NO. 13-1343

IN THE

Supreme Court of the United States

Albert Brown,
Petitioner

v.

Mississippi Department of Health
Respondent

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO COUNTERSTATEMENT OF THE CASE

1. The issue of tax enhancements should not be left to Congress.

Respondent contends Congress has already made a determination on this issue. This is simply not true. When Congress eliminated income averaging in 1986, there is no evidence that it expressly or implied to prevent tax enhancements. Respondent also contends that the issue could become moot if Congress enacts the Civil Justice Tax Fairness Act of 2013. There is almost no chance the bill will make it out of either legislative body. The website GovTrack.us ranks the Senate version of the bill as having zero percent chance of being enacted, and the House version only does slightly better with a one percent chance of being enacted.[1] Both bills were introduced in June 2013, and have not even made it out of the committees they were assigned to a year ago. If there were any realistic chance either bill would be enacted, Congress would have done so by now. Congress is gearing up for mid-term elections in November, and it is very unlikely they will take action now when they did not in the non-election year the bills were introduced. Moreover, this is not the first time Congress has failed to take action on this issue. The Civil Rights Tax Relief Act of 2011, which included income averaging, was introduced in both the House and Senate in 2011, and neither bill made it out of committee.[2]

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[1] https://www.govtrack.us/congress/bills/113/s1224 and https://www.govtrack.us/congress/bills/113/hr2509

[2] https://www.govtrack.us/congress/bills/112/s1781 and https://www.govtrack.us/congress/bills/112/hr3195

Essentially, the same bills were introduced in the House and Senate in 2007 and 2009, and also did not make it out of committee.[3] So for seven (7) years now, Congress has been presented with the opportunity to correct this issue, and for seven (7) years it has failed to act.

While enacting of either of these bills could render the issue moot for the current case, this Court should not wait to see if Congress will beat the longshot odds and act. If this Court were to deny *certiorari* and Congress not enact either bill, Petitioner and numerous other individuals will be denied justice simply because they were employed in the wrong area of the country.

2. This case is a good vehicle for deciding the question presented.

Respondent contends this case is not a good case because Petitioner allegedly did not put forward enough evidence to show damages. First, Respondent has waived this issue. Respondent did not raise this issue at the trial court level or before the Fifth Circuit. Instead, it only argued the remedy was not allowed under Title VII. Second, even if the Court were to allow Respondent to raise this very late argument, it still fails because Respondent lacks any evidence to support its argument as it neither performed any discovery or asked to be allowed to perform any discovery on this issue.

Respondent lists six (6) pieces of evidence that it claims Petitioner should have provided. Each identified piece of evidence would be part of an affirmative defense, which would be the

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[3] https://www.govtrack.us/congress/bills/110/s1689 and https://www.govtrack.us/congress/bills/110/hr1540

Respondent's burden to produce at trial. Additionally, even if this Court were to determine the district court should review such evidence this Court could remand the case to the district court with instructions to allow Respondent to do discovery on the issue if it rules in Petitioner's favor on the question presented.

3. Success by Petitioner would change the outcome of the case.

Respondent states "Neither the district court nor the Fifth Circuit Court of Appeals ruled that the lower court could not consider an increased award." Resp. Brief at p. 6. This is simply not true. The district court refused allow the increased award because it said it could not under *Johnston v. Harris County Flood Control District*, which found the remedy is not available in any situation because of income averaging and that district courts should not act as tax consultants. 869 F.2d 1565 (5th Cir. 1989). So, at no point did the trial court or the Fifth Circuit rule that Petitioner's evidence was too speculative.

4. There is a well-developed circuit split.

Petitioner claims the Fourth Circuit really did not allow district courts discretion in allowing increased award for negative tax consequences in *Bryant v. Aiken Regional Medical Centers, Inc.,* 333 F.3d 563 (4th Cir. 2003). This is not accurate. The Fourth Circuit clearly found that it was within the trial court's "discretion" to deny the increased award, which means the district court had the ability to either grant or deny the request.

Respondent is correct that the Eighth Circuit has only ruled sovereign immunity precludes the increased damages for negative tax consequences, but that does not mean it should not be counted as a

circuit court case against the increased damages. Respondent is a state agency that could raise sovereign immunity as a defense at the Supreme Court level, which would be relevant if this Court grants *certiorari*. In fact, if this Court were to grant *certiorari* on this issue it would be better dealt with when the employer is a state agency or the federal government so the Court can address the relevant issue for all employers, including private and public.

CONCLUSION

For the foregoing reasons, the petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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