No. 21-775

IN THE

Supreme Court of the United States

THOMAS E. RUBIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2 of this Court, Petitioner Thomas E. Rubin respectfully petitions for a rehearing of the denial of his Application for Writ of Certiorari to review the Amended Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit.

Intervening circumstances of a substantial or controlling effect have occurred since the date of the Amended Memorandum. The defendant, Internal Revenue Service (IRS), released at least two publications in February 2022 that are contrary to the holding of the Amended Memorandum Opinion and, instead, adopt the argument I used at the Ninth Circuit.

This case involves the issue of when to recognize cancellation of debt income. The Ninth Circuit held in June 2021 that cancellation of debt income cannot be recognized if prophesied future events may change the amount of cancelled debt. While this Petition for Writ of Certiorari has been pending before this Court, the IRS stated: "In general, if you have cancellation of debt income because your debt is canceled, forgiven, or discharged for less than the amount you must pay, the amount of the canceled debt is taxable and you must report the canceled debt on your tax return for the year the cancellation occurs." IRS Topic No. 431 Canceled Debt – Is it Taxable or Not? (February 18, 2022), *see also*, IRS Publication 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals) For use in preparing 2021 Returns (February 16, 2022) ("if a debt for which you are personally liable is forgiven or discharged for less than the full amount owed, the debt is considered canceled in whatever amount it remained unpaid. ... Generally, you must include the canceled debt in your income").

Neither publication from the IRS uses the test created by the Ninth Circuit in this case. The recent IRS publications require cancellation of debt income to be recognized in the year of the cancellation. These IRS

publications are an admission against interest by the defendant after the Ninth Circuit ruling, but before any final decision by this Court.

The IRS prevailed in this case when the Ninth Circuit held that a taxpayer may not recognize cancellation of debt income if prophesied future events may change the amount of the debt. This Court should apply the IRS' recent publication requiring cancellation of debt income to be recognized in the year in which the debt was cancelled and reverse the holding by the Ninth Circuit.

The Ninth Circuit's opinion departs from statutory authority, Treasury Regulations, and all prior well-established precedents from this Court, sister circuits, and even its own prior opinions, creating chaos and arbitrariness with national implications. The circuits are now seriously divided on an important tax law issue. In the intervening period since my application for certiorari was denied, millions of taxpayers are contending with the confusion caused by the Ninth Circuit, https://www.irs.gov/statistics/returns-filed-taxes-collected-and-refunds-issued. The amount of taxes owed by taxpayers now depends on the circuit in which they reside.

According to the Ninth Circuit's new rule set forth in its Amended Memorandum, the IRS is now permitted to defeat a taxpayer's reasonable choice for when to recognize cancellation-of-debt income or write-off bad debt on the basis of prophesied future events that may not even happen. Until now, this "reasoning" was rejected by this Court, *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 545 (2012), and the IRS was sanctioned when it attempted to use this discredited argument at the Fifth Circuit. *Owens v. Commissioner*, 67 F. App'x 253, 258 (5th Cir. 2003). No other circuit has adopted the flawed reasoning used by the Ninth Circuit.

The damage inflicted on me by rejecting my twenty-year old tax refund claim, with interest, exceeds $20 million, a figure not disputed by the government. More importantly, if the holding in the Amended Memorandum is not rejected,

it will undermine the ability of other taxpayers to come to practical resolution of their business tax obligations. The Ninth Circuit's new rule is that tax obligations are controlled by the spectre of future collection efforts, whether contemplated or not, and without regard to their success. These facts and the scenario they depict are not disputed by the Solicitor General on behalf of the IRS. Instead, the IRS is publishing guidance to taxpayers that contradicts this holding. The situation is untenable.

The Securities and Exchange Commission (SEC) requires all publicly listed companies to provide auditors with tax accounting rationale that is compliant with Generally Accepted Accounting Principles (GAAP). The Ninth Circuit's ruling regarding recognition of cancellation-of-debt and write-offs does not comply with GAAP. To comply with the Ninth Circuit's new rule for calculating tax "income" and "loss," including the mere possibility that future collection actions might occur, during this intervening period public corporations must now reserve for adverse findings and incur accounting and administrative costs associated with being GAAP-compliant. These costs will inevitably total billions of dollars.

Due to the current economic hardships caused by the pandemic, numerous additional business taxpayers are now confronting cancellation-of-debt income recognition and/or accounts receivable write-offs. This was not disputed by the Solicitor General on behalf of the IRS. Making these determinations subject to the Ninth Circuit's unnecessary new rule will affect the amount of tax obligations owed by taxpayers depending on their residence, will multiply the difficulties taxpayers will endure, and will not make our self-assessing self-reporting tax system more fair or efficient.

Given the potential financial and criminal penalties for non-compliance with the Sarbanes-Oxley Act, Pub.L. 107-204, 116 Stat. 745, July 2002, the quandary created by the Ninth Circuit when it departed from 90-years of precedent is not hypothetical. *See*, Internal Revenue Manual 4.10.20, Requesting Audit, Tax Accrual or Tax Reconciliation

Workpapers, December 8, 2020. In the intervening time since I filed my Petition, a taxpayer who is required to recognize cancellation-of-debt income in New York now has a higher tax obligation than a taxpayer under identical circumstances anywhere in the Ninth Circuit. The recent IRS publications exacerbate this problem.

The Ninth Circuit departed from well-established precedent by relying on the *post hoc*, subjective intentions of third parties, i.e., prophesied future unsuccessful collection activities by creditors. However, this Court clearly stated that "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent." *National Federation of Independent Businesses v. Sebelius*, *supra*, at 545. For the same reason that this Court did not permit Congress to legislate based on prophesied future activity, the Ninth Circuit should not be permitted to do so, particularly in a manner that causes national disruption inviting arbitrariness by government agencies. According to Justice Sotamayor, in her opinion published after I filed my Petition, the Ninth Circuit violated its obligation to apply existing precedent. *Whole Woman's Health* v. *Jackson*, 3 595 U. S. ____ (2022), Sotomayor, J., dissenting, p. 3 (circuit courts have an "obligation to apply existing precedent").

Here, the government did not contest my Petition by filing a Brief in Opposition. In its Amended Memorandum, the Ninth Circuit made several mistakes, including getting wrong the years for which I sought a tax refund, leaving me with a sizeable refund claim unadjudicated. Because the Ninth Circuit violated its fundamental obligation to apply precedent, particularly in the absence of legal reasoning and due diligence, this Court must assert its authority.

My Petition asked this Court to resolve three issues: (1) is the Ninth Circuit obligated to apply precedential authority; (2) can the Ninth Circuit legislate new tax law; and (3) is the Ninth Circuit required to follow the Federal Rules of Civil Procedure?

Here, the only issue on appeal from summary judgment was whether my choice of tax year to take the imputed income from cancellation-of-debt was reasonable. According to the leading case on this issue, a taxpayer establishes reasonableness by introducing evidence of an "identifiable event" that fixes the loss during that tax year. *Milenbach v. Commissioner*, 318 F.3d 924, 935-36 (9th Cir. 2003). I introduced competent evidence of 13 identifiable events that fixed the loss during that tax year, seven of which were acknowledged by the Ninth Circuit. It is not disputed that I produced competent evidence in support of each element of my cause of action for my tax refund claim. Nothing has occurred in the intervening period to support, in any way, the Ninth Circuit's ruling.

According to federal tax statutes, regulations, and applicable precedents, the reasonableness of the initial choice of tax year within which to recognize the cancellation-of-debt income is not affected by subsequent collection efforts. Instead, adjustments are made in the subsequent years in which revenue derived from such collection efforts is realized. 26 U.S.C. § 61(a)(11); 26 U.S.C. § 166(a)(2); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931); *Exch. Sec. Bank v. United States*, 492 F.2d 1096 (5th Cir. 1974); *Textron, Inc. v. United States,* 561 F.2d 1023 (1st Cir. 1977).

The Ninth Circuit's new rule violates tax regulations and banking law. The statute that requires taxpayers to recognize cancellation-of-debt income in the year in which it occurs, 26 U.S.C. § 61(a)(11), has been eviscerated by the Ninth Circuit. During this intervening period, recognition of cancellation-of-debt income cannot occur because there is always a possibility that future unsuccessful collection efforts can be contemplated and/or attempted. The Ninth Circuit's decision also rendered moot the statute that permits taxpayers to make adjustments in the event a cancelled debt is recovered in the future. U.S.C. § 166(a)(2). Given how drastically this will change tax law in America, this Court should immediately review the Ninth Circuit's Amended Memorandum. The recent IRS publications fuel

this confusion when they direct taxpayers to recognize cancellation of debt in the year when the debt is cancelled.

The Ninth Circuit's Amended Memorandum changes how to calculate "income" or "loss" for tax purposes. The change by the Ninth Circuit is not warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or establishing new law.

The Ninth Circuit's ruling provides the IRS with arbitrary power over whether or not the decision to recognize cancellation-of-debt income is reasonable. Since there is always a possibility that collection actions might occur in the future, the IRS can coerce taxpayers by exposing them to civil and criminal penalties. The ability of the IRS to deny legitimate refund requests because they find the mere possibility that future collection actions may exist reposes unintended power in that agency. The new rule is not supported by legal authority. This new rule even creates conflicts with the federal bank fraud statute prohibiting overstating assets for purposes of securing a loan. 18 U.S.C. § 1344; *Westpac Pacific Food v. Comm.*, 457 F.3d 970, fn.4 (9th Cir. 2006) (if a taxpayer attempted to use "the prospect that funds might be recovered" regardless of whether funds were actually recovered, as an asset to secure a loan from a bank, that taxpayer would violate section 1344, a felony punishable by up to 30-years imprisonment). The holding of *Westpac* was adopted by the IRS. *See*, In. Rev. Proc. 2007-53.

Congress has not authorized nor enacted such a change, nor has this Court nor other circuit courts found a need for this change. The cost of this new requirement to GAAP-compliant enterprises in the intervening period since I filed my Petition will entail thousands of hours from accountants and lawyers to conform each business to its new risk profile. Tax accrual workpapers must be prepared to calculate and demonstrate to auditors the accuracy of reserve accounts for this new deferred and contingent tax liability, at substantial cost.

Taxpayers and their professional assistants in the Ninth Circuit are inexorably headed to an unworkable dilemma unless this Court grants a writ of certiorari and reverses the Amended Memorandum.

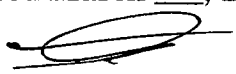
The fundamental attack on the principles of tax law by the Ninth Circuit, in direct contravention of longstanding holdings from this Court cannot go unaddressed. This Court has a duty to step in to address a monumental shift taking place in federal tax law with no oversight or deliberation.

The Ninth Circuit's Amended Memorandum will throw tax law and analysis into chaos across the country, as different courts will begin to use wildly differing standards. Taxpayers will no longer have a clear understanding when or if they are entitled to recognize certain items of "income" or "loss." This is particularly problematic given that the IRS imposes financial and criminal penalties if taxpayers are incorrect. Until this Court addresses these issues taxpayers are left in the dark about whether they should try to follow the Ninth Circuit's illogical new rule or assume the risk of ignoring it.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, I respectfully request that this Honorable Court grant rehearing and my Petition for a Writ of Certiorari or, in the alternative, summarily reverse and remand.

Dated March 1, 2022



Thomas E. Rubin, In Pro Per

CERTIFICATE OF COMPLIANCE

No. 21-775

THOMAS E. RUBIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

As required by Supreme Court Rule 44, I certify that my Petition for Rehearing is based on intervening circumstances of a substantial or controlling effect, is presented in good faith and not for delay.

I also certify that my Petition for Rehearing contains 2149 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2022

Thomas E. Rubin
In Pro Per