No. 19-402

In the Supreme Court of the United States

HOWARD L. BALDWIN AND
KAREN E. BALDWIN,
A MARRIED COUPLE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The government correctly observes that federal-court opinions are "not authoritative" under the *Brand X* regime, BIO.20, but this observation only underscores the importance of granting certiorari. The government essentially admits that *Brand X* elevates executive interpretations above prior judicial interpretations, rendering judicial precedents *unauthoritative*—even if not "legally wrong." *Id.* This topsy-turvy doctrine, which subordinates the courts to the executive branch, shows precisely why granting certiorari is imperative in this case.

Any other litigant would be laughed out of court for presuming to say that the litigant is free to ignore federal-court decisions it does not like. Yet *that* suggests the cost of keeping *Brand X* on the books. When a federal agency relies on that case to ignore a federal-court decision, *Brand X* requires federal courts to abandon their "province and duty … to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Indeed, it even requires them to repudiate what they earlier said the law is, thereby subjecting the authority of their precedent to an agency's mere say-so.

To be sure, these are not the only constitutional problems with *Brand X*. Like some other judicial deference doctrines, it compels federal judges to violate their Article III duty of judicial independence. And like other such doctrines, it requires federal judges to favor the legal position of one party—the most powerful of parties—in violation of the Fifth Amendment's due process of law.

But *Brand X* is distinctively unconstitutional because it subjects the courts, their judicial power, and their precedents to the executive and its interpretations. So, when the government concedes that federal court opinions are "not authoritative" under *Brand X*, this sums up precisely what is wrong with that decision and frames bright flashing lights around the words: "certiorari should be granted."

Howard and Karen Baldwin proved at trial, with credible testimony, that their refund claim was post-marked well in advance of the filing deadline. App.4a, 10a. IRS argued its regulation, applied retroactively, prevents the Baldwins from introducing evidence other than "registered or certified mail receipts." 26 C.F.R. § 301.7502-1(e). However, under the prior Ninth Circuit precedent in *Anderson v. United States*, the statute leaves in place the common-law mailbox rule that "extrinsic evidence to prove" the postmark date—and therefore "timely delivery"—is admissible. 966 F.2d 487, 491 (9th Cir. 1992).

The district court concluded that *Anderson* controlled, refused to defer to IRS's interpretation, App.39a, and allowed the Baldwins to prove that the refund claim was postmarked in time. App.18a. The Ninth Circuit reversed, concluding that *Brand X* required it to abrogate *Anderson* and give *Chevron* deference to IRS's amended regulation because 26 U.S.C. § 7502 is "silent" on the precise question at issue. App.11a.

Brand X, therefore, squarely and exclusively dictated the outcome on appeal. The Court should grant certiorari to revisit *Brand X.* This case provides a peerless vehicle for doing so.

ARGUMENT

I. IRS'S RESPONSE CONFIRMS THE CONSTITUTIONAL PROBLEMS WITH *BRAND X*

Brand X interferes with judicial independence and requires judges to be biased in favor of one of the parties—in violation of Article III and the due process of law.

Making it distinctively worse, *Brand X* is unworkable, it subverts *stare decisis*, and it violates the separation of powers by subordinating judicial power to executive power. Far from disproving these problems, the government's response does much to illustrate them and thus confirms that certiorari should be granted.

A. IRS Disregarded Court Precedent and Thereby Circumvented *Stare Decisis*

IRS here circumvented *stare decisis* by discarding precedents it did not like, such as *Anderson*, *Rosenthal v. Walker*, 111 U.S. 185 (1884), and the common-law mailbox rule. IRS now offers nothing "more than an argument that [those precedents were] wrongly decided." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (cleaned up); see BIO.2–18 (arguing *Anderson* was wrongly decided). Under ordinary constitutional principles, a split in the courts of appeals regarding the meaning of Section 7502 would be decided by this Court, and the executive branch would not be able to circumvent the judicial system by resolving the split on its own. Though the IRS may strongly feel a need to resolve the split, this cannot be the "special justification" needed to overcome *stare decisis*, *id.*, especially for a split IRS slept on for *21 years*.[1]

The Baldwins' predicament highlights the incompatibility of *stare decisis* with *Brand X*. The Baldwins relied on then-existing law when they mailed their refund claim by regular U.S. mail—only to find that the IRS later changed the regulation, retroactively applied it to

[1] The Eighth Circuit departed from the Second Circuit's interpretation of the relevant statute in 1990; IRS did not issue the final rule until 2011. *Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir. 1990); 76 Fed. Reg. 52561-01 (Aug. 23, 2011); see also Pet.6 n.3, Pet.7 n.4.

the Baldwins' filing, refused to issue them a refund, and then demanded and obtained the Ninth Circuit's acquiescence in the agency's unilateral rewrite of federal law.

Thanks to *Brand X*, IRS was allowed to rob statutory law, caselaw, and then-existing regulations of the certainty and predictability that are essential to preserving the rule of law and enabling individuals to evaluate how best to order their lives and comply with the law. *Brand X* has become a game-changer in favor of government litigants. See BIO.20 ("[T]he Court rejected [the *stare decisis*] argument in *Brand X* itself."); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006) (discarding *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978)); *Szonyi v. Barr*, 942 F.3d 874, 877 (9th Cir. 2019) (Collins, J., joined by Bea, J., dissenting from denial of rehearing *en banc*).

B. IRS Would Leave Federal-Court Decisions Interpreting Statutes to Have a Merely Advisory Effect Under *Brand X*

The practical consequence of accepting the IRS's position is that a vast majority of the statutory-interpretation decisions reached by federal courts would continue to have a merely advisory effect. *Brand X* dictates—as IRS highlights—that it is futile for lower federal courts to employ regular tools of statutory construction, because the federal-agency litigant can ignore the court's work regardless. That the IRS welcomes this departure from bedrock constitutional principles is unfortunate.

Though *Brand X* submits judicial precedents rather than judges' current decisions to the executive, the threat to judicial power remains. Judicial independence would be of scant value to the people if judicial decisions only applied to the litigants themselves. Authoritative precedent is how the judiciary elucidates the meaning of the Constitution and laws. Authoritative interpretations also enable Americans to avoid conflict. To preserve judicial power and the value of precedents, it is necessary to overrule *Brand X*.

"Article III courts do not sit to render decisions that can be reversed or ignored by executive branch officials." *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting). This fundamental disconnect between *Brand X* and the Constitution has since become more pronounced. It is a pity that the Solicitor General would defend the executive branch's claim to deprive judicial precedents of their authority, and this Court should recognize the danger and retreat from its mistake in *Brand X*.

C. *Brand X* Is Unnecessary for Gap-filling or National Uniformity

Despite IRS's feeble protestations, *Brand X* remains as unworkable now as it was on the day it was decided. Lower court judges have struggled to make it practicable. Pet.16–19. And at the same time, it is unnecessary for gap-filling or national uniformity.

IRS alludes to some nebulous efficiency that can be derived from appellate panels overturning other appellate panels without the need for *en banc* review. The Department of Justice, however, has historically been more successful than other litigants in obtaining *en banc* review in the courts of appeals or review in this Court for resolving circuit splits like the one that existed under Section 7502. Surely, IRS does not suggest here that it is unable to seek *en banc* or certiorari review to urge a statutory interpretation that would secure national uniformity—or that it cannot ask Congress to clarify the statute. Gap-filling and national uniformity are reasonable goals, but they cannot justify the executive's interference with the judiciary and its precedents, especially when there are other, fully constitutional mechanisms for achieving those ends. It is particularly comic to justify *Brand X* in terms of gap-filling when that case serves any such goal by *un-filling* a gap already plugged by a federal court.

It is odd for IRS at this late date to suggest that its concern is achieving national uniformity, BIO.15, 22, when as a litigant it neither sought nor supported—but rather *opposed*—certiorari in cases that created or deepened the split on the interpretation of Section 7502. See, *e.g.*, *Sorrentino v. United States*, 383 F.3d 1187 (10th Cir. 2004) (IRS won; court acknowledged circuit split; IRS opposed grant of certiorari). Evidently, to the extent the IRS has sought national uniformity, it has been by demanding judicial acquiescence to IRS's interpretations under the meretricious authority of *Brand X* and evading certiorari in the Supreme Court. IRS thus elevates itself above the courts, as if it had the authority to resolve circuit splits by issuing notice-and-comment regulations.

Far from being necessary, *Brand X* crudely short-circuits the court-of-appeals process. This is worrisome because those carefully considered differences of opinion, and their tendency to percolate to the Supreme Court, form a crucial element of our judicial system, which allows divergent views to be explored gradually before reaching the high court for judicious resolution. It is therefore very dangerous to accept *Brand X*'s executive method of resolving circuit-court splits.

D. *Brand X* Is an Affront to the Constitution

This Court has ruled: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996); see also

United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012). The same principle applies to lower-court decisions. *Hayburn's Case* recognized the unconstitutionality of executive "revision" of the decisions of circuit courts. *Hayburn's Case*, 2 U.S. 408, 410 (1792).

This Court stepped back in the direction of *Neal* with *Home Concrete* when it refused to allow IRS to assert gap-filling authority to overturn a 1958 federal-court decision. 566 U.S. at 483 (per Breyer, J.). IRS is free to "converse" with federal courts by proposing an interpretation like any other litigant, leaving judges independent and bias-free to interpret the statute. *Id.* at 503 (Kennedy, J., dissenting, joined by Ginsburg, Sotomayor, Kagan, JJ.). But it is not a "conversation"—and the *Home Concrete* dissenters did not so suggest—if an executive agency can jettison a prior court interpretation and demand judicial acquiescence. *Brand X*, therefore, departs from *Neal* and *Home Concrete*. The Court can correct course by explicitly holding what was implicit in *Neal* and *Home Concrete*: separation of powers commands that there is no gap for an agency to fill when a federal court with jurisdiction has already filled the gap by interpreting the relevant statute.

II. IRS'S ARGUMENTS DO NOT PRECLUDE A GRANT OF CERTIORARI IN THIS CASE

To oppose certiorari, IRS argues it would allegedly prevail absent *Brand X*. BIO.2–18. This argument conveniently ignores the fact that IRS did *not* prevail in district court when *Brand X* was disregarded. A decision from this Court overturning *Brand X* would mean that *Anderson* remains good law in the Ninth Circuit. On that basis, the Baldwins would surely prevail on remand.

IRS now rejects the Ninth Circuit's underlying reason for deferring under *Brand X*—that Section 7502 is *silent*—notwithstanding that this is an argument *IRS* made below. IRS CA9 Br.28–31, 43–46; BIO.8 (acknowledging same). The Ninth Circuit equated silence with ambiguity.[2] App.11a. But IRS claims now that the statute, if the traditional tools are applied, is *unambiguous*, devoting a majority of its filing to this argument. BIO.2–18.[3]

This Court routinely takes cases to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving alternative grounds for remand); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

That is the appropriate course to take here. The Court should review the issue that governed below—

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[2] The district court found "no statutory ambiguity" in the statute and instead found Congress's "silence instructive," as "there is no ambiguous statutory term that has been left undefined." App.39a.

[3] IRS's discussion of the common-law physical-delivery and mailbox rules is also flatly wrong. BIO.2–18. IRS's reliance on two cases predating enactment of Section 7502 to suggest the "legal backdrop for Section 7502 was the physical-delivery rule, not the common-law mailbox rule" is misplaced. BIO.2–3, 11. *Both* cases show the pre-enactment common-law rule was the mailbox rule. *Detroit Auto. Prods. Co. v. CIR*, 203 F.2d 785, 785–86 (6th Cir. 1953); *Arkansas Motor Coaches, Ltd. v. CIR*, 198 F.2d 189, 191–92 (8th Cir. 1952). Congress's enactment of Section 7502 in 1954 only conformed the section to *Rosenthal* (1884). Furthermore, no fewer than *eight* appellate courts, including *Anderson*, have rejected IRS's attempt to revise history and context. See Pet.7 n.4 (collecting cases); Pet.26–27 n.7 (same). The Court should not be distracted by this gambit to muddy the waters.

Brand X. If the Court repudiates *Brand X* or announces that traditional tools should be thoroughly applied before deference is due, that would leave the court below, under *Anderson*, to accept the district court's post-trial finding of timely delivery. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotovsky v. Clinton*, 566 U.S. 189, 201 (2012); *Bond v. United States*, 564 U.S. 211, 214 (2011).

Having expressly embraced *Brand X* deference below, and having prevailed solely due to this deference, IRS's current effort to distance this case from *Brand X* is more than curious. In fact, it confirms that certiorari is warranted. Otherwise, agencies will continue to play a cat-and-mouse game—using *Brand X* offensively in courts below, and then avoiding review in this Court.

IRS did not bother to engage in a traditional-tool analysis in its notices of proposed and final rulemaking. See 69 Fed. Reg. 56377-01 (Sep. 21, 2004); 76 Fed. Reg. 52561-01 (Aug. 23, 2011); Cato Inst. & NFIB Amicus Br.4–11 (discussing IRS's "perfunctory five-page rulemaking"). While *Chevron* and *Kisor* require courts to engage in a rigorous traditional-tool analysis to reach the best interpretation of statutes and regulations, *Brand X* allows a back door through which agencies can subvert such interpretations while doing far less careful analysis (including abandoning the centuries-old common-law mailbox rule, which Congress can abrogate only with a clear statement, not mere silence). This problem is of *Brand X*'s making, and it could be solved by overturning *Brand X* entirely or clarifying that an agency cannot overturn a previous court decision that has employed traditional tools in interpreting a statute. Otherwise, good, independent judicial analysis will be routinely overturned by sloppy, self-interested, outcome-driven agency regulations.

In sum, IRS mounts no serious opposition to a grant of certiorari to revisit *Brand X*. Certiorari should not be denied simply because IRS attempts to sow confusion by ignoring the basis for the decision below.

III. THIS CASE OFFERS A UNIQUELY STRONG VEHICLE TO REVISIT *BRAND X*

The Baldwins' case presents a strong vehicle because the district court developed a full evidentiary record. If the district court had felt obliged to defer to IRS under *Brand X*, as most courts do, IRS would have unilaterally foreclosed the creation of a record showing that the Baldwins mailed their refund claim. But because the district court did not so defer, it conducted a bench trial to enter facts on the record, thus giving this Court the benefit of a fully fleshed-out evidentiary record.[4] That makes this a unique case challenging *Brand X*, because rather than having to rely on the parties' speculations as to what the outcome might have been absent *Brand X*, the Court can see for itself that *Brand X* was outcome determinative.

IV. THIS COURT CAN RECONSIDER *BRAND X* WITHOUT REVISITING *CHEVRON*

The government also argues that there is no sound reason for reexamining *Brand X* without reassessing *Chevron*. BIO.11, 18–19, 22. Not so. In *Chevron* cases,

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[4] IRS's argument (BIO.7) that the Baldwins misaddressed their mailing is inapposite because at trial IRS's employee testified against IRS's theory; IRS sends documents to the correct service center internally; the court also so found. App.21a–22a, 26a.

there is typically no prior court decision that an agency ignores or overrides. *Brand X*, on the other hand, applies in situations, like here, where an agency that is dissatisfied with a court's decision counters it by issuing a contrary interpretation. That is an entirely separable issue. It is therefore quite appropriate for the Court in this case to rethink the precedent that *was controlling* below (*Brand X*), while leaving for another day a related case that was *not controlling* below (*Chevron*).

The Solicitor General's resort to discussing *Chevron*'s penumbras shows the desperation of the government to avoid a reconsideration of *Brand X* and the necessity of granting certiorari. *See* BIO.19, 21 (discussing "*Chevron*'s premise"). The Ninth Circuit resolved this case based on *Brand X*. It deferred to IRS's interpretation under *Brand X*. And *Brand X* allowed IRS to eviscerate a Ninth Circuit decision (*Anderson*) and fill the resultant void with IRS's "own reasonable interpretation of the governing statute." App.13a.

To be sure, all deference doctrines are dangerous. They require an abandonment of judicial independence and even judicial bias in favor one litigant over others, in violation of the due process of law. But *Brand X* is even worse.

This Court must ultimately choose between upholding *Brand X* and upholding the Constitution—in particular, the authority of the courts under Article III. This case therefore affords a welcome opportunity to confront—and overturn—*Brand X*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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