No. 19-488

In the Supreme Court of the United States

Steven T. Waltner and Sarah V. Waltner,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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

TABLE OF CONTENTS

TABLE OF CONTENTS -- Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES -- Continued

Constitutional Provisions

Statutes

Regulations

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. IRS's concession that the Regulation reflects and enforces the agency's preferred construction of §7502 underscores the Circuit conflict and the necessity for this Court's resolution of that conflict.

Respondent's Brief in Opposition ("R.Br.") suggests that Petitioners failed to identify any meaningful conflict among courts of appeals "about the meaning or validity of the 2011 regulation" and, therefore, that the case below "does not implicate the conflict that petitioners identify." R.Br. 8 IRS is incorrect. And Petitioners *do not* "effectively concede that the pre-regulation circuit conflict they identify is not implicated by this case." R Br. 10.

Treas. Reg. §301.7502-1(e)(2 (the "Regulation") has no meaning or validity apart from the statute that it purports to "clarify." R.Br. 5, 10. Central to IRS's opposition is its justification of the Regulation as interpreting and reflecting §7502. R.Br. (I) (first question), 4 (Regulation was implemented to provide "certainty" in light of the Circuit conflict), 5 (Regulation clarifies what §7502 sets forth), 7-8 (both Regulation and statute specify "the exclusive means to establish timely filing…"), 8 (Regulation makes explicit what "Section 7502 implies"), and 9 (Regulation reflects "the interpretation of Section 7502").

As the Ninth Circuit pointed out in *Baldwin*,[1] "In August 2011, the Treasury Department sought to resolve the split by promulgating an amended version of Treasury Regulation § 301.7502-1(e)." By Respondent's own assertions, the Regulation rests on, and embodies, one of those two conflicting interpretations. Then, by promulgating the Regulation, IRS neither clarified nor resolved the Circuit conflict—it merely picked sides in that conflict. When Treasury takes it upon itself to resolve a split among the Circuit Courts of Appeals, this Court's oversight is properly and necessarily invoked.

II. If *Brand X*[2] is constitutionally sound, it nevertheless cannot operate here to justify the Ninth Circuit's repudiation of *Anderson*.[3]

Petitioners doubt that the executive branch is constitutionally permitted to regulate the judiciary in the way that *Brand X* appears to allow, because, regardless of an agency's authority to fill any gaps that are left by Congress in a statutory scheme, it is the exclusive purview of Congress, and not the Treasury, to *replace the common law* with statutory provisions. Nevertheless, it is Petitioners' view that the court below misapplied both *Chevron U.S.A. v. NRDC,* 467 U.S. 837 (1984) and *Brand X.*

---

[1] In deciding the case below, the Court of Appeals relied on *Baldwin v. United States*, 921 F.3d 836 (CA9 2019), *cert*. pet. pending, No. 19-402 (filed Sept. 23, 2019), decided two weeks earlier.

[2] *National Cable & Telecomms. Ass'n v. Brand X Internet Servcs.,* 545 U.S. 967 (2005).

[3] *Anderson v. United States*, 966 F.2d 487 (CA9 1992).

A. Under a proper application of *Brand X* in this case, the Court of Appeals that previously had interpreted the statute's clear meaning was not required to defer to the Regulation.

In *Brand X,* this Court held that, when a court determines "a statute's *clear* meaning," that court's interpretation "trumps an agency's under the doctrine of *stare decisis*."[4] *Id.* at 984 (emphasis the Court's; citations omitted). The Ninth Circuit, in *Anderson*, had determined the statute's *clear* meaning. It described no provisions as ambiguous. It found no "gaps" in the statutory scheme that needed to be filled, and it refused to read into the statute the exclusions and restrictions urged by IRS. Correctly applying the canons of statutory construction to the clear language of the statute, the Court of Appeals in *Anderson* unequivocally rejected IRS's restrictive view at every turn:

> *[T]he language of section 7502 itself* does not indicate that subsection (c) is the only exception to the statutory mailbox rule.…*the language of section 7502* does not set forth an exclusive limitation on admissible evidence to prove timely mailing and does not preclude application of the

---

[4] In the absence of such determination of a statute's "*clear* meaning," the effect of judicial deference owed to agency regulations on *stare decisis* doctrine is left unclear by this Court in *Brand X*, which stated in confusing *dicta*, "the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction…." *Brand X,* 545 U.S. at 983. *Brand X* fails to explain how both interpretations can be "conflicting (yet authoritative)." *Id.* at 984.

> common law mailbox rule….*By its own terms, section 7502(c)* applies only when the document is sent by registered or certified mail….Neither *the language of the statute* nor Ninth Circuit precedent bars admission of extrinsic evidence to prove timely delivery….*The statute itself does not reflect* a clear intent by Congress to displace the common law mailbox rule.

Id. at 489-491 (emphasis added) (applying the presumption against change in the common law unless congressional disposition is clear). However, in 2019 in *Baldwin*, the Ninth Circuit Court of Appeals reversed its position in *Anderson* and validated the Regulation that enunciated the very interpretation the court previously, and roundly, had rejected.

The Ninth Circuit's resort to *Brand X* for support in abandoning both its analysis in *Anderson* and *stare decisis* was misplaced and inappropriate, and its rationale was flawed:

> We did not hold in *Anderson* that our interpretation of the statute was the *only* reasonable interpretation. In fact, our analysis made clear that our decision filled a statutory gap.

Baldwin, 921 F.3d at 843 (emphasis the court's).

It determined that step one of its cursory *Chevron* analysis had been met by recharacterizing Congress's silence regarding the *effect* of §7502 on common-law evidentiary presumptions as a statutory "gap" left for Treasury to fill by regulation. *Cf. Baldwin, supra*, 921 F.3d at 842 ("[W]e conclude that…§7502 is silent as to whether the statute displaces the common-law

mailbox rule….") But, a statute's silence about the common law, under either *Chevron* or *Brand X*, is not a "delegation[] of authority to the agency" to abolish that law. *See Brand X,* 545 U.S. at 980. Rather, the interpreting court must *presume* that Congress did not intend to depart from the common law.

Respondent does not rebut Petitioners' assertion that the common-law mailbox rule and the statutory postmark rule address unique and different circumstances, and that they operate in harmony to benefit filers of tax documents, as Congress intended. When, as in §7502, there is no clear language manifesting contrary Congressional intent, courts must *presume* harmony with existing law. *Estate of Wood v. CIR*, 909 F.2d 1155, 1160 (CA8 1990).

In step two of its *Chevron* analysis, the Ninth Circuit found to be "reasonable" the Regulation's restrictive evidentiary provisions that directly contradict Congress's statutory language and intent. Congress enacted §7502 as a safe harbor for filers of tax documents (*see Baldwin,* 921 F.3d 841), but the Regulation erects barricades to that harbor, especially for indigents. And exclusionary provisions in a regulation that are "manifestly contrary to the statute" are invalid under *Chevron,* 467 U.S. at 843.

Treasury encroached far into judicial territory when it promulgated rules that restricted both the admission of evidence and the use of common-law evidentiary presumptions. *Baldwin v. U.S.,* 2017 WL 11129004 (C.D. Cal. Jan. 24, 2017). The agency's power is to administer a congressionally-created program, to formulate policy and to make rules specific to that program. *Chevron,* 467 U.S. at 843. This includes "the making of rules to fill any gap

left….[i]f Congress has *explicitly* left a gap for the agency to fill…." *Id.* (emphasis added). Because §7502 does not explicitly leave a gap, there is no statutory basis for the restrictive and exclusionary rules in the Regulation.

Properly viewed, *Chevron* and *Brand X* require that no deference be given to the Regulation because, under *stare decisis,* the decision of the Ninth Circuit in *Anderson,* which interpreted the clear language of the statute, "trumped" the more restrictive agency interpretation in this case.

B. The Ninth Circuit improperly applied a canon of statutory construction that is not relevant to the Regulation.

The Ninth Circuit in *Baldwin* found that IRS interpretation of §7502 was reasonable in light of the quote relied upon by the government, *i.e.,* that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." R.Br. 9, quoting *Hillman v. Maretta*, 569 U.S. 483, 496 (2013); *Baldwin, supra,* 921 F.3d at 843.

A simple reading of *Hillman* reveals that this canon is inapplicable in both this case and in *Baldwin. Hillman* and the cases cited therein concerned statutes that, unlike §7502, actually contained prohibitions. *Hillman, supra*, 133 S.Ct. 1953 (payment of insurance proceeds to anyone but the named beneficiary prohibited, with express exceptions); and *Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616 (1980) (contracts for construction or repair of roads prohibited, with enumerated

exceptions). *Baldwin* also cited *Syed v. M-I, LLC*, 853 F.3d 492, 501 (CA9 2017) (prohibition of procurement of consumer reports unless certain specified procedures were followed, *497).

Section 7502 is not an exception to a prohibition, but rather an addition to a common-law evidentiary rule to further alleviate hardship in filing tax documents. Therefore, §7502 must be interpreted by presuming no congressional intent to disturb the common-law mailbox rule.

It is curious that IRS and the Ninth Circuit—abandoning *Anderson* to side with the Second and Sixth Circuits—consider §7502 to have carved out limited, exclusive exceptions to "the physical delivery rule" (R.Br. 3, 8-9, 11), and yet fail to interpret the statute as abrogating *that* rule. After all, the "physical delivery rule" that courts attribute to this Court's decision in *United States v. Lombardo,* 241 U.S. 73 (1916)[5] is a *common-law rule* that post-dated the well-established common-law presumption of delivery. This inconsistency undermines IRS's assault on the common-law mailbox rule.

The Ninth Circuit's precedent in *Anderson* was the law of the Circuit when Petitioners relied on it, and *Brand X* did not require, or support, the Ninth Circuit's reversal of its position.

---

[5] Like the two cases Respondent distinguishes in R.Br. fn.2, *Lombardo* did not involve a tax document.

III. IRS again waives rebuttal of Petitioners' constitutional and fraud issues.

A. IRS waives the constitutional challenges.

In its response, as in his merits brief below, IRS again fails to counter Petitioners' argument that indigent filers are deprived of due process when they cannot avail themselves of the Regulation's narrowed mailing options. R.Br. 11. IRS suggests that Petitioners' rights were assured in light of "the numerous other statutory exceptions to the physical-delivery rule." *Id.* But these "numerous other statutory exceptions" are precisely the Postal Service products that were *unavailable* to the indigent Petitioners when they needed them. Respondent's unsupported, ineffectual suggestion completely avoids the question.

By upholding the Regulation which barred Petitioners' uncontested evidence of early mailing of their notice of appeal, when they could not afford more expensive mailing options, the Ninth Circuit deprived Petitioners of their right to a "meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). IRS fails to rebut, and therefore waives, opposition to this issue. *U.S. v. Alonso,* 48 F.3d 1536, 1544 (CA9 1995) and cases cited therein.

IRS suggests that the mailbox-rule itself is not "constitutionally required." R.Br. 11. What *is* constitutionally required, though, is fundamental fairness. It is axiomatic that regulations must be constitutional and reasonable, and not arbitrary and oppressive. *See* 5 U.S.C. §706(2)(A) and (B). Regulations must be administered uniformly so that no group, such as indigent filers of tax documents, is

marginalized or deprived of rights afforded to other groups. Further, *no one* should be required to purchase products created (or favored) by the government in order to benefit from the provisions of any law or regulation.

IRS also does not rebut, and therefore waives opposition to, Petitioners' assertion (Petition, 33) that the judgment of the Tax Court was reached without due process of law.

B. IRS's Statement invites the Court to consider the underlying dispute, but the merits of that dispute are relevant here only with regard to the fraud Respondent perpetrated on the Tax Court.

IRS's characterization, in its "Statement," (R.Br. p. 5) of "the underlying dispute in this case" is inaccurate and misleading. This Court should grant a writ of *certiorari* regardless of the merits of the case that is the subject of the appeal that the Ninth Circuit denied to Petitioners. However, the nature of the case, when viewed accurately, does reveal that Petitioners' constitutional rights were infringed when officers of the court committed fraud on the U.S. Tax Court. This fact illuminates Petitioners' point that any court therefore has the power to declare the ensuing trial court judgment void.

Petitioners filed original and amended returns for several years in which they disclosed to IRS a reasonable dispute with respect to items of income reported on certain information returns, specifically challenging the amounts of Tax Code-defined wages and other income. Their dispute was lawful. *See, e.g.,* §§6201(d), 6662(B)(ii)(II), and 7491(a)(1) in which

Congress acknowledges such disputes, and in certain circumstances permits the burdens of proof and production to shift to the Secretary. Therefore, IRS penalties against Petitioners under the frivolous return statute, merely for disclosing their dispute on their returns, was unauthorized, in violation of their rights under the U.S. Constitution, Amendments I (freedom of speech), V (due process) and, VIII (excessive fines). As this Court has observed:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, … and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." ….

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citations omitted).

IRS has labeled the disclosure in a tax return of a dispute regarding information returns "Argument 44," a scam about which Petitioners briefed the courts below in detail. C.A. Op.Br. 27-29. IRS incorrectly suggests that it assessed penalties for filing frivolous tax returns "[a]fter determining that those assertions [that Petitioners owed no federal income tax for the relevant years] lacked a legal basis." R.Br. sec. 2, p. 5. In fact, however, IRS never made a legal-basis determination either (a) that the act of amending the returns was frivolous or (b) that the amounts reported on the returns were incorrect. Instead, government records reveal that all the fines that IRS imposed against Petitioners were based upon Petitioners' lawful dispute of third-party information returns—*i.e.,* the artificial "Argument 44." C.A.

ER395, 397, 399, 401, 403, 406, 410, 414, 418, 422, 440, 443, 445, 447, 530, 532, 535, 537, 537, 542.

Even if Petitioners' dispute were constitutionally included in the Secretary's official list of frivolous positions (but it is not), IRS would have had the duty to come forward with evidence proving liability. §6703, §7491(c). The law required IRS to prove, among other elements, that each and every one of the penalties (1) had been lawfully imposed against something that purported to be returns (most of them were not), and (2) had the prior written approval of the immediate supervisor of the employee who proposed the penalty. It is only recently that courts have finally acknowledged these legal requirements and have begun to hold the government to them. *Chai v. Commissioner*, 851 F.3d 190, 203-210 (CA2 2017); *Kestin v. Commissioner,* 153 TC 2 (Aug. 29, 2019); and *Graev v. Commissioner,* 149 TC 23 (2017).

In their cases below, Petitioners challenged IRS's purported proof of both of these elements, among others, and they demonstrated from the record (1) that most of the penalties had been against faxes, correspondence and courtesy copies of prior-filed returns (C.A. Op.Br. 24-26, 43), (2) that some of the penalties lacked the statutorily-required approvals altogether (C.A. Op.Br. 12-13), (3) that all of the submitted forms failed to show compliance with § 6751(b) (C.A. Op.Br. 41-42, 49, 56-57), and (4) that none of the forms was in Petitioners' administrative files before IRS Office of Appeals (C.A. Op.Br. 55). In fact, IRS forms exhibited all the same deficiencies as those noted in *Vigon v. Commissioner,* 149 TC 4 (Dec. 23, 2016).

Further, Petitioners discovered, and verified with a Certified Documents Examiner, that many of the ostensible approval forms, submitted by IRS counsel in response to a court order, had been faked. C.A. Op.Br. 12, 24-26. It was the introduction of perjured declarations and these forged approval forms that corrupted the entire proceeding and, as Petitioners argued, that rendered voidable the ensuing Tax Court judgment.

C. IRS fails to rebut the issue of fraud on the court.

IRS states that Petitioners' "cursory and unsubstantiated allegation of fraud [on the court] is baseless." R.Br. 12. Since IRS does not develop this assertion further, it fails to rebut the issue. *Alonso, supra.*

IRS also suggests that the cases cited by Petitioners do not support their arguments that the Ninth Circuit (i) had jurisdiction to determine its own jurisdiction, and (ii) could declare the lower court ruling void, when there is evidence in the record of a fraud on the court. This suggestion appears to be that no court can void a Tax Court judgment obtained by fraud on the court if the Tax Court simply denies that the notice of appeal of its judgment was received. The suggestion is meritless. Petitioners do not "seek to challenge" on appeal the merits of a void trial court judgment. Rather, Petitioners argued that the Court of Appeals *at least* had the power to examine the fraud on the court issue as a jurisdictional imperative.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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