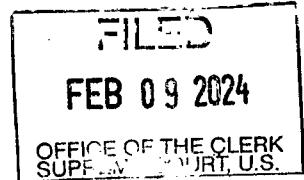


No. 23-6828 ORIGINAL

IN THE



SUPREME COURT OF THE UNITED STATES

WARREN J. LEVERING — PETITIONER
(Your Name)

vs.

THE STATE OF NEBRASKA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NEBRASKA SUPREME COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Warren J. Levering #83629

(Your Name)

P.O. Box 22500

(Address)

Lincoln, NE 68542-2500

(City, State, Zip Code)

(none)

(Phone Number)

QUESTION(S) PRESENTED

Did the Nebraska Supreme Court violate the U.S. Supreme Court's rules of Federal statutory construction by construing 26 U.S.C. §6428A to NOT exempt the \$600 EIP payment from offset for past due child support payments through the Treasury Offset Program (26 U.S.C. §6402(c)) when paid as a "tax" refund?

Subsidiary question fairly included; Rule 14.1(a):

Did the Nebraska Supreme Court improperly give (Chevron) deference to the Treasury Department's improper interpretation of 26 U.S.C. §6428A?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 11/17/2023. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. §6402 Authority to make credits or refunds

...

(c) Offset of past-due support against overpayments.

....

26 U.S.C. §6428A Additional 2020 Recovery Rebates for Individuals

(a) In general. -- In addition to the credit allowed under section 6428, in the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of --

(1) \$600 ...

(f) Advance refunds and credits. --

(1) In general. -- Each individual who was an eligible individual for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax imposed by chapter 1 for such taxable year in an amount equal to the advance refund amount for such taxable year.

....

Title 466 N.A.C. Chapter 11 §010

... Overpayments occur in a number of ways including, but not limited to: ...; payments from intercepted tax refunds in error or

Title 466 N.A.C. Chapter 11 §011 Request for Administrative Review

... The overpaid party may request a hearing within 90 calendar days of the notification of overpayment, but collection efforts will continue.

STATEMENT OF THE CASE

In 2020 the U.S. Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES) creating a \$1200 tax credit (EIP I) for eligible individuals. The same year Congress enacted the Consolidated Appropriations Act (CAA) creating a further \$600 tax credit (EIP II) for eligible individuals. These credits were called "Economic Impact Payments" (EIP). The U.S. Treasury Department first attempted to prevent incarcerated individuals from receiving these two EIP's. Following the California Federal Court's decision that inmates were "eligible" for these EIP's; Scholl v. Mnuchin, 494 F.Supp.3d 661, 689 (N.D.Cal. 2020); the Nebraska Department of Correctional Services (NDCS) instructed inmates on how to file for these EIP's.

Petitioner is an inmate incarcerated at the Nebraska State Penitentiary. Petitioner followed the instructions of NDCS and filed a Form 1040 tax return in 2020. In July of 2021 the U.S. Treasury Dept. sent a letter to the Petitioner informing him that his tax refund of \$1813.51 had been intercepted and sent to the Nebraska Dept. of Health and Human Services Child Support Enforcement Agency (DHHS) through the Treasury Offset Program (TOPS); 26 U.S.C. §6402(c). This letter informed the Petitioner to contact DHHS if he thought the payment was in error.

Petitioner contacted DHHS claiming that \$600 EIP II payment was exempt from offset for child support payments and was an overpayment that should be refunded to him. Hearing nothing from

DHHS the Petitioner filed a Motion for Return of Exempt Funds in the District Court of Douglas County, Nebraska. The District Court decided with DHHS that the \$600 EIP II payment was only exempt from offset when paid as an "advance refund" but not exempt when paid as a "tax refund."

Petitioner appealed arguing that the statutory note in 26 U.S.C. §6428A added the exemption for offsets for child support payments and this exemption applied to both "advance refunds" and "tax refunds" based upon the Federal Court rules of statutory construction and that the Court should not "defer" to the Treasury Dept.'s interpretation of that statutory note. The Nebraska Supreme Court cited the statutory note to 26 U.S.C. §6428A and then agreed with the District Court below, and other references, that the \$600 EIP II payment was only exempt from offset when paid as an "advance refund" and not as the "tax refund" the Petitioner had received.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the Nebraska Supreme Court's decision on an important question of Federal law conflicts with relevant decisions of this Court (Rule 10(c)).

The U.S. Supreme Court has held that:

A Court may not narrow a Federal Statutory provision's reach by inserting words Congress chose to omit.
Lomax v. Ortiz-Marquez, U.S., 140 S.Ct. 1721, 1725 (2020) citing U.S. v. Union Pacific RR Co., 91 U.S. 72, 85 (1875)

The statutory note to 26 U.S.C. §6428A is essential to determining the exempt status of EIP II tax refunds. For EIP II payments, 26 U.S.C. §6428A's captioned "Statutory Notes" reads:

(1) Exception from reduction or offset.--

Any refund payable by reason of section 6428A(f)..., or any such refund payable by reason of subsection (c) of this section, shall not be--

(A) subject to reduction or offset pursuant to Sec. 3716 or 3720A of Title 31 United States Code,

(B) subject to reduction or offset pursuant to subsection (c), (d), (e), or (f) of section 6402 [26 U.S.C.A. Sec. 6402(c), (d), (e), or (f)], or

(C)

Statutory Note to 26 U.S.C. §6428A (EIP II CAA)

Section 6428A(f) is captioned, "Advance refunds and credits".

These "credits" resulted in a "tax refund" for the Petitioner.

The above note differs from the statutory note for 26 U.S.C. §6428 (EIP I) only in (B). The EIP I note did not list (c) of §6402 the TOP program.

(2) subject to reduction or offset pursuant to subsection (d), (e), or (f) of section 6402 [26 U.S.C.A. Sec. 6402(d), (e), (f)], or

Statutory Note to 26 U.S.C. §6428 (EIP I CARES)

The statutory language in (1) of these notes is clear:

Any refund payable by reason of section 6428A(f)....

This does NOT say, "Any advance refund...." It can also include "Any tax refund ..." created by the credits payable by reason of §6428A(f). The Nebraska Supreme Court (and the Treasury Dept.) have inserted the word, "advance," to narrow the application of this exemption to only "advance refunds" and exclude "tax refunds". This is in conflict with this Court's decisions in Lomax v. Ortiz-Marquez, supra, and U.S. v. Union Pacific RR Co., supra.

One Federal District Court has agreed with the Petitioner's interpretation of 26 U.S.C. §6428A's exemption of the \$600 EIP II payment from offset for past due child support. In Vela v. IRS, 2021 WL 2432481, p.1 (W.D. Tex. 2021), the Court stated that the second EIP payment was NOT subject to satisfy unpaid child support obligations. Vela, however, had not followed the proper administrative procedure before suing the IRS and the suit was dismissed on sovereign immunity grounds.

Petitioner here has NOT sued the IRS or the Federal government. Instead the Petitioner pursued state administrative procedures for a refund of improperly offset funds. Title 466 Nebraska Administrative Code (NAC) Chapter 11 §010 defines "overpayments":

Overpayments occur in a number of ways including, but not limited to: ... payments from intercepted refunds in error or borrowed back to the Internal Revenue Service....
Title 466 NAC Chap. 11 §010

Then 466 NAC Chap. 11 §011 provides a remedy to obtain a refund of the overpayments:

The overpaid party may request a hearing within 90 calendar days after the notification of overpayment, but collection efforts will continue.

Title 466 NAC CHap. 11 §011

The Nebraska Courts have simply accepted the U.S. Treasury Dept.'s interpretation of the statutory note to 26 U.S.C. §6428A to not exempt EIP "tax" refunds from offset for child support. The Treasury Dept.'s improper interpretation here is no different from their attempt to exclude incarcerated individuals from receiving any EIP payments. That was corrected by the Federal Court in Scholl v. Mnuchin, *supra*. The Petition should be granted to correct this further misinterpretation of the Federal statutes.

Petitioner specifically briefed the Nebraska Supreme Court on the principle of Chevron deference, citing Johnson v. Guzman Chavez, U.S., 141 S.Ct. 2271, 2291 n.9 (2021)(The principle of Chevron deference does not apply where the statute at issue is clear.). The principle of Chevron deference is currently before this Court in Lopez Bright Enterprises v. Gina Raimondo, Sec. of Commerce, Case No. 23-451. Should the Court reject such deference in favor of statutory construction, that result would also affect the decision in the Petitioner's case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Date: February 8th, 2024


Warren J. Levering