No.

IN THE

# Supreme Court of the United States

RSBCO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Russell A. Woodard, Jr.
Law Offices of
Russell A. Woodard, Jr., LLC
119 Pelican Blvd.,
Ruston, LA 71270
(318) 255-4898
raw@therawlaw.com
*Counsel for Petitioner*

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

## QUESTIONS PRESENTED FOR REVIEW

1. **"Invited Error" Violation**. Did the Fifth Circuit err by reversing because of jury instructions that the Government itself drafted?

2. ***United Dominion* Violation**. Did the Fifth Circuit err by interpreting an undefined and unlimited term ("Impediment") in favor of the IRS and against the taxpayer?

3. ***Neder* Violation**. Did the Fifth Circuit err by reversing because of jury instructions when overwhelming evidence would have supported the same result with different jury instructions?

4. **Rule 51 Violations**. Did the Fifth Circuit err by reversing because of a: (1) jury instruction that the Government never objected to at trial; and/or (2) verdict form that the Government never objected to at trial?

5. **Attorney Fee Award**. If the Fifth Circuit erred for any of the reasons stated above, did it then also err by vacating the attorney fee award for RSBCO?

## PARTIES & PROCEEDINGS

1. **Parties**. RSBCO, Plaintiff (trial), Appellee (appeal), and Petitioner (currently). RSBCO is a Louisiana partnership and has no parent corporation nor publicly traded corporation that owns more than 10% or more of its stock. ROA. 23-30062.64; and the United States of America Defendant/Appellant/Respondent.

2. **Related Proceedings**.

   (1) *RSBCO v. USA,* 2022 U.S. Dist. LEXIS 245546 (W.D.La. July 5, 2022).

   (2) *RSBCO v. USA,* 2022 U.S. Dist. LEXIS 237066 (W.D.La. November 28, 2022).

   (3) *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024).

   (4) *RSBCO v. USA,* 2024 U.S. App. LEXIS 16758 (5th Cir. 2024).

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The Fifth Circuit's Opinion vacating and remanding the trial court's decision, Appendix A, A-1, is reported at 104 F.4th 551. The trial court rulings of the Western District of Louisiana, Appendix B, A-24, and C, A-36, are not reported but are available at 2022 U.S. Dist. LEXIS 245546 and 2307066. The Fifth Circuit's denial of the Appellee's Petition for Rehearing, Appendix D, A-38, is not reported but is available at 2024 U.S. App. LEXIS 16758.

## JURISDICTIONAL STATEMENT

On May 5, 2021, RSBCO filed suit against the United States in the Western District of Louisiana. After a jury trial, the court entered judgment for RSBCO on December 16, 2022. Thereafter, the USA appealed, and the Fifth Circuit Court of Appeals vacated and remanded on June 13, 2024. The Fifth Circuit denied RSBCO's petition for rehearing on July 9, 2024. Under U.S. Sup. Cr. Rule 10(c), this Court has jurisdiction as the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

This petition originates from an appeal from a final judgment of the U.S. District Court for the Western District of Louisiana, which had jurisdiction over the matter under 29 U.S.C. §§ 1330; 1346(a)(1). ROA.16; ROA.2379. The Fifth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291. As the Fifth

Circuit has denied rehearing on the matter, this Court has jurisdiction under 28 U.S.C. § 1254

## CONSTITUTIONAL PROVISIONS, STATUTES, & POLICIES AT ISSUE

Federal Rules of Civil Procedure, Rule 51-Objections; Preserving a Claim of Error. Internal Revenue Code, 26 U.S.C. § 6724 Waiver; definitions and special rules. Internal Revenue, 26 C.F.R. § 301.6724-1 Reasonable cause. The full text of these statutes is reproduced at Appendix E, A-39-69.

## STATEMENT OF THE CASE

### Introduction

In this tax refund case, the Fifth Circuit reversed a unanimous jury verdict in favor of RSBCO based on a jury instruction that the Government: (1) drafted and proposed prior to trial; and (2) did not object to at trial.

For context, the IRS forced RSBCO to pay $579,198.37 ("Penalty") for an untimely resubmission of informational returns that did not cause any harm to the Government or any third-party. ROA.2516-2517; 2595; 2666. When RSBCO filed an administrative refund claim ("1st Refund Claim"), the IRS lost it, requiring RSBCO to file suit ("1st Litigation"). ROA.18; 2653-2654.

Throughout the 1st Litigation, the IRS (incorrectly) claimed that RSBCO had not filed a refund claim. ROA.2650. Based on "good faith"

assurances from the IRS, RSBCO dismissed the 1st Litigation and filed another administrative claim ("2nd Refund Claim"). ROA.19; 2937-2965. However, the IRS lost that one too, resulting in another lawsuit against the IRS: all just for RSBCO to have the mere opportunity to recover its own money ("2nd Litigation"). ROA.15-56; 2653.

In the 2nd Litigation, RSBCO waded through intense discovery and motion practice to trial, obtaining a favorable jury verdict in ~fifteen minutes of deliberation. ROA.2207. Yet, on appeal, the Fifth Circuit reversed because of an instruction that the ***Government*** drafted pretrial and never objected to at trial. ROA.2241. In so ruling, the Fifth Circuit also interpreted an ***undefined*** and ***unlimited*** regulatory term in favor of the IRS and against the taxpayer. *See, RSBCO v. USA,* 104 F.4th 551, 560-61 (5th Cir. 2024).

## Factual Background

**January 1, 1986** RSBCO was formed. As a small wealth management company headquartered in Ruston, Louisiana, RSBCO was required to file informational returns for its clients per 26 U.S.C. § 6721. ROA.2492.

**May 2, 2011** RSBCO hired an employee named "Smith" to handle the annual filings of RSBCO's clients' informational returns. ROA.2499; 2822. Prior to hire, RSBCO thoroughly interviewed Smith based upon his qualifications: a college graduate with a master's degree in business administration and over a decade of professional

experience in the banking industry. ROA.19. After hire, Smith was trained and supervised within industry standards, too. ROA.20.

**April 1, 2012** Demonstrating his qualifications and RSBCO's proper training and supervision, Smith successfully filed ~24,678 informational returns on the IRS's "FIRE System."[1] ROA.2510-2511; 2862.

**April 1, 2013** Unbeknownst to anyone at RSBCO, Smith was privately grappling with severe depression, marital troubles, and suicidal ideations. ROA.2593-2594; 2607. In the midst of this illness, Smith attempted to file ~21,547 informational returns on the IRS's FIRE System. ROA.2863.

**April 5, 2013** The IRS's FIRE System issued an automated reply email to Smith (and only Smith) stating that one or more of the returns submitted had a "BAD" status requiring resubmission. ROA.2632; 2864. However, due to the severity of Smith's illness, Smith failed respond to the IRS or alert anyone at RSBCO about this issue. ROA.2594-2595; 2616.

**June 8 & July 8, 2013** The IRS's FIRE System sent automated "Reminder" emails to Smith (and only Smith). ROA.2865-2866. However, due to the severity of Smith's illness, Smith again failed to respond to the IRS or alert anyone at RSBCO about this issue. ROA.21.

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[1] Filing Information Returns Electronically.

**July 16, 2013** Smith corrected the information returns, and here is how: he removed "dash" marks inadvertently included on ***twenty-six*** of the returns before resubmitting them on the FIRE System. ROA.2867. Restated, 21,521-of-21,547 — ***99%+*** — were correct and without any error whatsoever when Smith originally (and timely) submitted them back on April 1. ROA.2522. More, the only error with the twenty-six returns that Smith corrected was a mere "dash" mark that had no impact on anything of substance within the returns (*e.g.* dollar value, taxpayer identification information, etc.). ROA.2517-2519. At all times, the IRS could view, access, and understand the informational returns: even those with the inadvertent "dash" marks. ROA.2635-2636. Still – even though no harm was caused to the Government or any third party – these twenty-six innocuous "dash" marks caused RSBCO to pay a $579,198.37 Penalty to then endure a decade of administrative abuse and incompetence by the IRS, outlined below. ROA.2595; 2666.

**April 1, 2014** Again proving himself to be duly qualified, trained, and supervised to file on the FIRE System, Smith successfully filed 18,778 informational returns without any issue, whatsoever. ROA.2868.

**August 4, 2014** The IRS sent a "Penalty Notice" to Smith (and only Smith) associated with the forty-two-day delay in correcting and resubmitting the information returns associated with the 2012 tax period as outlined above. ROA.2869. Smith hid the Penalty Notice inside of his work desk and failed to

alert anyone at RSBCO about the Penalty Notice. ROA.2616.

**November 12, 2014** RSBCO terminated Smith for unrelated performance issues. ROA.2505. While cleaning out Smith's desk, RSBCO discovered – for the first time – the FIRE System Reminder emails and the Penalty Notice. ROA.2855-2856. Thereafter, RSBCO representatives immediately reached out to the IRS to see what could be done. ROA.2527.

**October 12, 2015** Without any further communication from the IRS, the Penalty was assessed against RSBCO. ROA.2956. In response, RSBCO representatives again reached out to the IRS in effort to speak with a human being to discuss the problem. However, due to the IRS's entirely "automated system,"[2] RSBCO's efforts failed. ROA.17.

**January 25, 2018** Once again without further communication from the IRS, the IRS issued another automated email – labeled a "Final Notice" – demanding that RSBCO pay the Penalty or suffer drastic consequences. ROA.2884.

**June 13, 2018** RSBCO requested a "Due Process Hearing," which proved to be a misnomer insofar as it was conducted by telephone for approximately fifteen minutes before an IRS

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[2] Other than the "Due Process" hearing in 2018, ***no human employed by the IRS ever looked at a single page of RSBCO's administrative file.*** Instead, and at all times, the IRS relied entirely on a purely "automated" process, which even the IRS admits to be "***thoughtless***" in nature. ROA.2638-2639.

employee determined that the $579,198.37 Penalty was proper without providing any reasons supporting that determination. ROA.2529-2530; 2646.

**November 19, 2018** RSBCO paid $579,198.37 to the IRS simply to have the opportunity to dispute the Penalty administratively. ROA.2643; 2956.

### 1st Refund Claim

**December 11, 2018** RSBCO filed the 1st Refund Claim claiming that the Penalty should be refunded for "reasonable cause" under 26 U.S.C. § 6724, detailing the facts and circumstances associated with Smith's illness as outlined above. ROA.2904.

**December 31, 2018** The IRS received the 1st Refund Claim. ROA.922. However, the IRS then lost and failed to review or rule upon the 1st Refund Claim. ROA.2650-2651; 2653-2654.

### 1st Lawsuit

**August 29, 2019** RSBCO filed the 1st Lawsuit claiming that the Penalty should be refunded for "reasonable cause" under 26 U.S.C. § 6724, again detailing the facts and circumstances associated with Smith's illness as outlined above. ROA.18.

**June 29, 2020** After repeated (incorrect) claims by the IRS in affirmative defenses and motion practice that RSBCO had not filed an administrative claim, RSBCO – at the encouragement of the trial court and the assurances of administrative "fairness" promised by the IRS if it re-filed administratively –

voluntarily dismissed the 1st Lawsuit without prejudice. ROA.19.

### 2nd Refund Claim

**September 24, 2020** RSBCO filed the 2nd Refund Claim claiming that the Penalty should be refunded for "reasonable cause" under 26 U.S.C. § 6724, again detailing the facts and circumstances as outlined above. ROA.2937-2965. In addition to the reasonable cause claim, the 2nd Refund Claim also alleged that refund was proper because the Penalty: (1) was the product of "deminimis" errors under 26 U.S.C. § 6721; and (2) violated the 8th Amendment's "excessive fines" clause. ROA.2937-2965.

**September 30, 2020** The IRS received the 2nd Refund Claim. But, the IRS again lost and failed to review or rule upon the 2nd Refund Claim. ROA. 2650-2651; 2653.

### 2nd Lawsuit

**May 5, 2021** RSBCO filed the 2nd Lawsuit claiming that the Penalty should be refunded because: (1) RSBCO could show "reasonable cause" under 26 U.S.C. § 6724 based on Smith's illness; (2) the Penalty was the product of "deminimis" errors under 26 U.S.C. § 6721; and (3) the Penalty violated the 8th Amendment's "excessive fines" clause. ROA.16-56.

**May 18, 2022** After over a year of discovery and motion practice, in response to RSBCO's deposition questioning of the IRS's

corporate representative, the IRS finally located (and admitted to having long received) both the 1st Refund Claim and the 2nd Refund Claim. ROA.741. They were both sitting in a pile without any IRS case agent assigned to either of them. ROA.2940-2943. Even after finding them, the IRS did not assign a case agent to either the 1st Refund Claim or the 2nd Refund Claim. ROA.2652-2653.

## Pretrial Proposals

**August 31, 2022** Over a week ***before*** trial, RSBCO and the Government jointly submitted their proposed jury instructions and verdict forms ("Proposals"). ROA.2170-2205. Importantly, the pretrial Proposals were submitted electronically to a Magistrate and a law clerk: not the trial judge. The Proposals contained the parties' positions (and objections) on jointly proposed charges. ROA.2170-2205. Yet, at trial, the Proposals were not filed, read aloud, nor presented to the jury. ROA.2730-2743. Similarly, the pretrial Proposals were never ruled upon by the trial judge. *Id.* To the contrary, the pretrial Proposals were merely a rough starting point for the jury charge conference later held at trial. ROA.2242-2251.

## Trial

**September 6, 2022** The jury trial began. ROA.2206. Early on, the trial judge invited parties to make their respective objections to jury instructions, as follows: "Anything else? Anybody want to put your objection [to jury charges] on the record if you'd like objecting to them[?]". ROA.2441. In response, the

Government stated ***nothing***. ROA.2441. Even after a jury charge conference, the record is devoid of a single objection to a single instruction made by the Government at trial. ROA.2441.

**September 7, 2022** After hearing testimony from Smith (ROA.2580—2617), RSBCO's corporate representative (ROA.2490—2578), and the IRS's corporate representative (ROA.2623-2668), the record established that RSBCO had met the requirements necessary for a "reasonable cause" refund under 26 U.S.C. § 6724: (1) RSBCO behaved in a "Responsible" manner; and (2) RSBCO proved "Impediments" and "Mitigators." After closing, the jury was read the final charges ("Jury Instructions"), again without objection. ROA.2730-2743.[3] After less than fifteen minutes of deliberation, the jury returned a verdict for RSBCO. ROA.2745-2746.

## Post-Trial

**November 28, 2022** The trial court denied the Government's motion for judgment as a matter of law with specific reasons stated. Appendix B, A-24-35.

**December 8, 2022** The trial court awarded attorney fees to RSBCO with reasons stated (ROA.2213), commenting on the IRS's administrative abuse:

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[3] Importantly, the Jury Instructions read ***at trial*** were incomparably different from the ***pretrial*** Proposals. ROA.2170-2205; 2242-2251. Equally important, the Government lodged no objections whatsoever to the actual Jury Instructions read to the jury at trial. ROA.2728-2730.

> [A]lthough the administrative refund process is supposed to be a meaningful opportunity to present claims and be heard to minimize expense, ***the IRS used the administrative process to increase delay, burden, and expense on the taxpayer***. ROA.2362-2376. (Emphasis added).

**Appeal**

**June 13, 2024** The Fifth Circuit issued its ruling ("Opinion") vacating the jury's verdict and remanding proceedings back to the trial court because of an allegedly incorrect jury instruction on "Impediments" read in conjunction with the verdict form's usage of "and/or." *See, RSBCO,* 104 F.4th 551.

Essentially, the Fifth Circuit affirmed the trial court's instruction on "Mitigators," but it found found the instruction on "Impediments" to be erroneously oversimplified. *Id.* Even then, the Fifth Circuit conceded that the allegedly erroneous Impediments instruction only created a potential "fly in the ointment" when read in conjunction with the jury verdict form's usage of "and/or". *Id.* Specifically, because the verdict form used "and/or" (instead of separating Mitigators and Impediments into two separate questions with "or"), the Fifth Circuit acknowledged that two-of-three potential verdicts favored ***affirming*** the jury's verdict. *Id.* For example, the Fifth Circuit determined that the jury's verdict should be affirmed if the jury found that RSBCO proved either: (1) Mitigators; or (2) Mitigators and Impediments. *Id.* However, because of the

"possibility" that the jury only found that RSBCO proved Impediments, then – according to the Fifth Circuit – the verdict had to be vacated and remanded considering the allegedly erroneous Impediments instruction.

In so ruling, the Fifth Circuit overlooked key facts: (i) the ***Government*** drafted the definition of Impediments used by the trial court; and (ii) the Government ***did not object*** at trial to either the allegedly erroneous Impediments instruction or the verdict form's usage of "and/or." More, the Fifth Circuit never addressed this issue: neither Congress nor the IRS have defined "Impediments" in their statutory (26 U.S.C. § 6724) or regulatory (26 C.F.R. § 301.6724) schemes. Instead, "Impediments" are listed by examples with this open-ended phrase: "Includes but is not limited to." *Id.*

This notwithstanding, the Fifth Circuit vacated the verdict and remanded for a new trial, while also vacating the award of attorney's fees and costs to RSBCO.

**June 26, 2024** RSBCO filed a request for rehearing for five separate and independent reasons stated. *See,* Appellee Rehearing Brief at 3, *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024), ECF No.81:

> 1st–Under the "Invited Error Doctrine," the Government cannot complain about jury instructions that it drafted.
>
> 2nd–Under *Goleman*, the Government

cannot complain about a verdict form that it never objected to.

3rd–Under *Neder*, the jury's verdict should be affirmed because the result would have been the same even with different instructions.

4th–Under Rule 51 – which was amended significantly after the *Bender* decision relied upon by this Court – objections must be made on the record, at trial, and outside the presence of the jury.

5th–The Opinion contradicts *Marshall* and *United Dominion* by resolving ambiguities – critical undefined/unlimited terms in §6724 and §301.6724-1 – favorably to the IRS and against the taxpayer.

**July 9, 2024** The Fifth Circuit denied RSBCO's request for rehearing without written reasons. *See, RSBCO v. USA,* 2024 U.S. App. LEXIS 16758 (5th Cir. 2024).

**August 19, 2024** RSBCO's counsel (at trial and on appeal) obtained admission to the Honorable United States Supreme Court.

**September 30, 2024** RSBCO obtained an

extension (fifteen days) to present this certiorari application, pushing RSBCO's deadline to October 22.

**Recap**

1. The Government ***drafted*** the definition and an example of Impediments used in the final Jury Instructions at trial. ROA.2183.

2. The Government ***did not object*** to the Jury Instructions or the verdict form at trial. ROA.2728-2730.

3. Although "Impediments" is ***undefined*** and ***unlimited***, the Fifth Circuit interpreted it ***in favor of the IRS and against the taxpayer*** (RSBCO) to reverse a unanimous jury verdict. *See, RSBCO,* 104 F.4th 560-61.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

RSBCO highlights these issues warranting reversal of the Fifth Circuit's Opinion and reinstatement of the jury's verdict and the trial court judgments.

### I. "Invited Error" Violation—The Government provided the definition and examples of Impediments that the Fifth Circuit determined to be incorrect.

In the pretrial Proposals, the ***Government*** offered this definition of Impediments: "An Impediment is generally defined as a hindrance or

obstruction in doing something." ROA. 2183. Then, in the Jury Instructions read to the jury at trial, the judge accepted the Government's proposed definition verbatim. ROA.2738. On appeal, the Fifth Circuit took issue with two examples of Impediments under this definition.[4] However, the ***Government*** provided those examples (below), too.

[4] *See, RSBCO,* 104 F.4th 558.

| Government's Proposal | Trial Court's Instruction | 5th Circuit's Issues |
|---|---|---|
| **Ex.1: Actions of Agent**<br>"An 'event beyond the filer's control' might include … reliance on ***certain actions taken by an agent.***" ROA.2183. | **Ex.1 Actions of Agent**<br>"Events that are generally considered beyond the filer's control, include, but are not limited to: ***Certain actions of an agent."*** ROA.2738. | **Ex.1: Actions of Agent**<br>"The instruction recites part of [regs] ("Certain actions of an agent…"), ***but the district court nowhere else explained to the jury which 'certain actions' could."*** Opinion; p.12. |
| **Ex.2: Death/Illness/Absence**<br>"Those are just examples [of Impediments.] ***The only one you have to consider is whether Smith's mental illness was an impediment."*** ROA.2184. | **Ex.2: Death/Illness/Absence**<br>***"Death, serious illness, or unavoidable absence*** of the taxpayer … may establish reasonable cause. ROA 2738. | **Ex.2: Death/Illness/Absence**<br>"It was error for the instruction to state that the ***death, serious illness, or unavoidable absence*** of the filer constituted an example of an Impediment potentially warranting a Reasonable Cause refund under the regulation." Opinion; p.12. |

Under the "Invited Error Doctrine" – commonly utilized across appellate circuits and even recognized by the Supreme Court – parties cannot complain about jury instructions which they proposed, failed to object to, or otherwise induced the trial court to adopt. *See, McCaig v. Wells Fargo,* 788 F.3d 463, 476–77 (5th Cir. 2015) ("A party cannot complain on appeal of errors which he himself induced the district court to commit."). *See*, *U.S. v. Wells*, 519 U.S. 482, 488 (1997):

> [U]nder the "invited error" doctrine "'that a party may not complain on appeal of errors that he himself invited or provoked the [district] court to commit.'" *United States v. Sharpe,* 996 F.2d 125, 129 (C.A.6) (quoting *Harvis v. Roadway* 923 F.2d 59, 60 (C.A.6 1991)), cert. denied, 510 U.S. 951, 114 S.Ct. 400, 126 L.Ed.2d 347 (1993).

As the graphic above shows, here the Fifth Circuit found the "Actions of Agent" charge to be problematic because it failed to "explain to the jury which 'certain actions' could constitute impediments…"[5] The Fifth Circuit added, "by giving such an open-ended instruction, stripped of any of this nuance, the trial court freed the jury to find that any of Smith's actions that constituted 'a hindrance or obstruction to RSBCO."[6] Yet, the Fifth Circuit's

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[5] *RSBCO,* 104 F.4th 558.

[6] *Id.* at 559. Similarly – but indeed separately – the ***Government*** also proposed that Smith's mental illness was an "example" of a potential Impediment (ROA.2184).

reasoning is fatally flawed for multiple reasons.

First, the ***Government's*** proposed instruction on "Actions of Agent" was substantially ***identical*** to that used by the trial court in the final Jury Instructions. Indeed, the Government's proposed instruction (quoted in the graphic above) did not explain to the jury "which 'certain actions' could constitute impediments," either. Thus, using the Fifth Circuit's language, it was the ***Government*** (not the trial court) who "freed the jury to find that any of Smith's actions that constituted 'a hindrance or obstruction to RSBCO." Accordingly, any harm to the Government related to the Impediment instruction (which is denied) was principally self-inflicted.

Second and separately, the Fifth Circuit also held: "It was error for the instruction to state that the death, serious ***illness***, or unavoidable absence of the filer constituted an example of Impediment potentially warranting a Reasonable Cause refund under the regulation."[7] Yet, and once again, the ***Government*** drafted and proposed a substantially identical jury charge: "The only one you have to consider is whether Smith's mental ***illness*** was an impediment." ROA.2184 (Emphasis added).

Third and separately, the Government did not object to any of these instructions on the record at trial in compliance with Fed R. Civ. P. Rule 51. This – failing to object – is another example of an "Invited Error" under *U.S. v. Wells*, 519 U.S. at 488. This is detailed with supporting authority as a separate

[7] *RSBCO,* 104 F.4th 559 (Emphasis added).

assignment of error below in "IV. Rule 51 Violations—Objections to jury instructions and verdict forms must be on the record at trial."

Fourth and separately, under the Invited Error Doctrine, the verdict should be affirmed "if ***any*** one of the underlying theories is legally and factually sufficient." *See, McCaig*, 788 F.3d at 477. Here the Fifth Circuit explicitly recognized that a *majority* of the potential interpretations warranted ***affirming*** the jury's verdict. *See, RSBCO,* 104 F.4th 562: "If the ***first*** or ***third*** possibility, we could ***affirm***, based on the adequacy of the "mitigators" instruction." (Emphasis added). This is detailed with supporting authority as a separate assignment of error below in "III. *Neder* Violation—Even if the jury was instructed differently, overwhelming evidence would have supported the same result."

For these many reasons, reversing the Fifth Circuit's Opinion to re-instate the jury's verdict is necessary and proper.

## II. *United Dominion* Violation—The Fifth Circuit interpreted an undefined and unlimited term ("Impediments") against the taxpayer in favor of the IRS.

The IRS drafts the rules applicable to this dispute.[8] However, neither the statutory scheme (26 U.S.C. § 6724) nor its interpretive regulatory scheme (26 C.F.R. § 301.6724-1) define the most critical term

[8] 26 C.F.R. § 601.101; 26 U.S.C. § 6011(e) (2012).

in this entire case: "Impediments."[9] Instead, the IRS provides "examples" that are modified by this open-ended phrase: "Including but not limited to." *See,* 26 C.F.R. § 301.6724-1. Thus, RSBCO was fined $500,000+ under a statutory and regulatory term that is both ***undefined*** and ***unlimited***.[10]

Indirectly, the Fifth Circuit noticed this problem in the Opinion: "By giving such an ***open-ended*** instruction, stripped of any of this nuance, the trial court freed the jury to find that any of Smith's actions that constituted 'a hindrance or obstruction to RSBCO."[11] Despite recognizing that the IRS's own rules and regulations created the potential for this quandary, the Fifth Circuit then erred by filling in this gap with strict parameters favorable to the IRS and against the taxpayer, despite reams of precedent (cited below) commanding a holding in favor of RSBCO. In this critical regard – not appreciating that vaguenesses and ambiguities in IRS regulations must

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[9] The IRS also fails to define an equally critical term: "Mitigators." *See,* 26 C.F.R. § 301-6724.1. Likewise, "Mitigators" is also referenced by examples modified by the illustrative "including but not limited" -phrase. *Id.* However, the Fifth Circuit found that "Mitigators" was acceptably defined (and exemplified) in the Jury Instructions read by the trial court. *See*, *RSBCO,* 104 F.4th 558.

[10] In ***both*** the statutes ***and*** regulations, the IRS has ample opportunity to define terms critical to this dispute: but it fails to do so. More, in ***both*** statutes ***and*** regulations, the IRS has ample opportunity to limit what "examples" constitute a basis for reasonable cause: but the IRS fails to do that, too.

[11] *RSBCO,* 104 F.4th 559. (Emphasis added). Similarly – but indeed separately – the ***Government*** also proposed that Smith's mental illness was an "example" of a potential Impediment (ROA.2184).

be decided in favor of the taxpayer – the Fifth Circuit erred.

Punishing courts, juries, and taxpayers by resolving ambiguities of the IRS's own rules in a manner favorable to the IRS violates legions of jurisprudence from this Court. *See e.g., United Dominion Industries, Inc. v. U.S.*, 532 U.S. 822, 839 (2001):

> ***At a bare minimum***, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, ***we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter***. *See Leavell v. Blades,* 237 Mo. 695, 700–701, 141 S.W. 893, 894 (1911) ("When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it"); *United States v. Merriam*, 263 U.S. 179, 188, 44 S.Ct. 69, 68 L.Ed. 240 (1923) ("If the words are doubtful, ***the doubt must be resolved against the Government and in favor of the taxpayer***"); *Bowers v. New York & Albany Lighterage Co.,* 273 U.S. 346, 350, 47 S.Ct. 389, 71 L.Ed. 676 (1927) ("The provision is part of a taxing statute; and ***such laws are to be interpreted liberally in favor of the taxpayers***"). Accord, *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474, 12 S.Ct. 55, 35 L.Ed. 821 (1891);

> *Benziger v. United States*, 192 U.S. 38, 55, 24 S.Ct. 189, 48 L.Ed. 331 (1904). (Emphasis added).[12]

Indeed, the Fifth Circuit has previously followed this canon of interpretation, as well. *See*, *U.S. v. Marshall*, 798 F.3d 296, 318 (5th Cir.2015):

> We also heed the longstanding canon of construction that if the words of the tax statute are doubtful, ***the doubt must be resolved against the government in favor of the taxpayer***. (Emphasis added).

At trial, the parties and the court did their best with this amorphous term by applying its "plain and ordinary meaning," which is exactly what the court was supposed to do. *See, S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 377 (2006) ("[T]he term 'discharge' is not defined in the [Clean Water Act] but its ***plain and ordinary meaning*** suggests 'a flowing or issuing out,' or 'something that is emitted.'")*; Camacho v. Ford Motor Company*, 993 F.3d 308, 312 (5th Cir. 2021) ("When faced with an undefined statutory term, our job is to apply the ***common, ordinary meaning***…")*;* and *Grinnell Mut. Reinsurance Co. v. Villanueva*, 798 F.3d 1146, 1148 (8th Cir. 2015) ("When a term is undefined, it is given its ***plain and ordinary*** meaning.").[13] Nonetheless, the Fifth Circuit reversed the jury's verdict by using a strict interpretation of the undefined and unlimited regulatory term ("Impediments") to favor the IRS and

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[12] Hon. Justice Clarence Thomas, concurring.

[13] Emphasis added in each.

to the detriment of RSBCO, the taxpayer.

On appeal, RSBCO specifically argued this point (*e.g.* doubt or ambiguity must be resolved against the IRS and in favor of the taxpayer) citing decisions in support thereof. *See,* Appellee Brief at 32-33, *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024), ECF No.38. Yet, despite a lengthy reply, the Government did not respond to this argument. *See,* Appellant Reply Brief, *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024), ECF No.52. Then, at oral argument, RSBCO again raised this issue and these cases, again without any response from the Government or the Fifth Circuit panel.[14] Then, in its Opinion reversing and remanding, the Fifth Circuit did not respond to this argument or these cases, either. *See, RSBCO*, 104 F.4th 551, *in-toto.* Thus, RSBCO requested rehearing, once again bringing this argument and these cases to the Fifth Circuit's attention. *See,* Appellee Rehearing Brief at 17-18, *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024), ECF No.81. However, in denying RSBCO's request for rehearing, the Fifth Circuit again did not address this argument or these cases. *See, RSBCO v. USA,* 2024 U.S. App. LEXIS 16758 (5th Cir. 2024).

Condensing thorny specifics down to brass tacks, consider this: (1) the most critical term in this case — "Impediments" — is both undefined and unlimited in the controlling statutory and regulatory schemes; (2) the IRS has the ability and obligation to fairly define and limit this term; (3) jurisprudence

[14] Oral Argument, *RSBCO v. USA,* 104 F.4th 551 (5th Cir. 2024) https://www.ca5.uscourts.gov/OralArgRecordings/23/23-30062_12-7-2023.mp3.

from the Supreme Court require doubt/ambiguity to be interpreted pro-taxpayer and against the IRS; and yet, (4) the Fifth Circuit – after refusing to address this issue altogether – interpreted "Impediments" in a manner favorable to the IRS and against RSBCO.

## III. *Neder* Violation—Even if the jury had been instructed differently, overwhelming evidence would have supported the same result.

The jury deliberated for less than fifteen minutes before finding for RSBCO due to the overpowering nature and volume of evidence supporting RSBCO's claims. *See*, ROA.2207, showing deliberations began at 2:27p.m. and the verdict was returned for RSBCO at 2:41p.m. Even the Fifth Circuit's Opinion noted that a ***majority*** of the jury's potential findings – that RSBCO proved it was "Responsible" plus "Mitigators" or "Responsible" plus "Mitigators and Impediments" – warranted ***affirming*** the jury's verdict. *See*, *RSBCO,* 104 F.4th 561. Thus, according to this Court in *Neder v. United States*, 527 U.S. 1, 7-8 (1999), any errors in the trial court's instructions were "harmless" because overwhelming evidence would have supported a verdict in RSBCO's favor even under the instructions called for by the Fifth Circuit.

For example, the Fifth Circuit held that the jury should have been told that the only qualifying "actions of agent" would be: (i) if RSBCO exercised "reasonable business judgment" vis-à-vis its agent (Smith); and (ii) "mitigating factors" were present

regarding the agent (Smith).[15] First, there is compelling proof (recapped below) showing RSBCO satisfies both of these prongs. Second, nothing in the record suggests that the jury would have decided any differently had this instruction been given. To the contrary, even if the jury had been given the exact instructions articulated by the Fifth Circuit, overwhelming evidence would have still supported their verdict for RSBCO. Thus, any error in the instructions (which is denied) were "harmless." *See, Neder*, 527 U.S. at 7-8, finding erroneous jury instructions "harmless" where "overwhelming evidence" suggested that "the jury verdict would have been the same absent the error."[16]

Here is the powerful evidence showing that RSBCO exercised "reasonable business judgment" vis-à-vis Smith:

- **Qualifications (Pre-Hire)**. Smith was highly qualified both academically (ROA.2580) and through prior employment (ROA.2625-2626)

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[15] *See, RSBCO,* 104 F.4th 556: "(i) "the filer exercised ***reasonable business judgment*** in contracting with the agent…; and (ii) The agent satisfied the reasonable cause criteria set forth in paragraph (b) [i.e. '***mitigating factors***']…" (Emphasis added).

[16] This standard applies where personal liberty is at stake. Accordingly, it is with even greater justification *afortiori* that deference to a jury's verdict be afforded here civil cases where the record contains overwhelming evidence supporting the jury's verdict. Further, the typical standard in civil cases (*e.g.* "substantial and ineradicable doubt as to the charge ***as a whole***") is, at its core, saying the same thing articulated in *Neder*: an erroneous instruction only constitutes reversible error if the record suggests that the jury could have come to a different conclusion with the different instruction.

before being hired by RSBCO.

- **Qualifications (Post-Hire)**. Smith proved that he was qualified to file informational returns on the FIRE System by successfully filing thousands of returns without any issue both before (ROA.2510-2511) and after (ROA.2868) the subject incident.

- **Training**. Smith was rigorously trained above industry standards (ROA.2583-2585).

- **Supervision**. Smith was also supervised within industry standards (ROA.2504).

For these compelling reasons, the Government did not even appeal whether RSBCO had behaved "Responsibly" toward Smith under 26 U.S.C. § 6724.[17]

Next, as to "Mitigators," RSBCO presented the jury with equally powerful evidence "lessening the gravity" of Smith's offense:

- ***No harm*** was caused to the Government (ROA.2344) nor to any third-party. ROA.2595-2666.

- ***No benefit*** inured to RSBCO or Smith. ROA.2595-2666.

- Smith's original submission was ***timely.***

[17] The Government's only issues on appeal concerned the instructions for Mitigators (per the Fifth Circuit, correct) and Impediments (per the Fifth Circuit, incorrect).

ROA.2482.

- The originally submitted returns were ***processable*** by the IRS even with the alleged errors. ROA.2627.

- The alleged errors were corrected within ~***forty-two days*** after the statutory grace period. ROA.554;680.

- The alleged errors were ***insignificant*** in nature (a mere dash mark "—") and number (*e.g.* 26-of-21,574 returns contained an error). ROA.3000.

- Smith had a ***history of compliance***. ROA.2511; 2515.

Courts interpreting 26 U.S.C. § 6724 have found "mitigating factors" with far less compelling facts. *See, USA v. Quality Medical*, 214 B.R. 246, 250 (M.D. Fla. 1997) (finding mitigating factors present where taxpayer had no "financial gain"); and *Tysinger v. USA*, 428 F.Supp.2d 480 (E.D. Va. 2006) ("Sloppiness is not the same as willfulness…It is not surprising that the employees on the front lines failed to cross every 't' and dot every 'i'…").

In addition to cases from this Court – such as *Neder*, 571 U.S. 1 –treatises also favor RSBCO. For example, this Court frequently looks to Moore's Federal Practice treatise for complex procedural questions that arise at trial. *See e.g., Marx v. General Revenue Corp.*, 568 U.S. 371, 377 (2013). This well-respected treatise speaks to this specific issue. *See,* 6

Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner, *Moore's Federal Practice - Civil* § 206.02 (3d. 2018):

> A jury verdict supported by substantial evidence ***must*** stand, and the circuit court reviews jury findings for sufficiency of the evidence. The jury is not required to exclude every reasonable hypothesis and may choose between alternative constructions of the evidence. (Emphasis added).

Here, due to compelling evidence, the jury deliberated swiftly for RSBCO. *See*, ROA.2207. According to this Court (*Neder,* 527 U.S. 1), any errors in the instructions were "harmless" because overwhelming testimony and documentary proof would have supported a verdict in RSBCO's favor even under the instructions called for in the Opinion.

## IV. Rule 51 Violations—Objections to jury instructions and verdict forms must be on the record at trial.

### (1) Rule 51–Overview & Purpose.

Fed. R. Civ. P. Rule 51 states when and how to object to jury instructions: (1) "on the record"; (2) "distinctly"; and (3) ***at trial*** either: (i) "out of the jury's hearing before the instructions and arguments are delivered"; or (ii) "promptly after learning that the instruction or request will be, or has been, given or

refused."[18, 19, 20]

Over the past fifty years, this Court has spoken to Fed. R. Civ. P. Rule 51 in detail on ***three*** occasions, with emphasis given to the spirit and purpose of timeliness and specificity.

First, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 274 (1981), a three-justice dissent from this Court accurately stated the purpose of Fed. R. Civ. P. Rule 51:

> Rule 51 could not be expressed more clearly. Cases too numerous to list have held that failure to object to proposed jury instructions in a timely manner in accordance with Rule 51 precludes appellate review. ***Rule 51 serves an***

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[18] Fed. R. Civ. P. Rule 51 (c)(2)(A) references Fed. R. Civ. P. Rule 51(b)(2), contemplating objections being made ***at trial*** insofar as it speaks to "the jury." Similarly, Fed. R. Civ. P. Rule 51(c)(2)(B) also envisions that objections be made ***at trial*** insofar as it speaks to when the trial judge advises what instructions he will give (or not give) to the jury. Restated, there is no authority whatsoever for objections lodged ***pretrial*** to be compliant with Fed. R. Civ. P. Rule 51, and with good reason (explained below).

[19] The only exception to Fed. R. Civ. P. Rule 51 is the "plain error" section which is inapplicable insofar as neither the Government nor the Fifth Circuit has mentioned this standard. Instead, the Government and the Fifth Circuit (incorrectly) relied on objections made in the pretrial Proposals.

[20] Indeed, this commonsense interpretation is bolstered by Fed. R. Civ. P. Rule 46, which is to be read in conjunction with Fed. R. Civ. P. Rule 51. *See*, Fed. R. Civ. P. Rule 46: "When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."

> ***important function in ensuring orderly judicial administration and fairness to the parties.*** The trial judge is thereby informed in precise terms of any objections to proposed instructions, and thus is ***given "an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge.***" *Marshall v. Nugent*, 222 F.2d 604, 615 (CA1 1955). Moreover, the Rule ***prevents litigants from making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal.*** In light of the significant purposes and "uncompromising language," *ante*, at 2753, of Rule 51, courts should not depart lightly from its structures. (Emphasis added).

Second, in *Henderson v. U.S.*, 568 U.S. 266, 280–81 (2013), Justice Scalia (joined by Justice Thomas and Justice Alito) dissented from the majority on an unrelated issue, speaking to the purpose of Fed. R. Civ. P. Rule 51's timeliness requirement:

> Surely this [Rule 51] means that a party does ***not*** preserve a claim of error…unless he informs the court or objects to the court's action ***when the***

> ***ruling or order is made or sought.*** If it does not mean that, ***it means nothing.***[21]

Third and most recently, in *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 111–12 (2011), this Court held that:

> Although Microsoft emphasized in its argument to the jury that S4 was never considered by the PTO, ***it failed to request an instruction along these lines from the District Court***. Now, in its reply brief in this Court, Microsoft insists that an instruction of this kind was warranted. Reply Brief for Petitioner 22–23. ***That argument, however, comes far too late, and we therefore refuse to consider it.*** *See, Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 75 – 76, 130 S.Ct. 2772, 2781, 177 L.Ed.2d 403 (2010); cf. Fed. Rule Civ. Proc. 51(d)(1)(B). (Emphasis added).

Meanwhile, ***all eleven*** federal appellate circuits have held that objections to jury instructions must be made "***at trial***" under Fed. R. Civ. P. Rule 51. *See, Rivera Castillo v. Autokirey, Inc.*, 379 F.3d 4, 10 (1st Cir. 2004); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 60 (2d Cir. 2002); *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995); *Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587, 590 (4th Cir. 1985); *U.S. v. Chaney*, 662 F.2d 1148, 1151

[21] Emphasis partially in the original text and partially added by RSBCO.

(5th Cir. 1981); *Moore v. Tennessee*, 267 Fed.Appx. 450, 454 (6th Cir. 2008); *Kurczewski v. City of Milwaukee*, 1994 WL 279758, at *1 (7th Cir. 1994); *Krementz v. Raby*, 959 F.2d 695, 697 (8th Cir. 1992); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 716 (9th Cir. 2001) (rev'd on other grounds); *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1260 (10th Cir. 1978); and *Warner v. Columbia/JFK Medical Center, LLP*, 305 Fed.Appx. 610, 612 (11th Cir. 2008).

**(2) The Government never objected to the Jury Instructions at trial.**

It is undisputed that the Government failed to object to the Jury Instructions at trial. More compelling, the trial court even invited parties to voice any objections to the Jury Instructions before being read to the jury. ROA.2441. *See*, ROA.2441:

> "Anything else? Anybody want to put your objection [to any jury charges] on the record if you'd like objecting to them[?]"

In response, the Government stated nothing.[22] ROA.2728-2730.[23]

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[22] Hence, RSBCO's surprise when the Government appealed based upon jury charges: RSBCO was under the reasonable impression that the Government had gotten what it wanted in the jury charges.

[23] Point being, this is not a case where an objection would have been futile because the court had already made it clear what its ruling would be. To the contrary, the court was willing to consider modifications to the Jury Instructions during and even after the charge conference.

Nevertheless, the Government claims to have preserved its objections based on the ***pretrial*** Proposals that were submitted (to a Magistrate Judge and a law clerk) about a week before the trial even began and that were never ruled upon during trial. ROA.2170-2205. A comparison of the pretrial Proposals (ROA.2170-2205) to the final Jury Instructions (ROA.2730-2743) read at trial shows that they are night-and-day different in substance and volume. And here is why and how the changes occurred: a ***charge conference*** held during trial. ROA.2438-2440.

As an entirely customary practice, the trial court held a "charge conference" during trial where counsel for RSBCO, counsel for the Government, and the court refined the rough pretrial Proposals into the final Jury Instructions read to the jury at trial. ROA.2730-2743. Anyone who has participated in a jury trial as a judge or practitioner understands that jury charge conferences serve a valuable purpose that is highly relevant to this dispute: counsel and the trial court whittle inartful pretrial ***Proposals*** into a final set of ***Jury Instructions*** to be read to the jury. In this process, parties' counsel will voice objections, suggest edits, make concessions, etc. Thus, it is entirely possible (if not probable) that the trial court would have entertained a cogent, timely objection to the Impediments instruction: especially one articulated like the Fifth Circuit did in its Opinion. Similarly, it is equally possible (if not probable) that RSBCO would have consented to such a request. But, even despite a charge conference and even being invited to make any objections to the Jury Instructions before

they were read to the jury, the Government stayed silent.

Indeed, no objections occurred during the charge conference. Instead, the parties (guided by the court) made concessions and edits to refine the pretrial Proposals into the final Jury Instructions that were read to the jury. ROA.2438-2440. Eventually, after the charge conference, the Government asked for (and received) a curative instruction: but it never voiced a single objection to any of the Jury Instructions, let alone the definition or example of "Impediments" that the Fifth Circuit found to be problematic. ROA.2728-2730.

Treating objections to ***pretrial*** Proposals as objections to the incomparable Jury Instructions read to the jury ***at trial*** unduly burdens litigants and trial courts who reasonably believe that a "deal" has been reached with respect to the final instructions. The more logical, judicially efficient procedure is that envisioned under Fed. R. Civ. P. Rule 51: objections should be made to the proffered instructions at trial, on the record, and outside the presence of the jury. Otherwise, parties may induce appealable errors by submitting blanket objections pretrial and then staying mute throughout trial (and even the charge conference) as those pretrial submissions are edited into final charges, entombing a "second bite at the apple."[24]

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[24] *See, Lartigue v. Northside*, 100 F.4th 510, 524 (5th Cir. 2024), Hon. Judge Smith colorfully dissented from a similar "second bite at the apple": "You only get one shot, do not miss your chance to blow—this opportunity comes once in a lifetime, yo."

To recap: the pretrial Proposals were submitted ***August 31*** (ROA.2170-2205); the jury trial began on September 6 (ROA.2385); a charge conference was held during trial where the parties and the court edited the pretrial Proposals into the final Jury Instructions on September 6 (ROA.2438-2440); the court asked and invited the parties to make any objections to the Jury Instructions on September 6 (ROA.2441); the Government asked for (and received) a curative instruction on an unrelated issue on September 7 (ROA.2728-2730); the court read the final Jury Instructions to the jury on September 7 (ROA.2730-2743); and then the jury returned a verdict in favor of RSBCO September 7 (ROA.2745-2746). ***At no point did the Government lodge any objections to the Jury Instructions,*** let alone the Impediment instruction that the Fifth Circuit found to be problematic. This patent violation of Fed. R. Civ. P. Rule 51 warrants reinstatement of the jury's verdict.

### (3) The Government never objected to the verdict form at trial.

Equally important, the Fifth Circuit held that the Impediments instruction constituted a reversible "fly in the ointment," but ***only*** in conjunction with the verdict form's use of "and/or."[25] Indeed, the Fifth

[25] *See*, *RSBCO,* 104 F.4th 558. Even the IRS conflates the question of Mitigators and Impediments into a single question. *See,* Internal Revenue Manual § 20.1.7.12.1, where the IRS asks two separate questions in the reasonable cause context: (A) Did the taxpayer behave "Responsibly"; and (B) Did the taxpayer demonstrate (i) "Mitigators" or (ii) "Impediments." Therefore, even copying the IRS's own operating manual, the jury would

Circuit stated that it would have ***affirmed*** if the Mitigator question and the Impediment question had been presented to the jury separately instead of a single question using "and/or." *Id.* However, ***the Government never objected to the verdict form utilized by the trial court.***[26] This constitutes a separate and independent basis for reinstating the jury's verdict altogether.

For example, in *Goleman v. Wal-Mart Stores, Inc.*, 1999 WL 47224, at *5-6 (5th Cir. 1999), the Fifth Circuit upheld a jury's verdict even though the verdict form erroneously conflated two separate items of damages via "and/or." Specifically, "the verdict form provided only one line for 'lost wages ***and/or*** lost earning capacity,' even though those are separate damages items." *Id.* The Fifth Circuit upheld the jury's verdict because "neither party objected to this part of the verdict form." *Id.* Separately, the Fifth Circuit also upheld the jury's verdict because the weight of the evidence demonstrated that the jury

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have been presented with two separate questions – one for "Responsible" and one for "Impediments"/"Mitigators"). Restated, under the IRS's own manual, there is no basis for dividing "Impediments"/"Mitigators" into two separate questions.

[26] Pretrial, the Government proposed a verdict form that was erroneous on its face. *See,* ROA.2203-2204, where the Government's proposed verdict form stated that RSBCO had to show ***both*** Mitigators "***and***" Impediments, which is clearly not the law under 26 C.F.R. § 301.6724-1. Thereafter, in a charge conference (ROA.2207), the parties jointly came up with the verdict form that was presented to the jury. Thus, the record is clear: ***The Government never objected to the verdict form.*** It is unfair to RSBCO, the trial court, and the jury to reverse based on a verdict form the Government approved.

"could" have deliberately refused to award the plaintiff anything for lost earnings capacity "under the 'and/or'" language. *Id.*

Here, it is with greater justification *afortiori* that the jury's verdict be affirmed. Overwhelming evidence suggests that the jury could have sided for RSBCO due to Mitigators. More, as in *Goleman*, here the Government never objected to the verdict form that was presented to the jury: not ***pretrial*** (ROA.2242-2251); not at ***trial*** (ROA.2207); and not in a lengthy ***post-trial*** motion (ROA.2309-2333). In fact, the Government consented to the "and/or" language in the judgment memorializing the jury's verdict. ROA.2241. Presumably, the Government had no issue whatsoever with the verdict form: indeed, it did not even mention the verdict form as error in its appeal brief. Thus, the verdict form was not properly before the Fifth Circuit on appeal. *See, Martinez v. Texas Dept. of Justice*, 300 F.3d 567,574 (5th Cir. 2002).

**(4) The Fifth Circuit's reliance on *Bender* was misplaced.**

The Fifth Circuit cited *Bender v. Brumley,* 1 F.3d 271 (5th Cir. 1993) to find that the Government had not waived objections to jury charges by failing to object at trial. *See*, *RSBCO,* 104 F.4th 555, n.1. However, the Fifth Circuit's reliance on *Bender* was misguided for three separate and independent reasons.

First, *Bender* (1993) was decided before the substantial ***amendments*** to Fed. R. Civ. P. Rule 51 (2003) specifying that the time for objections to jury

charges is at trial (*e.g.* "on the record and out of the jury's hearing").

Second, in *Bender*, the party submitted written objections to the "proffered instructions" ***at trial,***[27] whereas here the Government's only objections were to ***pretrial*** Proposals. Other than the Opinion, undersigned is unaware of any reported decision stating that parties may preserve their objections under Fed. R. Civ. P. Rule 51 via pretrial submissions.[28]

Third, even under *Bender* era jurisprudence, the question was not solely whether a party had objected. Instead, there was a second requirement, too: the record had to also demonstrate that further objections would be "futile" because the trial court had "emphatically" ruled that no further objections would be considered.[29] Here, there is of course no such evidence.[30] To the contrary, after the charge conference, the trial court politely invited the Government to state any objections. *See*, ROA.2441:

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[27] *See*, *Bender*, 1 F.3d at 277 ("The lack of ***another in-court objection***…does not defeat his ability to challenge the instructions on appeal.")

[28] Obviously, Fed. R. Civ. P. Rule 51 envisions objections at trial because – prior to trial – there is no "jury" capable of overhearing.[28] Moreover, Fed. R. Civ. P. Rule 51's comments (2003) further solidify this interpretation: "The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) ***except*** where the court made a ***definitive ruling on the record***." (Emphasis added).

[29] *See*, *Taita v. Westlake*, 351 F.3d 663, 667-68 (5th Cir. 2003).

[30] The trial court was polite and accommodating to all throughout the trial: there is not a shred of evidence in the record indicating otherwise.

"Anything else? Anybody want to put your objection [to any jury charges] on the record if you'd like objecting to them[?]" In response, the Government stated nothing.[31]

The record here is indisputable: the trial court ***never*** made a "definitive ruling" on the pretrial Proposals. Thus, even assuming *arguendo* only that the Government's pretrial Proposals contained valid objections, the Government was ***still*** duty-bound to restate its requests and objections until a "definitive ruling on the record" had been reached. Failing to do so, the Government waived its right to object to the Jury Instructions per Fed. R. Civ. P. Rule 51.

RSBCO respectfully implores this Court to compare the pretrial Proposals (ROA.2170-2205) to the final Jury Instructions (ROA.2242-2251) read to the jury at trial. They are unrecognizably different work products. Thus, giving blanket objections to pretrial Proposals – on one hand – the same effect as specific objections to the final Jury Instructions to be read to the jury at trial – on another hand – is like pulling language from a preliminary letter of intent that was excluded in the final written agreement. *See, Knight v. Sharif*, 875 F.2d 516, 520 (5th Cir. 1989).[32]

Here, absent any such objection, the trial court

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[31] Hence, RSBCO's surprise when the Government appealed based upon jury charges: RSBCO was under the reasonable impression that the Government had gotten what it wanted in the jury charges.

[32] "The letter of intent [] only memorialized preliminary negotiations and was not intended, nor understood, by either party to constitute a final, binding agreement…"

(and RSBCO) reasonably understood that the Government was perfectly content with the charges. Indeed, had the Government won at trial and RSBCO appealed based upon the jury charges, the Government would be making this exact argument that RSBCO asserts now.

## V. Attorney Fees—If the Court reverses and reinstates for any of the reasons above, the attorney fee award should be reinstated.

In vacating the jury's verdict, the Fifth Circuit also summarily vacated the attorney fee award because RSBCO was no longer a "prevailing party" under 26 U.S.C. § 7430. *See, RSBCO,* 104 F.4th 562. Therefore, if this Court reverses the Fifth Circuit and reinstates the jury's verdict, it should likewise reinstate the attorney fee award because RSBCO would again be a "prevailing party" under 26 U.S.C. § 7430.

As a quick recap, the IRS's representative candidly admitted that the Penalty was assessed, levied, collected, and failed to be refunded "no thought process," whatsoever. ROA.2638-2639. Similarly, the IRS's representative also admitted having no evidence whatsoever that anyone with the IRS ever considered – let alone applied – any – let alone all – of the ***mandatory*** regulatory factors under 26 C.F.R § 301-6724-1 ("Responsible"—"Impediments"—"Mitigators") in evaluating the Penalty. ROA.2638-2639.

For these reasons, the trial court correctly awarded attorney fees to RSBCO in a fair amount

substantiated by detailed time entries and un-rebutted expert witness testimony, while also commenting upon the IRS's abuse of the administrative process. *See,* ROA.2362-2376:

> [A]lthough the administrative refund process is supposed to be a meaningful opportunity to present claims and be heard to minimize expense, ***the IRS used the administrative process to increase delay, burden, and expense on the taxpayer.*** (Emphasis added).

## CONCLUSION

In conclusion, the Fifth Circuit's Opinion should be reversed, and the jury's verdict should be reinstated for the following reasons (which are each a separate and independent justification).

First, under the Invited Error Doctrine, the Government cannot complain about jury instructions that it drafted, proposed and did not object to.

Second, the Fifth Circuit's Opinion contradicts *United Dominion* by resolving ambiguities – an undefined and unlimited term in the IRS's statutory and regulatory scheme – in a manner favorable to the IRS and against the taxpayer.

Third, because the jury would have reached the same result even with different instructions due to the overwhelming evidence in RSBCO's favor (even under the instruction proposed by the Fifth Circuit), the jury's verdict should be affirmed. Restated, the

jury charges, as a whole, did not create any error, let alone substantial and ineradicable error.

Fourth, under Fed. R. Civ. P. Rule 51, objections must be made on the record, at trial, and outside the presence of the jury — which the Government failed to do.

Respectfully submitted,

Russell A. Woodard, Jr.
Law Offices of Russell A. Woodard, Jr., LLC
119 Pelican Blvd.
Ruston, LA 71270
(318) 255-4898
raw@therawlaw.com
*Counsel for Petitioner*