No. 22-54

IN THE

Supreme Court of the United States

WILLIAM A. GODDARD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A 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 Supreme Court Rule 44.2, Petitioner, William Goddard, respectfully petitions this Honorable Court to grant a rehearing on the Court's order entered October 3, 2022, denying certiorari in this case, for the following reasons.

GROUNDS FOR REHEARING

This case is about whether a court can give *Auer* deference to an agency's regulatory interpretation without considering the limitations on agency deference as set out in this Court's opinion in *Kisor v. Wilke*, 139 S.Ct. 2400 (2019). The denial of certiorari in this case perpetuates the confusion that continues to exist, after *Kisor*, as to when courts may give such deference.

Rule 42.2 states in pertinent part that any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of the denial … but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented …

The Petition in this case was filed on May 23, 2022. Since then, the Fifth Circuit Court of Appeals, on May 31, 2022, issued its opinion in *United States v. Vargas*, 45 F.4th 1083 (2022); and this Court, on June 30, 2022, issued its opinion in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022). As these decisions were issued after the filing of the Petition in this case, these are intervening circumstances. Further, it has since come

to Petitioner's attention that one of the authorities on which he relied in his Petition, *Maxwell v. C.I.R.*, 87 T.C. 783 (1986), has been incorrectly described by Westlaw as having been "Superseded by Statute." That observation was not previously been presented to this Court

These are grounds for this Court to Grant a Rehearing on the Court's Order denying Certiorari in this case.

I. The Fifth Circuit's Decision in *Vargas* Makes It Clear There Is Still Confusion, Even After the Filing of the Petition in This Case, As to When to Apply *Kisor's* Limits on *Auer* Deference.

The Petition in this case noted that the Ninth Circuit, in this case, and the Eleventh Circuit, in a related case, refused to apply *Kisor*'s limits on *Auer* deference. Subsequently, the Fifth Circuit in *Vargas* refused to apply *Kisor's* limits on *Auer* deference, proving that even after the Petition in this case was filed there continues to be confusion as to when to apply Kisor's limits, and further proving Justice Gorsuch correct in his prediction that *Kisor's* "multi-step, multi-factor inquiry guarantees more uncertainty and litigation." *Kisor* 139 S.Ct. at 2447. Granting this petition for rehearing, and vacating the order denying certiorari in this case, would allow this Court the opportunity to end the continued confusion, uncertainty and litigation as to when to apply *Kisor's* limits on *Auer* deference.

II. This Court's Decision in *West Virginia v. Environmental Protection Agency* Makes It Clear That *Kisor's* Limits on *Auer* Deference Continue to Be a Matter of Utmost Importance.

This Court, in *West Virginia v. Environmental Protection Agency,* emphasized the continued importance of *Kisor's* limitations on *Auer* deference. In that regard, in *West Virginia v. Environmental Protection Agency*, this Court specifically referenced the penultimate step of *Kisor's* multi-step inquiry in its decision, namely, the step inquiring as to whether the agency's interpretation in some way implicates the agency's substantive expertise, and then confirmed that *Kisor* requires an agency interpretation to be disregarded "when [the] agency has no comparative expertise … *Kisor v. Wilkie*, 588 U.S. ____, ____, 139 S.Ct. 2400, 2417, 204 L.Ed.2d 841 (2019)." *West Virginia* at 2612. That decision was one of the most significant decisions of this Court's term. In citing *Kisor* in that case, this Court made it clear that *Kisor's* limits on *Auer* deference continue to be a matter of utmost importance.

West Virginia concerned an agency interpretation of a statute. This case concerns an agency interpretation of its own regulation. But *Kisor* makes clear that the same inquiry applies in either case, that is, in the context of interpretating a regulation, the inquiry is whether the agency has the comparative expertise, or court. *Kisor* at 2417 ("the same idea holds good as between agencies and courts"). In this case, the issue is whether a regulation, which by its own unambiguous terms applies only to "small partnerships" (a defined term), can be interpreted to apply to "any partnership." Even assuming *arguendo* that the

regulation was genuinely ambiguous (the first step of *Kisor's* multi-step inquiry), the agency's interpretation in this case would only be entitled to deference if its interpretation in some way implicated the agency's substantive expertise. It doesn't. As *Kisor* made clear, "the elucidation of a simple … term" falls naturally into a "judge's bailiwick." *Kisor* at 2417. That is the issue in this case, the interpretation of a simple term, the term "small partnership." That interpretation in no way implicates the agency's substantive expertise and so its interpretation is entitled to no weight under *Kisor* and now *West Virginia v. Environmental Protection Agency*.

In *West Virginia v. Environmental Protection Agency,* Justice Gorsuch in his concurring opinion noted that the limits on agency deference "operate to protect foundational constitutional guarantees," *West Virginia* at 2616, pointing out that the power to regulate "could … if not properly checked, pose a serious threat to individual liberty," *West Virginia* at 2618. Justice Gorsuch expressed a similar constitutional concern in *Kisor,* acknowledging that "[o]ur Nation's founders … knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of 'litigants with unpopular or minority causes or … who belong to despised or suspect classes' count for little." *Kisor* at 2437. Given the Ninth Circuit's inexplicable description of Petitioner as a "co-conspirator," Petitioner appears to belong to such a "despised or suspect class." The *Kisor* limits on *Auer* deference protect foundational constitutional guarantees, as reiterated by Justice Gorsuch in his concurring opinion in *West Virginia v. Environmental Protection Agency,*

That the Ninth Circuit's decision in this case was clearly erroneous and violated foundational constitutional guarantees is even more clear after *West Virginia v. Environmental Protection Agency*. Granting this petition for rehearing, and vacating the order denying certiorari in this case, would allow this Court to reverse that decision.

III. Westlaw's description of *Maxwell v. C.I.R.* as Having Been "Superseded by Statute" Was Incorrect and Should Not Have Been the Basis for Denying Certiorari (If That Was the Basis)

Petitioner is unaware of the reason underlying the order denying certiorari in this case, but in preparing this petition for rehearing, noted that Westlaw describes one of the decisions on which he relied, *Maxwell v C.I.R.*, 87 T.C. 783 (1986), as having been "Superseded by Statute." That description is incorrect.

As the Petition explains in more detail, the issue of the proper interpretation of the regulation in this case is a critical one. If the regulatory term "small partnership" cannot be interpreted to apply to "any partnership" (as Petitioner argues), then the IRS should have issued an FPAA notice (instead of an NOD notice) and the Tax Court should have dismissed this case for lack of jurisdiction. In making that point, Petitioner correctly cited *Maxwell* which holds that the "[Tax] Court does not have jurisdiction" in that circumstance. *Maxwell* at 788.

Westlaw describes *Maxwell* as having been "Superseded by Statute as Stated in *Nehrlich v C.I.R.*, T.C.Memo. 2007-88." But that description is incorrect. *Nehrlich* notes that Congress added section 6234 to the

Internal Revenue Code in 1997, and then states that "Section 6234(h) lets the Commissioner and (and us) regard the wrong type of notice as the right one." *Nehrlich* at fn. 4. But that statement in that footnote is not entirely correct. Section 6234(h) does not apply in all cases, it only applies in cases involving an "oversheltered return," as defined in Section 6234(b). In other words, *Maxwell* is still good law in cases, like this case, which do not involve an oversheltered return. Indeed, there has never been a finding or even an allegation that any of the returns at issue in this case was an oversheltered return. The statement in *Nerlich* is *obiter dictum*, and the *Nehrlich* decision itself, a so-called "memorandum opinion," is not considered binding precedent by the Tax Court. See *Nico v. Commissioner*, 67 TC 647, 654 (1977)("We consider neither revenue rulings nor memorandum opinions of this Court to be controlling precedent"). Nevertheless, the statement in *Nehrlich* is incorrect or at best misleading, resulting in the incorrect description of *Maxwell* by Westlaw as having been "Superseded by Statute."

Petitioner is unaware of the reason underlying this Court's order denying certiorari in his case, but if the reason is that Westlaw describes *Maxwell* as having been "Superseded by Statute," then this Court should grant the petition for rehearing as that description is inaccurate and does not apply to this case.

For all of the foregoing reasons the petition for rehearing should be granted.

Respectfully submitted,

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October 28, 2022

CERTIFICATION OF PARTY

William A. Goddard, by and through undersigned counsel, hereby certifies that this petition for rehearing is restricted to the grounds specified in Sup.Ct.R. 44.2 and has been presented in good faith and not for delay.

Respectfully submitted,

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