NO. 19-____

In the Supreme Court of the United States

ESTELLE STEIN,

Petitioner,

–v–

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a court of appeals vacated summary judgment in its favor, the Government filed a new summary judgment motion against a defendant-taxpayer, with additional evidence—arguing that a declaration the taxpayer had filed opposing the Government's earlier, pre-appeal summary judgment motion lacked sufficient detail. The district court then prohibited the taxpayer from submitting any evidence opposing the new motion (like a new declaration), and granted the motion on the basis that the declaration the taxpayer filed opposing the earlier motion lacked sufficient detail. The court of appeals affirmed.

The following questions contemplate evidence filed in compliance with the Federal Rules of Civil Procedure, including Rule 56:

1. Does a party have a right under the Due Process Clause to file evidence in opposition to a motion for summary judgment?

2. May a district court prohibit a party from filing evidence in opposition to a motion for summary judgment?

3. Did the district court err by granting summary judgment?

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Eleventh Circuit

No. 18-14625

United States of America, Plaintiff-Appellee, v.
Estelle Stein, Defendant-Appellant

Decision Date: April 23, 2019

United States Court of Appeals for the Eleventh Circuit

No. 16-10914

United States of America, Plaintiff-Appellee, v.
Estelle Stein, Defendant-Appellant

Decision Date: May 9, 2018

U.S. District Court Southern District of Florida

Case No. 15-cv-20884-UU

United States of America, Plaintiff, v.
Estelle Stein, Defendant

Date of Order Granting Plaintiff's Second Motion for Summary Judgment: October 23, 2018

Date of Order Granting Plaintiff's First Motion for Summary Judgment: February 26, 2016

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 769 Fed.Appx. 828. (App.1a). The order of the United States District Court for the Southern District of Florida granting the Government's second motion for summary judgment has been submitted in the appendix to this petition. (App.12a).

JURISDICTION

The court of appeals issued its opinion on April 23, 2019 (App.1a). On July 11, 2019 this Court granted an extension to file this petition until September 20, 2019. Sup. Ct. No. 19A64. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 56.

(a) Motion for Summary Judgment or Partial Summary Judgment.

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion.

Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions.

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence.

A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited.

The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations.

An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant.

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

STATEMENT OF THE CASE

A. Underlying Facts

This case presents the unresolved issue of whether a party faced with a motion for summary judgment has a right to file evidence in opposition to that motion. Here, the district court prohibited Estelle Stein from filing such evidence in response to the Government's post-remand motion for summary judgment, even though the Government filed new evidence in support of the motion. The Eleventh Circuit affirmed the trial court's decision, and Mrs. Stein seeks further review through this petition for writ of certiorari. The following facts contextualize the Eleventh Circuits' decision.

1. *Stein I*

In March 2015, the United States of America (the Government) sued Estelle Stein in the United States District Court for the Southern District of Florida, alleging she had failed to pay taxes in 1996, 1999, 2000, 2001, and 2002. (DE 1).[1] Mrs. Stein had filed joint federal returns for these years in 2004 and 2005, shortly after her husband passed away, but—according to the Government—she had not paid the required taxes with the returns. *Id.* The Government sought to recover the unpaid income tax, interest, and penalties. *Id.*

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[1] When an appendix cite is not available, references to the record refer to the docket entry (DE) and when appropriate to the pinpoint page number and any further identifier when needed as follows: (DE [docket number]:[page number]).

On December 24, 2015, the Government filed a motion for summary judgment, asserting that Mrs. Stein owed the Government $230,130.53 in unpaid taxes, interest, and penalties. (DE 31). In support, it submitted an affidavit executed by Michael Brewer, a Revenue Officer employed by the IRS, in which Mr. Brewer testified that internal IRS records indicated that Mrs. Stein owed the amounts alleged. (DE 31-1).

In opposition, Mrs. Stein filed an affidavit, swearing under oath that she had paid all of the assessments at issue when she filed the returns in 2004 and 2005. (DE 32-1). She further swore that (although more than a decade had passed since she filed the tax returns) she had been able to locate a check stub that related to the payment of the 1996 tax payment. (DE 32-1). Beyond that single check stub, Mrs. Stein was unable to locate any additional documentary evidence, and her bank had told her that it did not maintain records from so many years earlier. (DE 32-1). The Government then conceded—with respect to the one check stub Mrs. Stein was able to locate—that Mrs. Stein was correct that she had made that payment approximately 10 years earlier, but the Government continued to assert that she had not made the other payments at the same time. (DE 33-1).

The district court granted the Government's motion for summary judgment. (App.55a). The court founded its decision on the fact that Mrs. Stein's affidavit was insufficient to rebut an Eleventh Circuit presumption of correctness that applied to all IRS-issued tax assessments and, thus, the affidavit did not create a genuine issue of material fact because she had not

substantiated her sworn statements with other evidence. (App.62a).

Mrs. Stein appealed, arguing that the district court had erred by granting summary judgment in the face of her legally sufficient affidavit, which she contended created a genuine factual dispute about whether she had paid the taxes and penalties owed. (App.45a). Initially, the Eleventh Circuit affirmed based on the circuit's 1985 decision in *Mays v. United States*, 763 F.2d 1295, 1297 (11th Cir. 1985), which held that a taxpayer's claim "must be substantiated by something other than . . . self-serving statements" in order to create a disputed issue of fact. (App.47a). Then the court granted *en banc* review, receded from *Mays*, and vacated the prior panel opinion. (App.64a).

In the *en banc* opinion, the court held that a "non-conclusory affidavit which complies with Rule 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." (App.40a). Explaining its decision to overrule *Mays*, the court stated that "[n]othing in Rule 56 prohibits an otherwise admissible affidavit from being self-serving. And if there is any corroboration requirement for an affidavit, it must come from a source other than Rule 56." *Id.* at 36a.

On remand to the original panel, the parties advanced "arguments that no longer resemble[d] the arguments they made to the district court." (App.28a). Specifically, the government "contend[ed] that Stein's affidavit fail[ed] to create a genuine issue of material fact about her tax liability" because she supposedly failed to prove "'that funds were actually delivered to the [Internal Revenue Service]' to defeat summary

judgment." (App.29a). Critical to this petition, the Eleventh Circuit noted that "these arguments were never presented by the government to the district court . . . . " *Id.* Accordingly, the court remanded the case to the district court to address the Government's new arguments in the first instance. (App.29a-30a).

2. *Stein II*

On remand, the district court ordered the government to file a new motion for summary judgment that addressed the following novel question: "does [Mrs. Stein's] self-serving affidavit create a genuine issue of material fact?" (App.25a). The court further ordered that:

> The Parties ARE NOT permitted to engage in further discovery, to supplement the record already before the court, or otherwise to make new arguments which they could have made when Plaintiff moved for summary judgment the first time. Failure to comply with this order will result in the imposition of appropriate sanctions.

Id. (emphasis in original).

On July 27, 2018, the Government filed a new motion for summary judgment. (DE 52). Notwithstanding the district court's order, the Government's new motion for summary judgment contained a number of new arguments that it did not—but could have—made when it moved for summary judgment the first time. (DE 52). Specifically, the Government's new motion for summary judgment contained the same arguments it presented to the Eleventh Circuit in its *en banc* brief, and supplemental answer brief, which

the Eleventh Circuit expressly recognized were not made when the Government moved for summary judgment the first time. Further, notwithstanding the district court's order preventing either party from submitting additional evidence, the Government filed a new declaration and new supporting documentation in support of its new motion for summary judgment (DE 52-1).

In her response, Mrs. Stein requested permission to file an affidavit, pointing out that the Government had filed a new declaration in direct violation of the court's prior order and, if that violating declaration was allowed to stand, she should also be allowed to file an additional declaration to address the Government's new arguments. (DE 55: n.6). She contended that this was only fair because, if she was prohibited from submitting any new evidence in response to the Government's new motion for summary judgment, she would essentially be barred from addressing the Government's substantive basis for summary judgment. *Id.*

The district court granted the Government's new motion for summary judgment. (App.12). The court did not address Mrs. Stein's request to file additional evidence. *Id.* Instead, the court simply determined, once again, that Mrs. Stein's original affidavit was legally insufficient to overcome the Government's presumption of correctness that applied to its tax assessments. (App.21a-22a). Notably, in granting the Government's motion for summary judgment, the court relied on the argument that, to prevail on a motion for summary judgment, the defendant would need to present evidence that "the checks were

deposited and accepted in payment of taxes by the IRS"—a new argument presented in the Government's second motion for summary judgment. (App.20a) (quoting *Latham v. United States*, No. Civ A. 91-2397-O, 1992 WL 403030, (D. Kan. Dec. 1, 1992)); (DE 52: 11). This new argument presented precisely the type of factual issue that Mrs. Stein could have clarified, if she had beesn allowed to present evidence in opposition to the Government's new motion for summary judgment. (DE 55: n.6). Mrs. Stein appealed the summary judgment order to the Eleventh Circuit.

On appeal, Mrs. Stein argued, among other bases for reversal, that the district court had erred by not allowing her to submit a new declaration in response to the Government's new motion for summary judgment. (App.2a). She argued that the district court's prohibition violated Federal Rule of Civil Procedure 56 and her right to due process under the Fifth Amendment. (App.10a). The Eleventh Circuit rejected each argument, finding that "Rule 56 does not address the supplementation of the record on remand" and that whether Mrs. Stein should be allowed to file a declaration in response to the new, post-appeal summary judgment motion should be left to the district court's discretion. *Id.* The Eleventh Circuit also concluded—in rejecting her due process argument—that Mrs. Stein had failed to prove that she was prejudiced by the district court's decision to prohibit her from filing a new declaration that clarified the facts supporting her opposition. (App.10a-11a).

REASONS FOR GRANTING THE PETITION

I. THE RIGHT UNDER THE DUE PROCESS CLAUSE AND FEDERAL RULE OF CIVIL PROCEDURE 56 TO SUBMIT EVIDENCE IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT.

A. Circuit Conflict Regarding a Party's Due Process Right to Submit Evidence in Response to a Motion for Summary Judgment.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864). The procedural safeguards put in place to protect a litigant's due process rights have been codified in the Federal Rules of Civil Procedure. Accordingly, all court action must be undertaken "in a manner that is in harmony with the Federal Rules of Civil Procedure. Those rules are the product of a careful process of study and reflection designed to take 'due cognizance both of the need for expedition of cases and the protection of individual rights.'" *Strandell v. Jackson County, Ill.*, 838 F.2d 884, 886 (7th Cir. 1987) (quoting S. Rep. No. 1744, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.Code Cong. & Admin. News 3023, 3026).

Federal Rule of Civil Procedure 56 governs summary judgment practice. "Rule 56 is not merely

directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues." *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636, 638 n.1 (9th Cir. 1953). In light of the rule's critical purpose of ensuring that a party's rights are respected, courts must strictly adhere to the procedures required under Rule 56. *See Brooks v. Hussman Corp.*, 878 F.2d 115, 116–17 (3d Cir. 1989) ("This court has insisted on strict compliance with the procedural requirements of Rule 56(c).").

Rule 56(c) authorizes the filing of affidavits and declarations, expressly "including those made for purposes of the motion only." Fed. R. Civ. P. 56(c). Given that summary judgment involves an evidentiary inquiry, the ability to submit such opposing evidence —expressly authorized by Rule 56—is often a critical component of a party's response to a summary judgment motion. Indeed, if a party were prohibited from submitting evidence in opposition to a motion for summary judgment, they would be denied the opportunity to meaningfully respond. *See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000) (explaining that if "a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment.") (internal citation omitted).

Accordingly, due process in the summary judgment context is simple: "An opportunity to submit written evidence and argument satisfies the requirements of the rule." *Anchorage Associates v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 176 (3d Cir. 1990); *see also Mgmt. Inv'rs v. United Mine Workers of Am.*, 610 F.2d 384, 390 (6th Cir. 1979) (holding that a district court denied a plaintiff his due process right to be heard, explaining that the court had "denied plaintiffs the opportunity afforded under Fed. R. Civ. P.56(f), to present evidence essential to justify their opposition to the motion.").

The due process right to submit evidence in opposition to a motion for summary judgment has also been recognized in two close, peripheral situations. The first involves instances in which a district court converts a motion to dismiss into a motion for summary judgment. "When a court treats a dismissal motion as a summary judgment motion, it must give the nonmovant a 'reasonable opportunity' to contradict the material facts asserted by the movant." *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993); *see also Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2d Cir. 1990) (holding that district court's *sua sponte* conversion of motion to dismiss suit on jurisdictional grounds into motion for summary judgment was improper, as it took plaintiff by surprise and deprived her of reasonable opportunity to meet facts outside pleadings); *Winkleman v. New York Stock Exch.*, 445 F.2d 786, 789 (3d Cir. 1971) (rule governing conversion of motion to dismiss to motion for summary judgment "provides a right to the adverse party to serve opposing affidavits prior to the day of hearing.").

The second situation, and the more robustly fleshed out circumstance, arises when a district court wishes to grant summary judgment *sua sponte*. "As a general rule, a district court lacks the power to grant summary judgment *sua sponte* unless the party against whom summary judgment was entered had (1) proper notice that the district court was considering entering summary judgment and (2) a fair opportunity to present evidence in opposition to the court's entry of summary judgment." *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546, 549 (7th Cir. 1999); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."); *Sanchez v. Triple-S Mgmt., Corp.*, 492 F.3d 1, 7 (1st Cir. 2007) (concluding that a court may grant summary judgment *sua sponte* where: "First, the discovery process must be sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts. Second, the district court must provide "the targeted party appropriate notice and a chance to present its evidence on the essential elements of the claim or defense.") (internal citation omitted); *Bendet v. Sandoz Pharm. Corp.,* 308 F.3d 907, 912 (8th Cir. 2002) ("A district court may grant summary judgment *sua sponte* only if the "party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted.") (internal citation omitted); *Nat'l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1188 (Fed. Cir. 1996) (same); *Macon v. Youngstown Sheet & Tube Co.*, 698 F.2d 858, 861 (7th Cir. 1983)

(district courts lack power to enter summary judgment *sua sponte* when party against whom summary judgment is entered "did not have adequate notice and a fair opportunity to present evidence in opposition to the entry of summary judgment.").

The Eleventh Circuit's decision conflicts with the above decisions from the First, Second, Third, Sixth, Seventh, Eighth, and Federal Circuits. The Eleventh Circuit is not, however, alone in its determination that a district court may override a party's right to submit evidence in opposition to a motion for summary judgment. Other circuits have similarly concluded that a district court may grant summary judgment, even where a party is not given the opportunity to submit all available opposition evidence. *See Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (rejecting non-movant's claim that the district court had deprived him of his right to due process where he was unable to provide rebuttal evidence to evidence that the movant filed alongside its reply, concluding that his due process claim was barred because he did not move for leave to file sur-reply); *Levy v. Levitt*, 3 Fed.Appx. 944 (10th Cir. 2001) (rejecting a defendant's claim that "the district court denied him due process when it ordered the parties to submit simultaneous briefs consolidating all outstanding motions for summary judgment," which he contended "prevented him from presenting rebuttal evidence in accordance with Fed. R. Civ. P. 56, since he had no opportunity to respond to Plaintiff's brief after its submission.").

B. Additional Circuit Conflicts Created by the Eleventh Circuit's Rule 56 Analysis.

The Eleventh Circuit's Rule 56 analysis also conflicts with other circuits on other discrete issues. These additional conflicts make the court of appeals' decision an outlier even among the courts that have concluded that it is permissible to overrule a party's due process right to submit evidence in opposition to a motion for summary judgment.

First, the district court prevented Mrs. Stein from submitting any evidence in opposition to the Government's new motion for summary judgment, while—at the same time—allowing the Government to submit a new declaration in support of its motion. (App.25a). This independently conflicts with the Seventh Circuit's treatment of this very issue. *See Simpson*, 171 F.3d at 551 ("Granting summary judgment was error because the only evidentiary materials before the district court at the time it entered judgment were those submitted improperly by [the movant].") (internal quotation omitted).

Second, the district court forced Mrs. Stein to rely on a declaration that was crafted in response to a previously-submitted motion for summary judgment. The Sixth Circuit has previously rejected a similarly strained interpretation of Rule 56. *See Mgmt. Inv'rs,* 610 F.2d 384, 390 (6th Cir. 1979) ("the fact that the issue had been addressed elsewhere cannot serve as the basis for denying plaintiff an opportunity to address the issue as specifically raised in the motion. Considerations of justice and fair play required that plaintiff be granted an opportunity to respond to the motion prior to the court's decision . . . . ").

C. Conflict with this Court's Precedent on Interpreting Rules of Civil Procedure.

Beyond the circuit splits above, the Eleventh Circuit's decision runs afoul of this Court's command that courts not alter or amend the Federal Rules of Civil Procedure through judicial interpretation. Such deviations from the rules, if warranted, "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (declining to "apply any 'heightened' pleading standard" or nor do we seek to "broaden the scope of Federal Rule of Civil Procedure 9" by judicial interpretation); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (It would be inappropriate to adopt a heightened proof standard "to reduce the availability of discovery in actions that require proof of motive" because such "[q]uestions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process"); *Swierkiewicz v. Soreman, N.A.*, 534 U.S. 506 (1993) ("[T]he Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amended the Federal Rules, and not by judicial interpretation.'" (citing *Leatherman*, 507 U.S. at 168); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, . . . and generally with them, as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry

is complete . . . ."'); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980) (refusing to change the Federal Rules governing pleading by requiring the plaintiff to anticipate and plead in advance to rebut an immunity defense).

Rule 56(c) expressly anticipates that a party will have the opportunity to present evidence in opposition to a motion for summary judgment. The Eleventh Circuit's decision affirmed the district court's decision to prohibit Mrs. Stein from utilizing that established procedure and, in effect, modified a federal rule of civil procedure by judicial interpretation—precisely what this Court has said the lower courts cannot do. Such action conflicts with this Court's established precedent.

D. The Rule 56 Question Is Important.

"The opportunity to respond is deeply imbedded in our concept of fair play and substantial justice." *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993). For the right of response to be meaningful in the summary judgment context, it must include an evidentiary component. Otherwise, the right to respond would be meaningless—rendering the proceedings no more than a Kabuki litigation in which nothing matters but a foregone conclusion. The circuit split surrounding a party's due process right to submit evidence in response to a motion for summary judgment should be resolved. Differential treatment of the issue depending on where a litigant is located undermines the idea that our legal system is predicated on ensuring that each party is entitled to the same due process rights and protections.

Review is also justified by the importance of the conflict with this Court's precedent governing the interpretation of the Federal Rules of Procedure. The Court has stated on multiple occasions that it is impermissible for a lower court to modify, through judicial interpretation, the meaning of a Rule of Civil Procedure. *Twombly*, 550 U.S. at 569 n.14; *Crawford-El*, 523 U.S. at 595; *Swierkiewicz*, 534 U.S. at 506; *Leatherman*, 507 U.S. at 168; *Pavelic & LeFlore*, 493 U.S. at 123; *Gomez*, 446 U.S. at 639-40. Yet the Eleventh Circuit's decision that summary judgment motions filed post-appellate remand does exactly that, giving the district courts discretion to decide whether the opposing party may file opposing evidence—and thus irreconcilably conflicts with this Court's dictate.

II. SUMMARY JUDGMENT SHOULD BE VACATED.

The district court's conclusion that to prevail in opposing a motion for summary judgment, the defendant-taxpayer would need to present evidence that "the checks were deposited and accepted in payment of taxes by the IRS" (App.20a), illustrates that additional factual assertions could have created a disputed issue of fact. This is exactly the type of factual issue that Mrs. Stein could have clarified, if she had been allowed to present evidence in opposition to the Government's new motion for summary judgment. (DE 55 at n.6). If the district court had granted Mrs. Stein's request to submit a new declaration in opposition to the Government's new motion for summary judgment, she thus could have made factual assertions—*i.e.*, addressing the Government's new argument by clarifying her earlier sworn facts—that would have prevented

the issuance of summary judgment. The district court's order granting summary judgment should be vacated.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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