 2015 by February 27, 2017. SO Garcia indicated in her letter that she had reviewed petitioner's administrative record and transcripts of his account. As a result of this review, SO Garcia advised petitioner that he was precluded from disputing the existence or amount of the underlying tax liability in his CDP hearing as he had a prior opportunity to dispute the tax liabilities before the

Court in Schneider v. Commissioner, Docket No. 29122-14 (Sept. 1, 2016). See sec. 6330(c)(2)(B). SO Garcia also stated in her letter that based on her review it appeared that the IRS satisfied the legal and administrative procedures required to issue petitioner the final notice.

On February 16, 2017, petitioner faxed and mailed to respondent a letter containing contentions about oath swearing, accusations that SO Garcia was failing to uphold her constitutional duty, a statement that he is not liable for the taxes at issue, and a number of tax defier arguments. None of the information requested by SO Garcia in her January 27 letter was attached. On March 3, 2017, SO Garcia mailed petitioner a second letter, in which she denied petitioner's request for a face-to-face hearing for failing to provide any of the requested information needed to consider such a hearing, reiterated her prior request for such information, and extended the submission deadline to March 17, 2017. On March 22, 2017, SO Garcia received a packet in the mail from petitioner that contained multiple final notices concerning taxable years 2010 and 2011; however, the final notices were dated/issued after respondent received the Form 12153. Again, none of the information requested by SO Garcia was attached.

On April 6, 2017, SO Garcia issued a notice of determination sustaining the proposed levy with respect to petitioner's unpaid income tax, penalties, and interest due for 2011. The notice of determination

stated that respondent had determined that all appropriate requirements of law and administrative procedures for the proposed collection action were met. In response, petitioner timely filed a petition with this Court on May 15, 2017. See sec. 6330(d)(1); Rules

330-334. of frivolous arguments including: (1) "There is no such lawful thing as a 'substitute tax return'"; (2) "'Income' is not defined in Title 26 U.S.C., Internal Revenue Code"; (3) "Petitioner had NO taxable 'income' since his revenues/receipts do not constitute 'income' within the meaning of the Sixteenth Amendment"; (4) "there can be no lawfully-assessed 'income tax' nor any 'liability'"; (5) "Petitioner is NOT a 'person liable for any tax imposed by [Title 26 U.S.C.]'" per section 6011; (6) he is not a "taxpayer" as defined in section 7701(a)(14); and (7) "There is no law/statute that makes Petitioner liable for the 'income tax'" so he cannot be required to pay any tax, penalty, or interest.

Respondent filed his Answer on June 29, 2017. In the Answer, respondent alleged that petitioner has been warned by the Court five times prior to this case against the use of the frivolous arguments outlined supra. These five cases are all captioned Schneider v. Commissioner, with Docket Nos. 4759-07, 25463-08L, 12944-10, 17566-14 and 29122-14.[2] This is petitioner's sixth case before this Court in which he

continues to assert the same frivolous arguments. Petitioner has also asserted the same arguments in a seventh case, Schneider v. Commissioner, Docket No. 15652-17, which concerns taxable year 2012 and is currently pending before the Court. In the instant case, petitioner filed a Reply to Answer on August 12, 2017, in which he reasserted a number of the frivolous arguments previously made in his petition. As previously stated, on December 1, 2017, respondent filed a Motion for Summary Judgment, to which petitioner filed an Objection on December 11, 2017.

Discussion

A. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule

[2] Docket No. 4759-07, concerning taxable year 2004, was dismissed for failure to state a claim. Docket No. 25463-08L, concerning taxable year 2004, was disposed of by a Motion for Summary Judgment. The Order of Dismissal and Decision imposed a $2,500 penalty under sec. 6673. Docket No. 12944-10, concern-

grant summary judgment, the factual materials and inferences drawn from them must be considered in the light most favorable to the moving party. See FPL Grp., Inc. v. Commissioner, 115 T.C. at 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. Whether facts are material depends upon the context in which they are raised and the legal issues presented. Casanova Co. v. Commissioner, 87 T.C. 214, 217 (1986).

When the moving party has carried its burden, however, the party opposing the summary judgment motion must do more than simply show that "there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 121(d) imposes a duty on the nonmoving party to "set forth specific facts showing that there is a genuine dispute for trial", thus not allowing an adverse party to rest upon the mere allegations or denials of such party's pleadings. See Ramdas v. Commissioner, T.C. Memo. 2013-104, at *18. Where the record viewed as a whole could not lead a reasonable trier of fact to find for the nonmoving party, there is no "genuine issue for trial". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587. After review of the record in this case, the Court is satisfied that no material facts are in dispute and that respondent is entitled to a decision as a matter of law.

B. Hearings Under Section 6330

Section 6301 empowers the Secretary to collect the taxes imposed by the internal revenue laws. To further that objective, Congress has provided that the Secretary may effect the collection of taxes by, among other methods, liens and levies. See generally Living Care Alts. of Utica, Inc. v. United States, 411 F.3d 621, 624-625 (6th Cir. 2005). Section 6331(a) authorizes the Secretary to levy upon all property or property rights of any person liable for taxes (taxpayer) if the taxpayer fails to pay the tax within 10 days after notice and demand for payment is made.

When the Secretary pursues collection by levy, he must notify the affected taxpayer in writing of his right to a CDP hearing with an impartial Appeals employee (Appeals officer). See sec. 6330(a) and (b). At the hearing the taxpayer may raise any relevant issue, including challenges to the appropriateness of the collection actions and possible collection alternatives such as an installment agreement. Sec. 6330(c)(2)(A). Additionally, the taxpayer may challenge the existence or amount of the underlying tax liability, but only if he did not receive a notice of deficiency with respect to, or otherwise have an opportunity to dispute, it. See sec. 6330(c)(2)(B).

Following the hearing, the Appeals officer must issue a notice of determination concerning the proposed collection action. See sec. 301.6330-1(e)(3), Q&A-E8(i), Proced. &

Woodral v. Commissioner, 112 T.C. 19, 23 (1999); Fowler v. Commissioner, T.C. Memo. 2004163. If an Appeals officer follows all statutory and administrative guidelines and provides a reasoned and balanced decision, the Court will not reweigh the equities. Thompson v. Commissioner, 140 T.C. 173, 179 (2013). In Walker v. Commissioner, T.C. Memo. 2014-187, at *9-*10, we concluded that "(i)t is not an abuse of discretion for a settlement officer to refuse to consider collection alternatives if the taxpayer does not submit the requested financial information." Petitioner did not at any point submit any requested financial information despite being directed to do so by SO Garcia in letters dated January 27, 2017, and March 3, 2017. Petitioner also did not request or propose any collection alternatives. Therefore, SO Garcia did not abuse her discretion by refusing to consider collection alternatives.

The record further shows that SO Garcia properly verified that the requirements of all applicable laws and administrative procedures have been met and that the collection action balances the Government's need for the efficient collection of taxes with petitioner's concerns that the collection action be no more intrusive than necessary. SO Garcia provided petitioner multiple opportunities to substantiate his claim that he is not liable for income taxes and to provide information supporting a collection alternative. Petitioner failed to do so. Therefore, SO Garcia did not abuse her discretion in this case.

their clients who file petitions advancing those petitions should not be allowed to divert and drain away resources that ought to be devoted to bona fide disputes"). Suffice it to say that petitioner is a taxpayer who is obliged to file a Federal income tax return and pay Federal income tax on the taxable income he received in 2011. See secs. 1, 61(a)(1); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981).

Section 6673(a)(1) provides that the Tax Court may impose a penalty not to exceed $25,000 if it appears to the Court that (1) the proceedings have been instituted or maintained by the taxpayer primarily for delay or (2) the taxpayer's position in the proceeding is frivolous or groundless. Section 6673(a)(1) applies to proceedings under section 6330. See Pierson v. Commissioner, 115 T.C. 576, 581 (2000). As discussed supra, throughout these proceedings petitioner has repeatedly asserted frivolous arguments that are contrary to well-established law. Petitioner asserted these same frivolous arguments in five prior proceedings before this Court, three of which resulted in the Court ordering the imposition of a penalty of$2,500 under section 6673.[3] In Schneider v. Commissioner, Docket No. 16-4125 (Sept. 12, 2017), the U.S. Court of Appeals for the Eighth Circuit agreed with this Court's conclusion in Schneider v. Commissioner, Docket No. 29122-14 (Sept. 1, 2016), that petitioner's arguments were frivolous in nature in affirming the

APPENDIX D

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EXPLAINING THE SUPREME COURT'S SHRINKING DOCKET
(Excerpts)– [***all emphases mine***]

ABSTRACT

"In recent years, the United States Supreme Court has decided fewer cases than at any other time in its recent history. Scholars and practitioners alike have criticized the drop in the Court's plenary docket. Some even believe that the Court has reneged on its duty to clarify and unify the law. A host of studies examine potential reasons for the Court's change in docket size, but few rely on an empirical analysis of this change and no study examines the correlation between ***ideological homogeneity*** and docket size.

In a comprehensive study, the authors analyze ideological and contextual factors to determine the conditions that are most likely to influence the size of the plenary docket. Drawing on empirical data from every Supreme Court Term between 1940 and 2008, the authors find that both ideological and contextual factors have led to the Court's declining plenary docket. First, a Court composed of Justices who share largely the same world view is likely to hear forty-two more cases per Term than an ***ideologically fractured*** Court. Second . . . Congress's decision to remove much of the Court's mandatory appellate jurisdiction is associated with the Court deciding roughly fifty-four fewer cases per [p. 1220] Term. In short, the data

suggest that **ideology** and **context** have led to a ***Supreme Court that decides fewer cases.***

The Court's docket is not likely to increase significantly in the near future. Unless Congress expands the Court's mandatory appellate jurisdiction or the President makes a series of unconstrained nominations to the Court that increase its **ideological homogeneity**, the ***size of the Court's docket will remain relatively small compared to the past.*** Because ***the Court's case selection process is an important aspect of the development of the law***, this Article provides the basis for further normative and empirical evaluations of the Court's plenary docket.

[p. 1222] INTRODUCTION

On April 9, 2010, Justice John Paul Stevens set off fireworks in Washington, D.C. when he informed the White House that he planned to retire during the Court's summer recess. Immediately, scholars and journalists predicted who might succeed him, as well as the ***political*** and legal ramifications of the selection. Attention quickly turned to a handful of individuals: [List omitted] Each . . . nominee[]came to the table with a set of unique ***advantages*** and ***disadvantages, to be sure.*** Commentators, unsurprisingly, debated a series of questions: Would the President nominate from the left? Would he nominate a centrist candidate? Would Senate Republicans filibuster the nominee? Indeed, one news outlet expected to see a "bruising ... confirmation battle" after Senate Republicans signaled they would filibuster any nominee who was "clearly outside the mainstream.

It is not hard to understand why attention was focused so closely on nominee *ideology* and Senate filibusters.

After all, ***Presidents spend political capital on Supreme Court nominations primarily for ideological*** reasons. Senators, of course, largely have the same [p. 1223] motivations, and sometimes even employ the filibuster for purely *political* or *ideological* reasons . . .

Although the Stevens departure and elevation of Justice Kagan to the Court has come and gone, questions remain—questions that went ignored in the extensive discussion of the nomination. ***Would the new nominee to the Court spur it to hear more cases? What factors led the Court to hear historically low numbers of cases in recent Terms?*** And, ***are there ways to increase the number of cases the Court hears on an annual basis?***

The answers to these questions are important for a host of reasons, ***not least of which is that the Supreme Court's impact on the law is a function of the type and number of cases it hears.*** When the Court fails to grant certiorari in cases that call for review, ***it leaves the law unclear.*** And, by that standard, legal ambiguity may be [p. 1224] ***rampant.*** The Court decides ***fewer cases*** per Term now ***than at any other time*** in its modern history. . . Although existing studies advocate compelling and reasonable theories to explain the Court's shrinking docket, such commentary overlooks ***one potentially important feature: ideological heterogeneity*** on the Supreme Court. *Ideology*, after all, ***drives much of Supreme Court decision making. It motivates whether the***

Justices grant review . . . and the Court's review of lower court decisions.

[p. 1225] This Article . . . argues, in part, that *unless the political landscape becomes less polarized* and *results in a less ideologically diverse group of Justices* —which is not likely to happen anytime soon — *we can expect the Court to continue to decide relatively few cases each year.* In short, without a *fundamental restructuring* of the *political landscape*, the *legal landscape for the Court*, at least in terms of its docket size, is *not likely to change significantly*. . .

I. THE COURT'S DEPLETED DOCKET

Today's Supreme Court decides markedly fewer cases than its predecessors. Justice Douglas captured this dynamic presciently when he remarked nearly forty years ago: "I think the *Court* [today] *is overstaffed and underworked*.... We were much, much busier 25 or 30 years ago than we are today. I really think that today the job does not add up to more than about [p. 1226] four days a week." In short, *we are witnessing the "great disappearing merits docket."*

A. How the Court Chooses to Review Cases

. . . Once the petition, is filed, the petition is *randomly* assigned to one of the law clerks in the *cert pool* ..

[p. 1227] The cert pool clerk . . . reads the petition . . . and writes a *preliminary memo* that summarizes the proceedings and legal claims. The clerk concludes with a *recommendation for how the Court should treat the petition*. The pool memo is then distributed to the chambers of the participating Justices. *Relying on the memo*, and other information, the Chief Justice circulates a list of the petitions *he thinks deserve*

consideration by the Court at its next conference. This master list is called the "discuss list." The Court ***summarily — without a vote — denies petitions that do not make the discuss list.***

At conference, the Justice who placed the case on the list — typically the Chief — leads off discussion of the petition. That Justice then casts an agenda vote— that is, to grant, deny, hold, or call for the views of the Solicitor General. In order of seniority, the remaining Justices do the same. If four or more Justices vote to grant review, the case proceeds to the merits stage. This informal Court rule, which requires at least four Justices to put a case on the [p. 1228] merits docket, is called the "Rule of Four." There are ***no formal requirements that direct Justices to grant certiorari review.*** The decision is ***entirely discretionary*** to the Court. Supreme Court Rule 10 states simply that the Court is likely to hear cases that involve ***conflicts among the lower courts***, or cases that involve ***important legal issues.*** All this is to say, then, that the agenda-setting process the Court employs is ***rife with discretion, allowing Justices to hear more, or fewer, cases as they wish.***

> ***[worthy of note : nothing is said of the absolute split between the Supreme Court and all inferior courts on the issue brought in the case]***

B. A Descriptive View of the Court's Depleted Docket

. . . ***the contemporary Court decides fewer cases than any Supreme Court in modern times.***

[p. 1230] Tax cases and union cases also fell short of the Court's attention over time. ***In 1946, the Court***

decided 16 tax cases. In the 2008 Term, it decided none.

. . . [p. 1232] what is certain is that the Court's attention to some issues has wavered more than others and, overall, ***the modern Court has changed dramatically the number and types of cases it hears.***

[p. 1234]

C. Existing Explanations for the Court's Depleted Docket

The question of ***why the Court hears fewer and fewer cases*** has produced no shortage of explanations. Generally, these explanations fall into one of three categories: (1) internal mechanisms and Court composition, (2) external mechanisms, and (3) the judicial hierarchy.

1. Internal Mechanisms and Court Composition.

To begin with, features internal to the Court may influence how many cases the Court hears. By internal factors, we mean those over which Justices largely have direct control. Like many institutions, the Supreme Court observes a set of rules that govern its practices and procedures, and which might influence the Court's docket size. At the same time, who sits on the Court can influence the agenda it sets. These two factors—internal procedural mechanisms and Court composition—may influence the size of its plenary docket.

The Court's informal rules . . . govern . . . most importantly . . . the conditions under which the Court is ***most likely to grant*** a writ of certiorari to a petition for [p. 1235] review. In that vein, some scholars have argued that two informal mechanisms — ***the cert pool and the "Rule of Three"*** — either by themselves or in combination with Court membership, ***have influenced***

the Court's docket size.

The *cert pool*, as stated above, was generated as a *time-saving mechanism* for the Justices' chambers as they filter out the "*cert-worthy*" petitions from the *frivolous* ones. As many argue, though, there are *tremendous pressures on law clerks* in the cert pool *to recommend that the Court deny review* to a petition; *clerks fear* mistakenly *recommending the Court grant review on cases that could make themselves, the Justice for whom they clerk, or the Court look foolish*. Scholars, former clerks, and even Justices themselves *wonder whether the cert pool creates an incentive for law clerks to recommend denials* and, thus, may have led to the depleted merits docket. Kenneth Starr, for example, contends that the cert pool has led to a depleted docket. He suggests that to *avoid* personal and institutional *embarrassment, clerks in the pool try to find as many reasons as possible to deny a petition.*

Others believe the evidence may support Starr's contention, as the decrease in the plenary docket ostensibly has coincided with the rise of the cert pool. Justice Stevens, for one, agrees with Starr's hypothesis: "*You stick your neck out as a clerk when you recommend to grant a case.* The risk-averse thing to do is *to recommend not to take a case.* I think it accounts for the lessening of the docket."

Former clerks also allude to *this dynamic.* Laura Ingraham, once a clerk for Justice Thomas, stated: "You're in perpetual fear of making a mistake." Other clerks *attribute their reluctance* to a *culture of restraint.* One remarked that his practice was to "*find*

[p. 1236] *every possible reason to deny cert. petitions.*" Part of this was *institutional*: "[T]here is ... *the rule that anything that is avoidable should be avoided*." One clerk described this rule as an "*enormous pressure not to take a case*" and "*an institutionalized inertia not to grant cert.*" Because the Court treats most cases as fungible, that is, having the same value, *clerks believe* that "*it really [does not] matter if the Court ma[kes] a mistake in not taking a case*." *To them, "[i]t is better to let [the case] have a little extra time, because if we [do not] grant cert, the [issue] will come up again.*

Moving away from anecdotal accounts, other scholars, such as David Stras, use empirics to argue that the cert pool may have contributed to the docket's decline. In his study of the cert pool, Stras examined cert pool memoranda and compared them to the Court's certiorari decisions. He found that when the cert pool recommended the Court grant cert, the Court did so between 70 and 75 percent of the time. He also found a strong positive correlation between the number of grant recommendations and the number of plenary decisions. In other words, when the cert pool recommends the Court grant cert, the Court's decision to grant is strongly influenced by that recommendation. This is important in explaining the plenary docket's decline because the cert pool "is considerably more stingy in making grant recommendations than is the Court in its decisions to grant plenary review."

Given the correlation between the cert pool and the Court's decision to grant cert, fewer recommendations from the cert pool may help explain the docket's decline.

Although Stras cautions that the "extent of that relationship is unclear," he has examined and rejected several other factors that may explain the decline including: [p. 1237] a decline in the number of cert-worthy opinions, a decline in the quality of cert petitions, and changes in personnel on the court. In other words, Stras's study supports the idea that ***the cert pool's recommendations influence the Court's ultimate decision to grant or deny cert.***

Other scholars writing before Stras's study are less enthusiastic about the cert pool's ability to explain the decline. Margaret and Richard Cordray argue that "the cert pool has not had much systematic influence on the votes cast by individual Justices to grant or deny plenary review." They claim this is the case for two reasons. First, the Justices' differing levels of attention to cert petitions "does not correlate with their participation in the pool." In other words, one Justice may examine petitions more closely than another Justice, ***but participation in the pool does not explain this behavior.*** Second, variation exists in the Justices' voting patterns within the cert pool. Justices who participate in the cert pool vote to grant or deny cert at different rates. The Cordrays argue, therefore, that the cert pool does not influence the size of the plenary docket.

> Fn 54 : Despite the strong relationship, the data leave room for independent judgment of the Justices. Nevertheless, the data still support the hypothesis that ***some meaningful relationship exists between the recommendations of the cert pool and the final decisions of the Justices.***

[p. 1238] David O'Brien, too, suggests that no concrete evidence shows the cert pool influenced the plenary docket. By drawing attention to more cases, he argues that the cert pool could have influenced the docket's size in either direction. On the one hand, greater attention to detail could have highlighted *circuit splits*, "which after further scrutiny are *deemed 'tolerable' or in need of 'percolation.'*" But just that kind of "highlighting" also could have caused some Justices to grant cert to settle such circuit divisions. He also notes "there is no evidence that justices not in the cert pool give more attention to petitions than those in the pool." Put simply, O'Brien does not think there is concrete evidence showing the cert pool influences the Court's docket.

How, then, do the Cordrays and O'Brien explain the decline? In their view, the *primary factor* influencing the decline *is the Court's composition*. They are not alone in this view. Preliminary support for this hypothesis comes from Arthur Hellman and others. Hellman contends that the Court's membership, and the Justices' views of the Court's role in deciding cases, explain the decrease in the plenary docket. Justices who joined the Court in the late 1980s and 1990s, he argues, held a different view of the Court than their predecessors. Specifically, they believed that "a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues." Thus, he argues that the view held by the new Justices influenced the decline in the Court's docket.

[p. 1247] . . . As the philosophical division between the lower federal courts and the Supreme Court grows,

the more often the Court must grant plenary review to audit those lower courts.

> **[The philosophical division between the lower federal courts and the Supreme Court (in this matter) has ostensibly reached the tipping point]**

Thus, as the lower courts and Supreme Court – [p. 1248] become more ***ideologically congruent***, the Supreme Court's need to audit lower courts decreases. . . . As the distance between the Supreme Court and a circuit grows, the Supreme Court becomes more likely to disagree with the lower court and, concurrently, more likely to review that court's decisions. Thus, because the Supreme Court and CAx disagree ideologically, the Supreme Court will be forced to audit the lower court more frequently to ensure that it complies with Court policy. Conversely, the Supreme Court will be forced to review CAy less frequently, as that court shares the same general views as the Supreme Court.

[p. 1251] We argue that policymakers and the legal community should care about the Court's docket size for at least four reasons. First, a [p. 1252] ***Court that hears few cases leaves important legal questions on the table.*** This can increase uncertainty among the lower court judges who must apply the law and parties who must operate within its confines. Second, a smaller docket can lead to a Supreme Court ***out of touch with the major legal issues of the day.*** Third, a small docket may put the Court ***in a position to be "captured" by certain interests or actors.*** And, finally, a small docket might cause public opinion to turn against the Court, leading to a ***loss of legitimacy*** for

the institution whose strongest reservoir of power is legitimacy.

A. A Depleted Docket Risks Leaving Important Cases Undecided

Justice White viewed the Supreme Court as the unifier of law. He believed that the Court should resolve as many circuit splits as possible and unify the law. If we subscribe to Justice White's philosophy—that important cases, especially those that evince conflict among the lower courts, must be reviewed by the Court — the declining docket poses a clear and significant problem. According to this perspective, a depleted docket is normatively bad because it likely means that the Court is resolving fewer circuit splits. Justice White was not alone. Chief Justice Rehnquist, whose tendency to grant cert admittedly fell during his tenure, also believed that the law needed clarification and unification. He thought that cases [p. 1253] should be resolved, not stewed until tender: "[T]o ... suggest that it is actually desirable to allow important questions of federal law to 'percolate' in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity." Chief Justice Rehnquist was concerned with the need to decide national law. He did not endorse the idea of percolation: "We are not engaged in a scientific experiment or in an effort to square the circle." The Court's role was not, as he saw it, to allow uncertainty in hopes of achieving the "best" outcome. It was instead, among other things, a unifier of national

law—and that was the reason he advocated some twenty-five years ago for the creation of something like a national court of appeals. To him, it was preposterous that ***one federal statute could produce two rules "simply because" two circuit courts disagreed on its meaning***. In supporting a national court of appeals, Chief Justice Rehnquist wished to avoid forcing the Court to choose between its "active role in constitutional adjudication and its active role in statutory adjudication." He believed that the Court should decide more cases, but recognized that, logistically, it could not. A smaller docket meant uncertainty in the law, and, without certainty, the law does not serve one of its main purposes: to demarcate the boundaries within which people can act legally and without retribution.

To be sure, concern over the Court's docket size may depend on how one perceives the Court's role. Justice Brennan, for example, thought that part of the Court's role was "to define the rights [p. 1254] guaranteed by the Constitution." He believed the Court's ability to do this increased as the number of cases it decided increased. When the Court hears and decides more cases, he argued, it clarifies —and probably expands—the meaning of important constitutional principles. As such, rights are enhanced, as is the power of the Court. Even if one believes, alternatively, that the Court should take a more passive role, a small docket nevertheless might diminish the Court's importance. A small docket could afford the Court less opportunity to put its stamp of approval on actions taken by the elected branches. What is more, hearing

few cases could put the Court's importance on the line. *The Court arguably gains institutional importance by hearing and deciding cases. And as the number of cases on which it renders judgments declines, the Court's importance in policymaking could drift toward irrelevance.* Finally, as the Court's caseload declines, the potential effect of each decision increases. On its own, this is not necessarily a problem. Yet if the Court miscalculates in these cases, the effects of the error could be greater than an erroneous decision among numerous other correct decisions. In short, *the smaller the denominator, the larger the marginal effects of wrongly decided cases.* Whatever the appropriate role for the Court, *fewer cases could minimize the Court's effectiveness and leave important legal issues on the table.*

[p. 1268]

2. The Certiorari Pool

Many have argued that the cert pool led to a diminished docket, as clerks have become hesitant to recommend a grant vote and risk making the Court look foolish by accepting a case that is not truly cert-worthy. That, at least, is the view of some Justices, law clerks, and scholars. Interviews with both Justices and clerks confirm that a culture of restraint permeates the pool. Clerks are reluctant to recommend that Justices grant cert, and the Justices understand why: in an environment in which all cases are treated as fungible, *recommending a denial of one more case is less risky than recommending a grant.* If one recommends denial, it *is harder to call it a "mistake," because the issue will confront the Court*

again. A grant recommendation forces the Court to confront the issue now. As a result, the *unwritten rule is to avoid what you can.* Accordingly, we hypothesize that *after the adoption of the cert pool, the Court's docket decreased.*

3. Ideological Agreement Between the Supreme Court and Lower Courts

A further hypothesis, as we discussed above, suggests that the Court heard fewer cases during the 1980s and 1990s because of its *ideological agreement with lower federal courts.* That is, scholars have argued that *the* Court heard fewer cases simply because *it did not need to audit the lower courts to the same degree as in previous Terms.* There is some anecdotal evidence to support this theory.

[p. 1269] . . . we hypothesize that as the *ideological distance* between the Supreme Court and lower federal courts *increased*, the Court heard *more cases*, and conversely, when the two were *ideologically in line*, the Court *heard fewer cases.*

4. Membership Change

Finally . . . a host of scholars argue that the Court's depleted docket is a function of membership change. Standing above all others in terms of docket activity, however, was Justice White. Justice White often dissented from the denial of cert because he thought the Court had an obligation to grant review to petitions showing the slightest of conflicts among the circuits. He possessed an "unswerving view that the Court *ought not let circuit splits linger*, that *it should say what the federal law is sooner rather than later.*

[p. 1285] . . . [T]he data suggest that *ideological agreement* among the Justices *ought not to be overlooked* by scholars seeking to examine the conditions under which the Court decides cases each Term.

In the end, then, *it would appear that unless something dramatic in the political world changes, the legal world will continue to observe low levels of Supreme Court activity,* along with the *detrimental* factors that come with a *fractured Court*, such as *increased dissents, tolerated intercircuit conflict, and ambiguous law.* When the next Supreme Court vacancy and nomination arises, we are sure to witness another grueling examination of the nominee's ideology and background. To be sure, these issues are critical and deserve searching scrutiny. Yet, we ***hope that policymakers do not in the process continue to neglect the Court's broader obligation to clarify and unify law.*** We hope that when policymakers debate the merits and demerits of the nominee, they press that person on his or her views of the Court's docket. Recent nominees, such as Chief Justice Roberts, have paid lip service to the issue, but ***policymakers can force the issue and persuade the Court to address head on its obligation to provide clarity to the law.*** Failure by the Court to send clearer signals could have damaging long-term consequences for the Supreme Court as an institution.

[- END -]

APPENDIX E

CONCLUSIONS OF LAW

There is no law/statute that imposes a legal requirement for petitioner to file a federal income tax return.

There is no law/statute that specifically defines the legal term, "income".

Although the Tax Court (TC) repeatedly refers to "liability", it cannot show a law/statute that establishes such liability upon petitioner for any tax imposed by subtitle A of Title 26, U.S.C (IRC).

Neither the judges of the TC nor of the Court of Appeals for the Eighth Circuit (COA) offer any conclusions of law – in fact, neither court even recognizes "legislative" facts (the law as written by the legislature).

The TC reiterates alleged facts purported by the respondent but offers no laws/statutes nor any separately stated conclusions of law substantiating such claims.

The TC states "petitioner did not file a federal income tax return for 2011" but fails to state any statute or conclusion of law requiring such legal duty.

The TC acknowledges that "petitioner contends that he did not receive income" but the court cannot identify a statute rebutting such a contention nor identify any statute defining income or assigning any specific, legal description of petitioner's financial receipts.

The COA has offered no reasoned decision or explanation — as shown in Appendix "A".

The TC has disregarded all legislative facts presented by petitioner and only offered specious phrases as: "no specific reasons"; "any such explanations"; "no specific factual reasons"; or "any factual support".

The TC cites only §§ 6651, 6654 & 6673 of the IRC but purposely DOES NOT cite any statutory foundation for the imposition of those sections. It cannot show any statute that specifically establishes a legally-sound basis upon which any "failure" can be adjudged. Neither can it show any statutory justification for its determination of "delay", "frivolity", or "failure to pursue administrative remedies".

Upon the granting of this petition, petitioner's brief will establish irrefutable proof of judicial fraud, malfeasance, misfeasance, and mendacity.