No. 11-139

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
HOME CONCRETE & SUPPLY, LLC, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF BAUSCH & LOMB INCORPORATED AS *AMICUS CURIAE* CONDITIONALLY SUPPORTING CERTIORARI

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INTEREST OF *AMICUS CURIAE*

Bausch & Lomb Incorporated ("B&L") is an eye health company. Founded in 1853, it is one of the oldest, best known, and most respected healthcare brands.[1] This case is one of several currently pending before this Court, or soon to arrive, that present a circuit split concerning a complex set of statutory and administrative law issues relating to whether an overstatement of basis results in an omission from gross income that triggers the special statute of limitations under 26 U.S.C. § 6501(e)(1)(A). B&L has both a substantial interest in the issues presented by these cases and a unique perspective on the potential breadth of the Commissioner's arguments.

B&L is litigating a case in the Second Circuit in which—even though the case indisputably solely turns on the different statute of limitations set forth in 26 U.S.C. § 6229(c)(2), and not § 6501(e)(1)(A)—the Commissioner is making the same arguments as those presented in this case. *See Wilmington Partners v. CIR*, No. 10-4183 (2d Cir. filed Oct. 13, 2010). In addition, B&L also can provide a comprehensive view of the state of the law because it has filed *amicus* briefs in the Fourth, Fifth, Tenth, Federal, and D.C. Circuits on the same issues presented here. The courts of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel have been submitted to the Clerk concurrently with this filing.

appeals have recognized and relied upon those briefs. *See, e.g.*, *Intermountain Ins. Serv. of Vail v. CIR*, No. 10-1204, 2011 WL 2451011, at *1 (D.C. Cir. June 21, 2011).

B&L's case (*Wilmington Partners*) underscores the potential implications of the government's position in these cases. The underlying transaction in *Wilmington Partners* does not involve a marketed tax shelter or so-called "listed transaction." Instead, the tax issues arise from unrelated good faith business restructurings driven by changing business realities and separated in time by more than six years. *See id.* at *6 (recognizing that B&L's case involves no "tax shelter allegation"). Moreover, as noted, the operative limitations period in *Wilmington Partners* is supplied by § 6229(c)(2)—and not § 6501(e)(1)(A). The Commissioner contends that two subparagraphs in § 6501(e)(1)(A) change the meaning of the language interpreted by this Court in *Colony, Inc. v. CIR*, 357 U.S. 28 (1958), (which is repeated verbatim in § 6501(e)(1)(A)). But § 6229(c)(2) does not contain those subparagraphs. It is phrased in *exactly* the same way as the statute interpreted in *Colony*, and was enacted against the backdrop of the *Colony* decision. Nonetheless, in *Wilmington Partners* the Commissioner has taken the remarkable position that the entirely different text and history of § 6229(c)(2) does not matter and is making the same § 6501(e)(1)(A)-based arguments that he has pressed in this case, and is claiming the same extraordinary and retroactive regulatory authority. The Commissioner is, in other words, pushing a position that is even more starkly inconsistent with this Court's clear holding in *Colony*.

Because the statute-of-limitations issue in *Wilmington Partners* indisputably solely turns on § 6229(c)(2)—and not § 6501(e)(1)(A)—there is no need for the Second Circuit in *Wilmington Partners* to delve into the complex issues presented in this case surrounding § 6501(e)(1)(A). *Wilmington Partners* can and should be decided based on a straightforward application of § 6229(c)(2), without even having to reach any question concerning § 6501(e)(1)(A). But since the Commissioner's arguments have consistently (and erroneously) conflated the two, B&L has been left with no choice but to participate in the § 6501 cases and explain why the Commissioner's interpretation of § 6501(e)(1)(A) is wrong and unsustainable on its own.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States claims that this case "presents the question whether an understatement of gross income attributable to an overstatement of basis in sold property is an 'omi[ssion] from gross income' that can trigger the six-year assessment period in 26 U.S.C. 6501(e)(1)(A)." Pet. 7. According to the government, "[t]hat question" is currently presented by the petition in *Beard v. CIR*, No. 10-1553 (filed June 23, 2011), and "*Beard* is the earlier-filed petition, and the government is not aware of any reason why this case would present a more suitable opportunity than *Beard* for resolving the circuit conflict." *Id.*

If this Court believes that certiorari is warranted to resolve the circuit conflict, there is sound reason why this case is "a more suitable opportunity than *Beard* for resolving the circuit conflict." The Commissioner's extraordinary efforts to rewrite the meaning of the operative tax provisions and overturn a decision of this

Court raise a number of interrelated issues. Even the government acknowledges at least two separate Questions Presented, Petition at (I), and the issues could easily be stated in a way that recognizes five or six other distinct, and important, issues. For example:

- Did this Court resolve the meaning of § 6501(e)(1)(A) in *Colony*?
- Does *Colony* recognize or leave any "ambiguity" that might permit the Commissioner to issue regulations overruling this Court's decision?
- Do the Treasury Regulations issued last year apply, by their terms, retroactively to reopen limitations periods that had already expired?
- Can the regulations apply retroactively to reopen limitations periods that had expired under existing law without exceeding the Commissioner's power under 26 U.S.C. § 7805(a)?
- Are the regulations entitled to deference under basic administrative law principles, given that they were promulgated in the midst of litigation in order to reverse the outcomes of legal contests that the Commissioner was losing?

In answering those questions, this Court should reject the government's arguments about the proper reading of § 6501(e)(1)(A). This Court rejected essentially the same arguments in *Colony* when interpreting a nearly identical predecessor statute. And to date the Seventh Circuit's decision in *Beard v. CIR*, 633 F.3d 616 (7th Cir. 2011), is the *only* court of appeals decision to conclude that a subparagraph added to § 6501(e)(1)(A) to clarify the definition of "gross income" in a particular context alters the meaning of the general language that Congress reenacted when it passed § 6501(e)(1)(A), such that the new subparagraph requires a different conclusion than the one this Court reached in *Colony* (even though the language that this Court interpreted in *Colony* is the same). The *Beard* decision, which is wrong on its own terms, is thus an outlier. The other courts that have addressed these issues have focused on whether the 2010 regulations can or do change the proper interpretation of § 6501(e)(1)(A)—a question that *Beard*, alone among the pending decisions, simply declined to reach on the merits (and discussed only in passing in dictum). And while the issues surrounding the 2010 regulations were pressed by the taxpayer in *Beard*, they were not briefed as fully as in the other pending cases—in part because the Seventh Circuit, again alone among the courts of appeals, declined to accept the timely *amicus* brief that B&L presented in *Beard*.

The validity of the Commissioner's 2010 regulations attempting to change the meaning of settled statutory law and override a decision of this Court is a crux of the dispute presented by these cases. *Beard* presents a *potential* vehicle for certiorari on the questions presented in these cases. But if the Court believes that these questions warrant certiorari, it would be better served by considering the validity of the regulations in a case in which they have actually been passed on below, consistent with this Court's usual and settled practice of reserving certiorari for issues that were pressed and passed on below. The questions presented were actually decided by the Fourth Circuit below and this case is the most suitable vehicle for this Court's review among the crop of cases currently pending before this Court on certiorari.

ARGUMENT

I. THE COMMISSIONER'S READING OF 26 U.S.C. § 6501 IS IMPLAUSIBLE

For decades in the wake of this Court's decision in *Colony*, the meaning of § 6501(e)(1)(A) was settled: an overstatement of tax basis does *not* result in an omission from gross income triggering the special statute of limitations established by that provision. A few years ago, in connection with the advent of the so-called "Son of BOSS" transaction, the Commissioner suddenly had a revelation: the operative language in § 6501(e)(1)(A) did not mean what this Court held in *Colony* and everyone—including the IRS—had understood for decades. The government has made an elaborate and implausible attempt to defend the Commissioner's new interpretation that an overstatement of basis *does* result in an "omi[ssion] from gross income," even when the return includes the sales price, basis, or other information. 26 U.S.C. § 6501(e)(1)(A); *Beard v. CIR*, No. 10-1553, Br. for Respondent at 8-11 (filed July 27, 2011) ("*Beard* Resp. Br."). That argument relies on the general definition of "gross income," a heavy emphasis on the word "amount," and an utter disregard of the ordinary meaning of the key word "omits." *Beard* Resp. Br. at 8-11; *see also Beard v. CIR*, 633 F.3d 616, 621-22 (7th Cir. 2011). It is precisely the same argument that this Court unequivocally rejected in *Colony*, when interpreting the identical "omits from gross income" language in the old § 275(c) of the 1939 Code.

The government also argues that two features of § 6501(e)(1)(A)—subparagraphs that by their terms do not purport to address the meaning of the key phrase "omits from gross income"—"reinforce that understanding." *Beard* Resp. Br. at 11-13. Since this Court's decision in *Colony* is, of course, authoritative on the statutory language it construed, the government must mean that these new features of § 6501(e)(1)(A) *change* the statutory meaning of "omits from gross income" so dramatically as to overwhelm all the considerations that this Court discussed in *Colony* and require the opposite result, even though Congress did not change the operative language that was the basis for the Court's holding in *Colony*.

The heart of the government's argument, and the Seventh Circuit's holding in the *Beard* case, is that § 6501(e)(1)(A)(i) now provides that for "trade or business" taxpayers "the term 'gross income' means the total of the amounts received or accrued from the sale of goods or services . . . prior to diminution by the cost of such sales or services." *Id.* at 11. The government contends that this provision, within its scope, ensures that an overstatement of the cost of goods sold could not constitute an omission from gross income, and argues that it "would be superfluous, or at least of extremely limited scope, if the general rule were that an overstatement of basis cannot give rise to an omission from gross income." *Id.* at 12. That argument has several glaring flaws.

First, that provision was already on the books when this Court decided *Colony*, and this Court closed its opinion by noting that its reasoning was *consistent* with the language of the new § 6501. *Colony, Inc. v. CIR*, 357 U.S. 23, 37 (1958). The Seventh Circuit rationalized that problem by suggesting that this Court meant that § 275(c) and the new § 6501(e)(1)(A)(i) were consistent *on the facts of Colony* only because *Colony* itself supposedly involved "an omission of an actual receipt or accrual in a trade or business situation," and because the new § 6501(e)(1)(A)(ii) provides an adequate disclosure defense that accommodates some of the policy considerations that influenced this Court's reasoning in *Colony*. *Beard*, 633 F.3d at 620-21. "In other words," the Seventh Circuit reasoned that "*Colony*'s holding is inherently qualified by the facts of the case before the Court . . . ." *Id.* at 620. That reasoning collapses upon even the slightest scrutiny of *Colony*.

One problem with that reasoning is that the taxpayer in *Colony*, while perhaps a "trade or business," was not dealing in "goods or services" at all but in *land*.[2] More importantly, absolutely nothing in this Court's opinion suggests that this Court paid any attention to the taxpayer's line of business, or thought that it mattered in interpreting the statute before it. This Court's reasoning was based on the plain meaning of the language "omits from gross income," the legislative history of § 275(c), and the bizarre and anomalous consequences of the government's reading. None of those points were, or are, affected by the nature of the taxpayer's business. *See, e.g.*, *Salman Ranch Ltd. v. United States*, 573 F.3d 1362, 1372 (Fed. Cir. 2009) ("*Salman Ranch I*") ("We do not discern any

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[2] The Code does not define "goods," but the ordinary meaning of the term, embraced by the Commissioner in *Salman Ranch*, is limited to movable personal property. *See Salman Ranch Ltd. v. United States*, No. 2008-5053, Brief for the Appellee, 2008 WL 4133498 (Fed. Cir. June 25, 2008) (citing *Black's Law Dictionary* 701 (7th ed. 1999); *Webster's Third New Int'l Dictionary* 978 (1969)).

basis for limiting *Colony*'s holding concerning the 'omits from gross income' language of I.R.C. § 275(c) to sales of goods or services by a trade or business. Neither the language nor rationale of *Colony* indicates such an intent on the part of the Court."); *Bakersfield Energy Partners, LP v. CIR*, 568 F.3d 767, 778 (9th Cir. 2009) (*Colony* "did not even hint that its interpretation of § 275(c) was limited to cases in which the taxpayer was engaged in a 'trade or business.'").

And while this Court did support its interpretation of "omits from gross income" by noting Congress's intent to confine the extended limitations period to situations in which the IRS is at a special disadvantage in detecting the issue, the Court in no way suggested that that language could have an entirely different meaning in the new § 6501(e)(1)(A) just because Congress added an explicit safe harbor for taxpayers who provided adequate disclosure. The Seventh Circuit believed that its interpretation was supported by the Fifth Circuit's decision in *Phinney v. Chambers*, 392 F.2d 680 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968). *See Beard*, 633 F.3d at 620-21. But the Fifth Circuit has since expressly repudiated the Seventh Circuit's misreading of Fifth Circuit precedent. *See Burks v. United States*, 633 F.3d 347, 352 n.5 (5th Cir. 2011) ("The Seventh Circuit in *Beard* incorrectly read our decision in *Phinney* as limiting *Colony*'s holding.").

Second, as several other courts of appeals have explained, there is no genuine argument that this Court's interpretation of the "omits from gross income" language in *Colony* renders § 6501(e)(1)(A)(i) superfluous. Even accepting *Colony*, that subparagraph plays an important computational role in determining whether any omission affects 25% of the taxpayer's gross income, by specifying (unlike the *Colony* holding) that cost of goods sold must be excluded from the denominator of the calculation in addition to the numerator. *See, e.g., Bakersfield*, 568 F.3d at 776 ("[W]e are not convinced that applying *Colony* to the 1954 Code would render § 6501(e)(1)(A)(i) superfluous," because "*Colony*'s holding . . . affects only" the numerator of gross income omitted "by defining what constitutes an omission from gross income."); *Salman Ranch I*, 573 F.3d at 1375 ("We do not see how [*Colony*'s] reading of the statutory language renders subparagraph (i) superfluous . . . .").

Indeed, even the Seventh Circuit did not genuinely advance an argument that § 6501(e)(1)(A) would be superfluous if *Colony* applied. Its reasoning is that "the special definition in subparagraph (i) would be, if not superfluous, certainly diminished." *Beard*, 633 F.3d at 622; *see also id.* at 623 ("To say that subsection (i) was included simply to clarify the 25% calculation diminishes the plain meaning of the statute."); *Intermountain Ins. Serv. of Vail v. CIR*, No. 10-1204, 2011 WL 2451011, at *11 (D.C. Cir. June 21, 2011) (acknowledging that the taxpayer's "point is well taken" and that the taxpayer "is technically correct that its interpretation avoids turning subsection (i) into surplusage"). But there is not, and could not be, any canon of construction against interpretations that "diminish" the potential scope of operation of a provision, while leaving it an important and meaningful role. The Seventh Circuit is merely saying, in a peculiar way, that a faithful application of this Court's holding in *Colony* would render § 6501(e)(1)(A)(i) less consequential than the Seventh Circuit believes it should be. That *ipse dixit* reasoning has no grounding in ordinary canons of construction.

The government's statutory argument has not persuaded any court of appeals but the Seventh Circuit. The Fourth, Fifth, Ninth, and Federal Circuits have all ruled for the taxpayers on this issue. *See Home Concrete & Supply, L.L.C. v. United States*, 634 F.3d 249 (4th Cir. 2011); *Burks*, 633 F.3d 347 (5th Cir. 2011); *Bakersfield*, 568 F.3d 767 (9th Cir. 2009); *Salman Ranch I*, 573 F.3d 1362 (Fed. Cir. 2009). The Federal Circuit and Tenth Circuit have subsequently joined the government's camp, but only because they concluded that the 2010 regulations were applicable, valid, and *changed* the law. *See Grapevine Imps., Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011); *Salman Ranch, Ltd. v. CIR*, No. 09-9015, 2011 WL 2120044 (10th Cir. May 31, 2011) ("*Salman Ranch II*"). The D.C. Circuit similarly relied on the regulations and held only that "nothing in section 6501(e)(1)(A) unambiguously forecloses the Commissioner from interpreting 'omissions from gross income' as including basis overstatements." *Intermountain*, 2011 WL 2451011, at *12.

For these reasons, *Beard* represents an unsound and ill-founded aberration when it comes to the proper interpretation of § 6501(e)(1)(A). The Seventh Circuit's erroneous decision in *Beard* deserves to be set aside, but that does not mean it presents the most suitable vehicle for this Court to resolve the questions presented in these cases.[3]

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[3] As noted above, the applicable statute of limitations in *Wilmington Partners* is 26 U.S.C. § 6229(c)(2), not § 6501(e)(1)(A). Section 6501(e)(1)(A) applies when a *partner* has omitted from gross income an amount exceeding 25% of the gross income stated in the *partner's* return. By contrast, § 6229(c)(2) applies at the partnership level, and extends the limitations period to six years when the *partnership* omits from gross income an amount in excess of 25% of the *partnership*'s gross income. The distinction is critical given the Commissioner's litigating position on the meaning of § 6501(e)(1)(A), because § 6229(c)(2) does not contain the subparagraphs (§ 6501(e)(1)(A)(i) and (ii)) at the heart of the Commissioner's argument in § 6501(e)(1)(A) cases. Instead, § 6229(c)(2) uses the *exact* same language as the old § 275(c) that this Court interpreted in *Colony*. When Congress enacted § 6229(c)(2) in 1982 the meaning of that language had been conclusively settled by *Colony*, and the unassailable conclusion is that when Congress enacted § 6229(c)(2) it therefore intended to adopt the meaning settled by *Colony*. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010) ("We have often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'") (alteration in original) (citation omitted); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (same).

Even assuming, *arguendo*, that there is any room for debate as to § 6501(e)(1)(A), the meaning of § 6229(c)(2) is thus unambiguously controlled by the *Colony* holding that Congress acted against when it enacted § 6229(c)(2) in 1982. That conclusion is underscored by the fact that the Commissioner did not conceive of his argument that § 6501(e)(1)(A) called for a different result

II. THE SEVENTH CIRCUIT'S FAILURE TO REACH THE REGULATIONS IS A MATERIAL VEHICLE DEFICIENCY

The Seventh Circuit in *Beard* noted that "[b]ecause we find that *Colony* is not controlling, we need not reach" the applicability or validity of the 2010 regulation—although it offered the conclusory *dicta* that it "would have been inclined to grant the [regulations] *Chevron* deference." *Beard*, 633 F.3d at 623. The issues the Seventh Circuit elected not to reach are critically important in this case. Although the taxpayer in *Beard* did press arguments concerning the regulations, this Court would be better served by taking a case in which the lower court actually *passed on* the taxpayer's arguments. There are several problems with the regulations meriting review.

First, by their own terms, the regulations do not apply in the manner that the Commissioner has argued

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than *Colony* until 2005 or so—decades after Congress passed § 6229(c)(2). In *Wilmington Partners*, the Commissioner has nevertheless contended that § 6229(c)(2) should be given the same interpretation as § 6501(e)(1)(A), with nothing more than an *ipse dixit* and counterintuitive argument that these different provisions must be interpreted the same way for the Commissioner. But the well-settled rule, of course, is that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). And the problem for the Commissioner is that the more he tries to attach significance to the subparagraphs added by § 6501(e)(1)(A), the more significant it has to be that Congress did *not* include those subparagraphs in § 6229(c)(2). There is simply no way around that conclusion for the government when it comes to § 6229(c)(2), making *Wilmington Partners* a different and far easier case for the taxpayer than any of the cases involving the application of § 6501(e)(1)(A).

in court. The regulations state that they apply only "to taxable years with respect to which the period for assessing tax was open on or after September 24, 2009." Treas. Reg. §§ 301.6501(e)-1(e), 301.6229(c)(2)-1(b) (2010). The plain language of that regulation directs attention to whether the limitations period "was" open in September 2009 and, in particular, focuses on whether the "period for assessing tax" "was open" at that time. Assuming the government's statutory argument, discussed above, is rejected, then as of September 24, 2009 the governing law was this Court's decision in *Colony*, the ordinary three-year limitations period applied and had long-since expired in all of these cases, and (as such) the period for assessing tax obviously *was not* "open" on or after September 24, 2009.

The government's counter-argument rests on language from the regulation's preamble from the Federal Register (artfully blended with the actual controlling text, *see Beard* Resp. Br. at 15), which offers the interpretation that a taxable year is "open" if it is the "subject of any case pending before any court of competent jurisdiction . . . in which a decision had not become final." 75 Fed. Reg. 78,897, 78,898 (Dec. 17, 2010). Of course, in many senses a *case* remains open until the exhaustion of all appeals. But in any non-Orwellian legal parlance a *limitations period* that has expired prior to the institution of litigation remains expired. Otherwise, the government could never lose on statute of limitations grounds, by definition. The government's argument rests on a Code provision indicating that limitations periods are *tolled* by the filing of litigation "until the decision of the court becomes final." 26 U.S.C. § 6229(d)(1); *see Grapevine*, 636 F.3d at 1382-83. But the concept of tolling only applies to extend an *open* limitations period; it does not *reopen* a limitations period that has already closed before the case is filed. The Fourth Circuit correctly held in this case that the government's interpretation is "contrary to the clearly and unambiguously expressed intent of Congress and must fail." *Home Concrete*, 634 F.3d at 257. The Tax Court aptly called the government's position circular and derived from result-driven logic. *Intermountain Ins. Serv. of Vail, LLC v. CIR*, 134 T.C. 211, 219 (2010) (*en banc*), *rev'd*, 2011 WL 2451011 (D.C. Cir. June 21, 2011). No measure of agency deference can sustain an interpretation of a rule that conflicts with the rule's own text and creates such an anomalous result.

Second, even if the regulations did apply, they are potentially entitled to *Chevron* deference only if there is an ambiguity for the agency to resolve. For most of the courts of appeals to consider these cases, therefore, the central issue has been whether this Court's decision in *Colony* leaves open the possibility that the government's arguments might constitute a *reasonable* interpretation of the statute, even though this Court firmly rejected them. As Judge Wilkinson explained in his thoughtful concurring opinion in this case, "*Colony* was decided under *Chevron* step one." *Home Concrete*, 634 F.3d at 258 (Wilkinson, J., concurring). This Court's opinion in *Colony* acknowledges a superficial textual ambiguity at the initial step of the analysis, but it held that resort to the conventional tools of statutory interpretation (including legislative history) *resolved* that ambiguity and that and the government's interpretation would create a "patent incongruity in the tax laws." *Colony*, 357 U.S. at 36-37.

This Court came to a firm conviction about when "Congress intended an exception to the usual three-year statute of limitations" and when it did not. *Id.* at 36. "*If a court, employing traditional tools of statutory* construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). *Colony* expressed such a conclusion as clearly as one could hope in a decision rendered more than two decades before *Chevron*. Indeed, Justice Harlan had the remarkable foresight to observe—in language that closely tracks the "precise question at issue" language that this Court used decades later in describing *Chevron* step one—that Congress had "address[ed] itself to the *specific situation*" at issue. *Colony*, 357 U.S. at 33 (emphasis added).

Third, even if the regulation applies and even if there is ambiguity to interpret, there are very serious questions about whether this regulation is valid and entitled to deference. Congress generally eliminated the Commissioner's authority to promulgate retroactive tax regulations in 1996,[4] and the

[4] *See* Pub. L. No. 104-168, § 1101(b), 110 Stat. 1452, 1469 (1996). That amendment effectuates Congress's longstanding intent that "it is generally inappropriate for Treasury to issue retroactive regulations." H.R. Rep. No. 104-506, at 44 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1167. The text somewhat confusingly states that it "shall apply with respect to regulations that relate to statutory provisions enacted on or after the date of enactment." Pub. L. No. 104-168, § 1101(b), 110 Stat. at 1469; 26 U.S.C. § 7805 (note). The government reads that language to mean that the prior version of § 7805(b) applies to all post-1996 regulations unless the underlying Code provision was enacted after July 30, 1996. That interpretation eviscerates Congress's stated intent.

government's claim that these regulations "are not retroactive" simply ignores the ordinary meaning of that term.[5] And the fact that the Commissioner promulgated these regulations in the midst of pending litigation, to effectively reverse judicial decisions that were running very strongly in the taxpayers' favor, raises very difficult questions under retroactivity doctrine, the Administrative Procedures Act, and the *Chevron* doctrine. "Deference to what appears to be nothing more than an agency's convenient litigating position" is "entirely inappropriate," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988), even when that litigating position has been laundered through a hollow charade of notice and comment rulemaking. *See, e.g., Burks*, 633 F.3d at 360 n.9; *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971) ("[T]he Commissioner may not take advantage of his power to promulgate retroactive regulations during the course of a litigation for the purpose of providing himself with a defense based on the presumption of validity accorded to such regulations."); *Intermountain*, 134 T.C. at 238-48 (Halpern and Holmes, JJ., concurring in result). *But see Intermountain*, 2011 WL 2451011, at *15.

The government claims this extraordinary new authority based primarily on dicta in a footnote in *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984). *See Beard* Resp. Br. at 15-16; *Intermountain*, 2011 WL 2451011, at *12. Judge Wilkinson debunked this theory

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The statute has to be understood as governing all regulations enacted after July 30, 1996 if they relate to statutory provisions—as opposed to internal Treasury matters, where retroactivity is permitted.

[5] T.D. 9511, 2011-6 I.R.B. 455.

as well. He wrote that "agencies are not a law unto themselves," and that the government's position in these cases "seems to me something of an inversion of the universe and to pass the point where the beneficial application of agency expertise gives way to a lack of accountability and a risk of arbitrariness." *Home Concrete*, 634 F.3d at 259 (Wilkinson, J., concurring).

III. THIS CASE PRESENTS A SUPERIOR VEHICLE TO *BEARD* TO DECIDE THE QUESTIONS PRESENTED

This Court has a strong and longstanding preference that all important issues in a case have been both pressed *and* passed on below. As this Court has observed, and as the Solicitor General himself is fond of reminding this Court, this Court ordinarily "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999) (citations omitted); *see, e.g.*, *Teclezghi v. Holder*, No. 10-1210, Br. for Respondent in Opp'n, 2011 WL 2192271, at *19 (U.S. June 6, 2011) ("Specifically, the court of appeals did not address the question 'whether asylum seekers have the Fifth Amendment right to effective assistance of counsel' or 'what standard should be used to assess attorney performance.' This Court should not consider those questions in the first instance.") (citation omitted); *Hinkson v. United States*, No. 10-869, Br. for the U.S. in Opp'n, 2011 WL 805237, at *16 (U.S. Mar. 7, 2011) ("Neither the majority nor the dissenting judges on the court of appeals addressed that issue, and it would be a departure from the Court's normal practice to review it in the first instance."); *Sabhnani v. United States*, No. 10-476, Br. for the U.S. in Opp'n, 2010 WL 5102984, at *17-18 (U.S. Dec. 14, 2010) (stating that "[t]hat issue was not addressed in either of the lower courts" and therefore "[t]here is no occasion for this Court to address that issue in the first instance"); *Ochoa v. Holder*, No. 09-1132, Br. for Respondent in Opp'n, 2010 WL 2502668, at *11 (U.S. June 18, 2010) ("Because this contention was ... [not] passed on below, this Court should not decide it in the first instance."); *Shabaz v. United States*, No. 09-636, Br. for the U.S. in Opp'n, 2010 WL 391258, at *6 (U.S. Feb. 1, 2010) (stating that "the court below did not address" the issue and therefore "[t]his Court should not review the question in the first instance"). There is no reason to break with the customary practice here, where there is a ready vehicle in which the issues *were* passed on.

Because the Seventh Circuit held that the best interpretation of § 6501(e)(1)(A) favors the Commissioner, it did not actually pass on the validity of the 2010 regulations or seriously delve into the significant issues surrounding those regulations. *See Beard*, 633 F.3d at 623. In addition, the Seventh Circuit, unlike every other court of appeals, denied B&L's timely motion for leave to participate as *amicus curiae*. As a result, the Seventh Circuit did not have before it certain arguments made in other cases and other arguments were not as fully developed as in the other pending cases. As B&L explained in a motion for reconsideration to the Seventh Circuit, B&L's *amicus* brief addressed additional legal issues not addressed in appellees' brief—including distinct arguments about *Chevron* deference, whether the temporary and final regulations were valid under the Administrative Procedures Act, and retroactivity. *Commissioner v. Beard*, No. 09-3741, Mot. for Reconsideration of Order Denying Mot. of Bausch & Lomb Inc. for Leave to File

Br. as *Amicus Curiae* in Supp. of Appellees and Affirmance at 3-4 (7th Cir. filed Aug. 3, 2010).

In this case, by contrast, the issues were fully briefed and the Fourth Circuit considered and actually passed on *both* the threshold *Colony* issue and the Commissioner's arguments based on the 2010 regulations. Respondents filed their brief in opposition early so that this case could be considered at the same Conference as *Beard*. And this case is a better vehicle than the other cases likely to arrive at this Court soon. Petitions also are pending in *Burks* and *Grapevine*. *Burks*, however, involves two separate consolidated cases—which could needlessly complicate the briefing. And, because the Federal Circuit had resolved the threshold statutory issue in favor of the taxpayers in *Salman Ranch I*, the *Grapevine* opinion focuses on the issues relating to the 2010 regulations.[6]

The Fourth Circuit's decision in this case—which includes a separate concurring opinion by Judge Wilkinson—considered the issues that will likely occupy this Court's attention more thoroughly and thoughtfully than the Seventh Circuit's decision in *Beard*. The fact that the *Beard* petition was "earlier-filed," Pet. 7, is not in itself a sufficient reason to grant certiorari in that case when a better vehicle is right at hand.

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[6] In addressing the 2010 regulations issue in *Grapevine*, the Federal Circuit reaffirmed its holding in *Salman Ranch I* that this Court's *Colony* holding applies to § 6501. Thus, in the absence of this case, *Grapevine* would still represent a better vehicle than *Beard* because the *Grapevine* court (unlike the Seventh Circuit in *Beard*) passed on both the statute and the regulations.

CONCLUSION

If the Court believes that the questions presented by this case and *Beard* warrant certiorari, the Court should grant certiorari in this case.

Respectfully submitted,

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