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

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING

In accordance with Supreme Court Rule 44.2, Petitioners Steven T. Waltner and Sarah V. Waltner petition this Court for a rehearing of their Petition for Writ of Certiorari that this Court denied on February 24, 2020.

ARGUMENT

The following substantial intervening circumstances support this Court's rehearing and reconsideration of its denial of the Petition for Writ of Certiorari that it entered on October 8, 2019.

I. Justice Thomas, the author of the *Brand X* opinion, dissented from this Court's denial of certiorari in *Baldwin* on constitutional grounds that govern the instant case.

In *Baldwin v. U.S.,* 921 F.3d 836 (2019), No. 19-402 *cert. den'd* 589 U.S. ___ (2020), the Ninth Circuit held, after its slim analysis under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984) and *National Cable & Telecomms. Ass'n v. Brand X Internet Servcs*., 545 U.S. 967 (2005), that it was required by those cases (a) to accept the agency's statement of the law in Treas. Reg. §301.7502-1(e)(2) ("Regulation"), (b) to declare *Anderson v. U.S.*, 966 F.2d 487 (CA9 1992), "no longer the law" in the Ninth Circuit, and (c) to follow IRS's restriction of what constituted evidence of timely mailing. By applying these same holdings in the case below, the Ninth Circuit held it lacked subject matter jurisdiction over the Waltners' appeal, despite their proof of early mailing.

The Baldwins and Waltners filed petitions for certiorari to this Court within days of each other in the fall of 2019. Both cases presented comparable facts, and the identical legal issue of whether the Regulation could resolve a decades-old conflict among the circuits by wiping out a common-law rule.

The Waltners argued that the Ninth Circuit's application of this Court's criteria in *Chevron* was cursory and incorrect, that it eviscerated both the common law mailbox rule and *stare decisis,* and that it utterly failed to address the constitutional question of whether, and to what extent, the Regulation should be allowed to exclude, and thus violate the rights of, indigent filers of tax documents who "cannot avail themselves of the Regulation's narrowed [and more expensive] mailing options. R.Br. 11." Reply to Br. in Opp., p. 8.

The Baldwins attacked the constitutionality of the *Brand X* decision itself on the grounds that it violated bedrock separation of powers principles. In their Reply brief, the Waltners expressed doubt as to the constitutionality of *Brand X* in the context of agency abrogation of the common law, and that, in any case, the Ninth Circuit misapplied both *Chevron* and *Brand X* because it previously found no ambiguity when it interpreted §7502 to be in harmony with the common-law rule. Further, the Waltners argued that "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." The Waltners agreed that Treasury encroached far into judicial territory when it promulgated the Regulation.

This Court denied Certiorari in both cases on February 24, 2020. Justice Thomas dissented from the denial of certiorari in *Baldwin.*

A. Justice Thomas urged this Court to reconsider *both Brand X and Chevron* because they unconstitutionally blur the separation of powers.

Justice Thomas's dissent rested on his firm conviction that *Brand X*—the majority opinion in which he authored—is likely unconstitutional and should be reconsidered. Seeing *Brand X* as an extension of *Chevron*, he challenged the constitutionality of *Chevron*, as well. Since the Ninth Circuit's denial of subject matter jurisdiction in the *Waltner* appeal was based entirely on these two Supreme Court cases, Justice Thomas's dissent, and his reasons for dissenting, bear directly on the *Waltner* Petition for Certiorari.

Specifically, Justice Thomas wrote that the Court's former views of *Brand X* should be surrendered to "a better considered opinion," stating:

> *Brand X* appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation.

Baldwin, supra, 589 U.S. ___, Thomas J., dissenting. Explaining that his "skepticism" about *Brand X* begins "at its foundation—with *Chevron* deference," *id.*, he pointed out that:

> The [*Chevron*] decision rests on the fiction that silent or ambiguous statutes are an implicit delegation from Congress to agencies. [467

> U.S.,], at 843–844. *Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions.

Id. In similar fashion, the Waltners argued that it was error for the Ninth Circuit to hold that the silence of §7502 *as to the effect of the statute on an almost 200-year-old common-law rule* was such an implicit delegation from Congress to the IRS.

Further, Justice Thomas explained that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Id.* Similarly, the Waltners argued that Treasury and IRS improperly were allowed to encroach on this Court's sole authority to resolve conflicts among the circuits. *See* Pet. 22-23. Justice Thomas also charged that, having only "the executive Power" under Art. II, §1, agencies are given unconstitutional judicial power when given *Chevron* deference, and that, when they engage in the formulation of policy, "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress. See Art. I, §1." *Baldwin, supra,* 589 U.S. ___.

> This apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power…. When the Executive is free to dictate the outcome of cases through erroneous interpretations, the courts cannot check the Executive by applying the correct interpretation of the law….It now appears to me that there is no such special justification [for deferring to federal agencies] and that *Chevron* is inconsistent with accepted principles of statutory interpretation from the first century of the Republic.

Id.

Following this searing deconstruction of *Chevron* deference, Justice Thomas indicated his growing conviction that *Brand X* was "wrongly decided" and "even more inconsistent with the Constitution and traditional tools of statutory interpretation than *Chevron*." *Id.* He explained that, by requiring courts to overrule their own precedent (as had the Ninth Circuit, here) when an agency later adopts a different statutory interpretation, "*Brand X* likely conflicts with Article III of the Constitution" which "imposes a duty on judges to exercise the judicial power" in order to give effect to the will of Congress. *Id.* "But *Brand X* directs courts to give effect to the will of the Executive…." *Id. Brand X* thus wrought "heightened constitutional harms." *Id.*

The Waltners objected to IRS's attempt to remove from the tax-filing public (*i.e.,* every taxpaying American worldwide) benefits that existed at common law, while further restricting, especially for indigent filers, benefits that Congress provided in §7502. Pet. 22-27. Now, in explicit and urgent terms, Justice Thomas laid responsibility for this usurpation squarely at the threshold of this Court:

> Regrettably, ***Brand X* has taken this Court to the precipice of administrative absolutism**. Under its rule of deference, **agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations**….Even if the Court is not willing to question *Chevron* itself, at the very least, **we should consider taking a step away from the abyss by revisiting *Brand X***.

Id. (bold emphasis added).

B. Justice Thomas's dissent echoes the sentiment of four other justices of this Court who have questioned the legitimacy of *Chevron* / *Brand X* deference, particularly as it was applied in this case and in *Baldwin*.

In 2013, Chief Justice Roberts, discussing the proper application of *Chevron* deference, noted "the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies." *Arlington v. FCC*, 133 S.Ct. 1863, 1886 (2013) (ROBERTS, C.J., dissenting). He stated that the Court's duty to respect the separation of powers "means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is." *Id.*

In 2015, Justice Thomas wrote a concurring opinion in *Michigan v. EPA,* 135 S.Ct. 2699, 2712-2714 (2015) (THOMAS, J., concurring), which case, he said, "raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes" under *Chevron,* treating agency discretion "as though it were a form of legislative power" *even when Congress did not actually have an intent* as to a particular result thus obtained. *Id.,* citing *U.S. v. Mead Corp*., 533 U.S. 218, 229 (2001) (some quotation marks omitted). "*Chevron* deference raises serious separation-of-powers questions." *Id.* He concluded with a stern warning concerning this Court's administrative agency jurisprudence:

> …[W]e seem to be straying further and further from the Constitution without so much as

> pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.

Id. Particularly in light of the rule that taxing statutes are to be interpreted in favor of the taxpayer and against the government,[1] this Court should curb, rather than allow, unfettered license to the government to interpret statutes as it alone sees fit.

The following year, in his concurrence in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (CA10 2016) (Gorsuch, concurring), then-Circuit Judge Gorsuch criticized this Court's decisions in *Chevron* and *Brand X* as upsetting the separation of powers.

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.

Id. at 1149. Voicing the same constitutional concerns as the Waltners have raised, he stated,

> Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew

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[1] *See Greyhound Corporation v. U.S.*, 495 F.2d 863, 869 (CA9 1974) citing *Hecht v. Malley*, 265 U.S. 144 (1924); *Gould v. Gould,* 245 U.S. 151 (1917).

> would arise if the political branches intruded on judicial functions.

Id. at 1152.

In a concurring opinion in *Pereira v. Sessions,* 138 S.Ct. 2105, 2120 (2018), Justice Kennedy noted with disapproval that some Courts of Appeals—as the Ninth Circuit did the very next year in *Waltner* and *Baldwin*—engage in a "cursory" *Chevron* analysis of Congressional statutory intent and a regulation's reasonableness. Given the concerns raised by Justices Thomas and Gorsuch, Justice Kennedy concluded, "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Id.*

And Justice Kavanaugh, while on the D.C. Circuit Court of Appeals, also questioned the limits of a broad application of *Chevron* deference. *See* Fixing Statutory Interpretation, 129 Harv.L.Review 2118, 2150 (2016) ("…*Chevron* encourages the Executive Branch...to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.") *See also Kisor v. Wilkie*, 139 S.Ct. 2400, 2446, fn. 114 (2019) (GORSUCH, J., concurring, joined by THOMAS, J., and KAVANAUGH, J.).

Thus, five justices of this Court have criticized *Chevron* on the basis of which case and its progeny the Ninth Circuit cursorily disposed of the *Waltner* and *Baldwin* cases. And Justice Thomas once again has urged the Court to revisit it.

Both *Waltner* and *Baldwin*, which could be reheard together, present the right facts to allow the Court to dispose of the precise constitutional

questions attendant to judicial deference that have increasingly troubled members of this Court.

C. The *Waltner* case is the perfect vehicle for reexamining *Chevron* and *Brand X*.

The *Waltner* case is inextricably bound with that of *Baldwin*. Both cases presented virtually the same facts and legal issues, and both were decided by the same Ninth Circuit panel on the same shaky grounds. It is unlikely this Court will see a better confluence of conditions in which to revisit *Brand X*:

- The Ninth Circuit held *Brand X* required reversal of its precedent in *Anderson* and required *Chevron* **deference to a regulation that creates rules abrogating the common law**.
- The Ninth Circuit's *Chevron* analysis was cursory, in part because *Brand X*'s directive makes detailed analysis superfluous.
- Two cases, affected by the same common-law and statutory provisions that aid filers of tax documents, present the same constitutional difficulties that trouble several Justices.
- The Ninth Circuit gave deference to, and enforced as law, a regulation interpreting a statute that neither family invoked or relied upon.
- In contrast to the evidence discussed in most other cases concerning the statutory and common-law rules, the evidence on which both the Waltners and the Baldwins relied was sufficient under Ninth Circuit precedent to raise the common-law presumption of delivery.

- The Ninth Circuit, in both cases, abandoned its prior position that §7502 clearly indicated no Congressional intent to supplant the common law rule.
- The Regulation at issue in each case (1) itself violates separation of powers, (2) establishes serious consequences for failing to purchase federal products that indigent tax filers may not be able to afford (thus creating its own due process problem), (3) obliterates centuries-old evidentiary presumptions, (4) demonstrates the problem of deference in the context of an agency's change in position, and (5) affects every tax-document-filing American citizen worldwide.

When will the Court again have such a unique opportunity to address the constitutionality of (or proper application of) deference jurisprudence in the context of agency action of such pervasive legal application and effect?

II. This Court recently has received criticism for appearing to serve the interests of the Executive over the interests, and rights, of the average American citizen.

On March 11, 2020, in a letter to Chief Justice Roberts announcing his resignation from membership in the Supreme Court Bar, James Dannenberg[2] pointed out this Court's widening departure from a legal conservatism that he says he could respect, one that "enshrined the idea of *stare decisis* and eschewed

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[2] Dannenberg was former First Deputy Attorney General, and former District Court judge, of Hawaii. *See* https://yubanet.com/opinions/brian-fallon-roberts-court-is-facing-a-crisis-of-legitimacy/

the idea of radical change in legal doctrine for political ends." Instead, he charged, this Court is serving the Executive Branch at the expense of the rule of law, and has "wantonly flouted established precedent….some more than forty years old."

This Court should avoid even the appearance of such allegiance. Judicial deference to the self-serving effort of the IRS to win, by administrative regulation, what it could not consistently win by litigation has worked great hardship and injustice, and further weakens constitutional protections for a citizenry already deeply divided and disenfranchised. Rather than doing what *Brand X* directs, *i.e.,* "defer to the Executive on what the law is," *Arlington, supra,* 133 S.Ct. at 1886, this Court should rehear the Waltners' Petition for Certiorari and restore public confidence that this Court is not an "errand-boy" for the Executive Branch.[3]

And last month, in her dissent in *Wolf v. Cook County,* 589 U.S. ___ (2020), Justice Sotomayor rued that "the Court yields" too often to pressure from the federal government to grant stays of preliminary injunctions issued by lower courts. Similarly to the case below, *Wolf* arose from government efforts to enforce, as law, an agency regulation that constricted a long-accepted meaning of a statute that prevents a noncitizen who is likely to become a "public charge" from obtaining citizenship. By a regulation issued in 2019, the Department of Homeland Security narrowed the longstanding definition of "public charge," resulting in the exclusion of more people.

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[3] *See* text of Dannenberg letter at https://slate.com/news-and-politics/2020/03/judge-james-dannenberg-supreme-court-bar-roberts-letter.html

The District Court in New York imposed a nationwide injunction against enforcement of the regulation (the "public-charge rule"), and this Court granted the government's application for a stay. But a District Court in Illinois prevented the government from enforcing the public-charge rule in that state. Then, as Justice Sotomayor pointed out, this Court, "upend[ed] the normal rules of appellate procedure" and all-too-quickly acceded to an "emergency" petition for stay of the Illinois injunction without holding the government to its "especially heavy burden" to show a likelihood of irreparable harm. Justice Sotomayor found it troubling that this Court's "recent behavior has benefited one litigant over all others." *Wolf, supra.*

The Court has an opportunity to regain the nation's trust in its leadership to protect the interests of those who seek justice and fairness when they petition for the redress of their grievances. Rehearing the *Waltner* and *Baldwin* petitions would be a "step away from the abyss" of administrative absolutism and toward a restoration to the American public of what IRS—in an act of self-dealing with this Court's imprimatur—has unjustly wrested from them.

When this Court upholds (or declines to review) the unconstitutional acts and decisions of subordinate courts, states, organizations and individuals, it *discourages* and *disappoints* the American people. But when this Court's own decisions violate constitutionally-guaranteed rights and liberties, it *betrays* and *harms* the American people. In the latter case, it is this Court's *duty* to repair the damage that it caused to the framework of the Republic.

In view of (a) Justice Thomas's dissent in *Baldwin*, which reflects ongoing concern among several of the Justices that *Chevron* and *Brand X* are unworkable and do not pass constitutional muster, (b) Justice Sotomayor's reminder that this Court must strive to protect the fair and balanced decisionmaking process of the courts, *Wolf, supra,* and (c) the serious violations of constitutional rights to due process, equal protection, fair trial, and liberty from excessive fines and government malfeasance that pock the record of the case below, this Court should rehear and grant the Waltners' Petition for Writ of Certiorari for reconsideration of *Chevron*/*Brand X*, or grant, vacate, and remand the case to the Ninth Circuit.

CONCLUSION

Fiat justitia ruat caelum. "Let justice be done though the heavens fall."

The petition for a writ of certiorari should be reheard and granted.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH AND COMPLIANCE WITH SUPREME COURT RULE 44.2

The undersigned counsel for Petitioners certifies under penalty of perjury that the foregoing Petition for Rehearing is restricted to the grounds specified in paragraph 2 of Supreme Court Rule 44 and is presented in good faith and not for delay.

Dated March 18, 2020.

/s/ Donald W. Wallis
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