No. 23-11144

ORIGINAL

In the
Supreme Court of the United States

JOHN ANTHONY CASTRO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If the government raises an affirmative defense, does it bear the burden of proof?

If the government has previously claimed the *Good Faith Erroneous Interpretation* affirmative defense, can it again claim that affirmative defense 20 years later in the same jurisdiction?

If the standard of review for the *Good Faith Erroneous Interpretation* Defense is an objective one, is it proper to take a person's subjective belief into account?

If the government makes a judicial admission that it did not make a violative disclosure, is the government estopped from making a contingent evidentiary admission to the contrary in a motion for summary judgment?

STATEMENT OF RELATED PROCEEDINGS

None

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PETITION FOR WRIT OF CERTIORARI

John Anthony Castro respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is unpublished and reproduced at App. 1-4. The opinion of the District Court for the Northern District of Texas is reported at 131 A.F.T.R.2d 2023-1941 and reproduced at App. 5-9.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2023. App. 1-4. A timely petition for panel rehearing en banc was denied on February 16, 2024. App. 27-28. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

Not applicable.

STATEMENT OF THE CASE

Petitioner John Anthony Castro sued the United States of America, pursuant to 26 U.S.C. § 7431, alleging that Special Agent Tuan Dang Ma ("Agent Ma") of the Internal Revenue Service ("IRS") told certain individuals that Petitioner was the subject of an IRS criminal investigation in violation of 26 U.S.C. § 6103. App. 5, App. 13. Agent Ma submitted a sworn declaration that he did not make the disclosures that Petitioner alleged. In the sworn declaration, Agent Ma stated that he subjectively determined that the relevant information was unavailable elsewhere.

Despite Agent Ma's declaration and judicial admission to the contrary, the Government moved for summary judgment arguing (1) that Agent Ma made the disclosure and that it was an authorized "investigatory disclosure" under § 6103(k)(6), and (2) if not an authorized investigatory disclosure, the disclosure was covered by the *Good Faith Erroneous Interpretation* affirmative defense under § 7341(b)(1).

However, despite bearing the burden of proof for the affirmative defense, neither the Government nor Agent Ma provided any evidence, openly or *in camera*, that would objectively establish the relevancy of the information sought, whether that information was actually acquired, and whether it truly was unavailable elsewhere. Similarly, the Court did not require the government to meet its evidentiary burden.

Nevertheless, the lower court Magistrate concluded that the government's *Good Faith Erroneous Interpretation* affirmative defense under § 7341(b)(1) applied because Petitioner offered "no evidence" that other people in a public restaurant in a busy station were "within ear shot" and "no evidence that the information [Agent] Ma sought... was available elsewhere." *See* ECF 52. Petitioner filed a timely Objection to the Magistrate's Findings that included new evidence in the form of a Declaration pursuant to 28 U.S.C. § 1746. *See* ECF 55. The Declaration verified that other patrons were, in fact, within an earshot. *See* ECF 55. The Objection also emphasized that the lower court was required to "view... evidence in the light most favorable to the

party opposing the motion."[1] As such, the lower court should have concluded that a gas station restaurant adjacent to a highway on a weekday would have patrons; a fact that Petitioner specifically alleged in the Declaration verified under 28 U.S.C. § 1746.[2]

Nevertheless, the lower court accepted the Magistrate's finding that the *Good Faith Erroneous Interpretation* affirmative defense applied because Petitioner offered no evidence to rebut its application and granted summary judgement to the Government. *See* ECF 58. Appellant timely filed a notice of appeal. *See* ECF 60.

On appeal, Petitioner submitted his Opening Brief that first explained the *Good Faith Erroneous Interpretation* affirmative defense under § 7341(b)(1) is "an affirmative defense for which the government carries the burden of proof." Nevertheless, the panel's unpublished decision again improperly placed the burden of proof on Petitioner and held that Petitioner "did not present any evidence suggesting that Agent Ma's interpretation of the relevant authorities was unreasonable under the circumstances. Agent Ma's disclosure thus fell within § 7431(b)(1)'s 'good faith' exception to Government liability." App. 4. Petitioner also emphasized that the Fifth Circuit had already permitted the government to rely on the *Good Faith Erroneous Interpretation* affirmative defense in a case over 20 years prior and that to permit the government to again claim the same defense with regard to an

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[1] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Rosado v. Deters*, 5 F.3d 119, 123 (5th Cir. 1993).

[2] *See* ECF 55, Page 15 of 16.

allegedly erroneous interpretation of the same exact statute would allow the IRS to violate the privacy rights of American citizens in perpetuity. Moreover, both the Fifth Circuit and lower court both emphasized that the *Good Faith Erroneous Interpretation* affirmative defense mandated an objective analysis yet considered the agent's subjective belief. Lastly, despite the government making a judicial admission through the agent's declaration that no disclosure whatsoever of any kind was made, the lower court permitted the government to make a contradictory contingent evidentiary admission for summary judgment purposes.

REASONS FOR GRANTING THE WRIT

A. If the Government Raises an Affirmative Defense, It Bears the Burden of Proof

In the Fifth Circuit's unpublished decision, it held that Petitioner "did not present any evidence suggesting that Agent Ma's interpretation of the relevant authorities was unreasonable under the circumstances. Agent Ma's disclosure thus fell within § 7431(b)(1)'s 'good faith' exception to Government liability." App. 4.

To summarize, the panel decision held that because Petitioner did not refute or rebut the reasonableness of Agent Ma's erroneous interpretation of the law, the *Good Faith Erroneous Interpretation* affirmative defense applied.

This Court has held that "good faith immunity is an affirmative defense that must be pleaded by a defendant official."[3] Thus, the *Good Faith Erroneous Interpretation Defense* under 26 U.S.C. § 7431(b)(1) is an affirmative defense to an unlawful disclosure under 26 U.S.C. § 6103 for which the government bears the burden of proof.[4]

In other words, it is on the government to prove that Agent Ma's misinterpretation of the law was reasonable. It is ***not*** on Petitioner to prove the misinterpretation was unreasonable.

Therefore, the Fifth Circuit's decision holding that the *Good Faith Erroneous Interpretation* affirmative defense applied because Petitioner failed to establish the unreasonableness of Agent Ma's erroneous interpretation is a clear and indisputable mistake of law.

Although thankfully an unpublished decision, the Fifth Circuit's decision conflicts with decades, if not more than a century, of established federal jurisprudence that an affirmative defense must be

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[3] *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)). *See also FTC v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) (citing *U.S. v. Cent. Gulf Lines, Inc.*, 974 F.2d 621, 629 (5th Cir.1992)).

[4] *See* Fed. R. Civ. P. 8(c)(1); *also see McDonald v. U.S.*, 102 F.3d 1009, 1010 (9th Cir. 1996) ("Good faith is an affirmative defense which the government must prove."); *see also Jones v. U.S.*, 97 F.3d 1121, 1124 (8th Cir. 1996) ("The burden of pleading and proving good faith under section 7431 rests with the government... good faith defense to a section 6103 violation is analogous to the immunity defense... 'good faith' immunity is an affirmative defense.").

proven by the party asserting it. For this reason alone, the Court should grant the writ.

The lower court also incorrectly reframed the issue and held that "Ma could reasonably conclude that he was authorized to orally disclose that he was conducting a criminal investigation." Petitioner's core argument was ***not*** that an IRS Special Agent with the Criminal Investigation division could not disclose he was conducting a criminal investigation even though Agent Ma's own exhibit of IRM § 9.4.5.11.3.1.4 clearly states "Special agents will refrain from characterizing investigations as 'criminal except in those instances where this disclosure is necessary to obtain the information sought."[5] Petitioner expressly asserted that Agent Ma could not have reasonably believed he was authorized to ***unnecessarily*** disclose that Petitioner was the ***target*** of a criminal investigation.

A question of reasonableness is a question of fact that is reserved for a jury to determine at trial; not for the court to determine on summary judgment.[6]

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[5] *See* ECF 38-1, Exhibit B.

[6] *See Owensby & Kritikos, Inc. v. C.I.R.*, 819 F.2d 1315, 1323 (5th Cir. 1987) ("question of reasonableness is an ultimate question of fact"); *Matter of Coston*, 991 F.2d 257 (5th Cir. 1993) ("reasonableness... is question of fact."); *Atl. Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1297 (5th Cir. 1986) ("reasonableness... is a question of fact."); *Matter of Young*, 995 F.2d 547, 549 (5th Cir. 1993) ("reasonableness... is a question of fact."); *Cascade Cap. Grp., LLC v. Landrum*, 846 F. App'x 253, 255 (5th Cir. 2021) ("The reasonableness of [the issues] are questions of fact."); *Com. Finish Grp., Inc. v. Milband*, No. CIV.A. 3:01CV1630-L, 2003 WL 22038328, at *6 (N.D. Tex. Aug. 29, 2003) ("reasonableness is a question of fact.").

The Fifth Circuit's decision grossly misapplied the burden of proof with regard to the affirmative defense raised by the government. It is the burden of the government to prove that the information Agent Ma sought was relevant to his investigation.[7] It is the burden of the government to prove that Agent Ma's determination of the necessity to disclose the target of the criminal investigation was a reasonable interpretation of the law. It is the burden of the government to prove that Agent Ma's interpretation of the relevant authorities was reasonable under the circumstances. It is ***not*** the burden of Petitioner to disprove those issues.

B. The Affirmative *Good Faith Erroneous Interpretation* Defense under 26 U.S.C. § 7431(b)(1) is a One-Time Defense that May Not Be Relied Upon in Perpetuity

26 U.S.C. § 7431(b)(1) states: "No liability shall arise under this section with respect to any inspection or disclosure... which results from a good faith, ***but erroneous***, interpretation of section 6103."

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[7] Now that the investigatory privilege is no longer applicable given the unsealing of an indictment against Petitioner, Agent Ma can provide this information. Moreover, *res judicata* would not apply since, at the time the civil action was filed, the investigatory privilege would have applied preventing Petitioner from learning the relevance of the information sought and whether that claimed sought-after information was actually acquired during the interview or if it was simply either a pretext or after-the-fact excuse. Hence, new information not previously available has arisen negating the application of *res judicata*.

Inherent in the *Good Faith Erroneous Interpretation Defense* is a legal conclusion that an agent's interpretation of the law was "erroneous."

The U.S. Supreme Court has held that "[w]ithout a statutory definition, we turn to the phrase's plain meaning at the time of enactment."[8]

Merriam-Webster's Dictionary defines "erroneous" as "containing or characterized by error." It also defines it as "mistaken." Merriam-Webster's includes the following synonyms: false, inaccurate, incorrect, invalid, untrue, wrong.

In *Gandy*, "the district court held that [the agents] believed in good faith, although erroneously, that they were authorized by 26 U.S.C. § 6103 to tell third parties that Gandy was under criminal investigation."[9] This Court held that, because the law was ***not yet clear in this circuit***, the agents "had a good faith belief that they could disclose" that Gandy was the subject of the criminal investigation.[10]

However, the *Gandy* decision did, in fact, conclude that the belief that agents could verbally disclose the target of the investigation was an erroneous and mistaken interpretation of the statute; false, inaccurate, incorrect, invalid, untrue, wrong.

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[8] *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) (citing *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011)).

[9] *Gandy v. U.S.*, 234 F.3d 281, 283 (5th Cir. 2000)

[10] *Id.* at 287.

Now, 23 years later, Agent Ma, who received his training in 2017 well after the *Gandy* decision and admitted to his extensive training on Section 6103, claims to have made the same erroneous interpretation of the law.

The panel's decision misconstrues 26 U.S.C. § 7431(b)(1) to be a perpetual exception allowing the government to continue to repeatedly misinterpret the law in the same manner that this Court has already determined to be erroneous.

Gandy did not create a perpetual loophole for the government to violate taxpayer privacy rights based on the same and repeated "erroneous" interpretations.

Pursuant to Fed. R. Evid. 406, this kind of pattern of repeated "erroneous" interpretations with no evidence that the IRS adjusted their regulations and internal manuals to account for the *Gandy* and *Snider* decisions is evidence of individual habit and routine organizational practice in flagrantly disregarding Congress's intent to protect the privacy of taxpayers, especially when the IRS published a Non-Acquiescence to the 8th Circuit's *Snider* decision evidencing a conscious and willful disregard of a legal issue that carries the potential for criminal liability.

In 2000, *Gandy* established that it was erroneous, mistaken, and wrong for agent conducting activities in the Fifth Circuit to believe that he could verbally disclose the target of an investigation. This closed the door to future claims on that same basis. As a matter of established law, Agent Ma could not have reasonably believed his disclosure was proper.

C. An Objective Analysis of the Good Faith Erroneous Interpretation Affirmative Defense Cannot Account for a Person's Subjective Belief

The lower court made it a point to emphasize that the "Fifth Circuit applies an objective standard to determine if a disclosure was made"[11] based on a "good faith, but erroneous, interpretation of section 6103."[12]

Nevertheless, to justify its assertion that Agent Ma's interpretation was made in good faith, the lower court relied on government's evidentiary admission that Agent Ma subjectively determined it was necessary to disclose the target of the investigation.

However, the government did not provide and the lower court did not require *any* evidence or explanation, openly or *in camera*, as to why it was necessary to make such a disclosure. The lower court quite simply took the government's word at face value without any further inquiry.

As previously explained, the government bears the burden of proving the affirmative defense of good faith as every other circuit in the United States has held, including the U.S. Supreme Court, for over a century.

Therefore, pursuant to the objective standard in applying the *Good Faith Erroneous Interpretation Defense*, being that Agent Ma received his training in 2017, no agent conducting activities in the Fifth Circuit can be found to reasonably believed it was okay

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[11] App. 7.

[12] 26 U.S.C. § 7431(b)(1).

to disclose the target of a criminal investigation when *Gandy* had already established that such an interpretation of the statute was erroneous, in error, mistaken, and wrong.

D. A Binding Judicial Admission in a Declaration Prevents Contingent Evidentiary Admission to the Contrary in a Motion for Summary Judgment

Courts have held that a judicial admission is "binding on the party making them. Although a judicial admission is not itself evidence, it has the effect of withdrawing a fact from contention."[13]

By "contrast, an ordinary evidentiary admission is merely a statement of assertion or concession made for some *independent purpose*."[14]

"[A]ffidavits preclude [parties] from seeking [relief contrary to the affidavit] either as a judicial admission, judicial estoppel or a matter of preclusion."[15]

In this case, Appellant, who is *pro se* and whose filings should be liberally construed, inartfully explained that there was an issue involving a "judicial admission" and the government's motion for summary judgment.

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[13] *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001).

[14] *Id.* at 476–77.

[15] *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 776 (5th Cir. 2001) (citing *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir.1994)).

The issue is Agent Ma's unequivocal statement in an affidavit that he did not disclose to a third party that Petitioner was the target of a criminal investigation. That was a judicial admission of nondisclosure that was binding on the government.

Because the assertion of nondisclosure in the affidavit was binding on the government, it was an error for the lower court to permit the government to contradict it with an evidentiary admission for purposes of the motion for summary judgment.

CONCLUSION

The Fifth Circuit's opinion is contrary to over a century of established case law on who bears the burden of proof for an affirmative defense, creates a permanent loophole for the government to repeatedly claim an erroneous interpretation of the same statute in perpetuity, permits the circuit to improperly utilize subjective beliefs in an objective analysis, and allows the government to make contingent evidentiary admissions that are in direct conflict with judicial admissions.

The fact is that the Fifth Circuit's decision is unpublished does not lower the risk; it heightens the concern that Petitioner is being singled out for special treatment.

Respectfully submitted,

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