No. 11-163

IN THE
Supreme Court of the United States

GRAPEVINE IMPORTS, LTD.,
and T-TECH, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, undersigned counsel state that Grapevine Imports, Ltd. and T-Tech, Inc. have no parent corporations and no publicly held company owns 10% or more of the stock of either entity.

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The government does not dispute that this petition squarely presents two issues that have deeply divided the federal courts of appeals, and that these issues are of exceptional importance, not only for ensuring the uniform administration of the Tax Code, but also for determining the proper relationship between administrative agencies and the courts. The government even agrees that this Court should grant a petition to resolve these issues. Gov't Resp. Br. at 6. It only disagrees with Grapevine over *which* petition this Court should grant. *See id.*

In short, the government argues that, because the related petition in *Beard* v. *Commissioner*, 633 F.3d 616 (7th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3004 (U.S. June 23, 2011) (No. 10-1553), is the "earlier-filed petition," Gov't Resp. Br. at 6, this Court should grant that petition and hold the petition in this case, *id.* at 8. This argument might make sense if the decisions of the court of appeals here and in *Beard* were identical in all material respects. But the government concedes that the decision in *Beard* did not address the validity of the very regulations that are central to this Court's ultimate *Chevron* analysis. *See id.* at 7. And the government likewise concedes that *Beard* did not meaningfully address the propriety of the Internal Revenue Service seeking to apply on appeal newly-promulgated regulations in order to reverse a judgment that had been entered against the IRS prior to the promulgation of those regulations. Thus, the government is requesting that this Court select as the most appropriate case for resolving the validity of the regulations and

the propriety of the IRS's actions the only federal appellate case that declined to reach either of these issues. *See* Grapevine Pet. at 32-34.

The government's position here differs markedly from the positions that it has previously taken before this Court. In case after case—three examples of which are recounted below, *see infra* at 6-8—the government has argued that, although more than one case might present the same opportunity for the Court to address an issue in conflict, it would "be preferable to grant review in a case in which the court of appeals considered and decided" the question at issue. *E.g.*, Brief for United States at 12, *Stephens* v. *Owensboro Nat'l Bank*, No. 95-74 (U.S. Sept. 13, 1995) (*available at* http://www.justice.gov/osg/briefs/1995/w9574w.txt). Such an approach makes complete sense, because it ensures that the Court has before it a case in which both the parties and the lower courts fully considered and addressed the issues in conflict. Because *Beard* did not decide all of the issues in conflict, the Court should grant the petition in this case and hold the petition in *Beard*, pending the final disposition of this case.

I. THE GOVERNMENT'S RESPONSE CONFIRMS THE EXISTENCE OF THE IMPORTANT CONFLICTS IDENTIFIED IN THE PETITION.

The government does not dispute that the decision below further deepened a widespread and entrenched conflict over an issue of significant importance: whether an overstatement of the tax basis of sold property constitutes an "omi[ssion] from gross income," thereby triggering an extended statute of

limitations for the assessment of that tax, *see* 26 U.S.C. §§ 6229(c)(2), 6501(e)(1)(A) (2000), where this Court—in *Colony, Inc.* v. *Commissioner*, 357 U.S. 28 (1958)—has already held that such an interpretation is contrary to the text, legislative history, and purpose of the operative statutory language. *See* Grapevine Pet. at 16-23 (recounting the decisions of the seven federal courts of appeals that have divided over the application of *Colony*).

In addition, the government does not dispute that the decision below further deepened a split among several courts of appeals over an equally important issue: whether a federal agency may use newly-promulgated regulations to compel an appellate court to reverse a judgment that had already been entered against that agency prior to the promulgation of those regulations. Consistent with the line this Court drew in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967, 983-84 (2005); *see also id.* at 1016-17 (Scalia, J., dissenting), several federal appellate courts have made clear that a federal agency may not use its regulatory authority to reverse a judgment that had previously been entered against it, *see* Grapevine Pet. at 26-27 (recounting cases both before and after *Brand X* in which a federal court of appeals recognized that an agency may not use its regulatory authority to reverse a judicial decision).

These issues are undoubtedly important, both because they relate to the uniform administration of federal tax law, and because they implicate the relationship between administrative agencies and the courts. Perhaps for these very reasons, the govern-

ment argues that the Court should reach and decide these important questions. *See* Gov't Resp. Br. at 19-21; *see also* Brief of Respondent, *Beard* v. *Comm'r*, No. 10-1553 (U.S. July 27, 2011) (acknowledging the importance of these questions and the need for this Court's review); *accord* Brief of Petitioner at 7, *United States* v. *Home Concrete & Supply, LLC*, No. 11-139 (U.S. Aug. 3, 2011); Brief of Petitioner at 7, *United States* v. *Burks*, No. 11-178 (U.S. Aug. 11, 2011).

II. CONTRARY TO THE GOVERNMENT'S ARGUMENT HERE, AND FULLY CONSISTENT WITH THE POSITION THE GOVERNMENT HAS TAKEN IN PRIOR CASES, THIS CASE IS THE BEST VEHICLE FOR RESOLVING THE ISSUES IN CONFLICT.

The question remains which petition presents the most appropriate vehicle for this Court's resolution of the issues in conflict. The government argues that *Beard* is that case, not because it better presents the issues in conflict, but because "the government is not aware of any reason why [*Grapevine*] would present a more suitable opportunity than *Beard* for resolving the circuit conflict." Gov't Resp. Br. at 6. Assuming all things are equal, the government argues that the Court should grant *Beard* as "the first-filed petition," *id.* at 7—a petition that, in all likelihood, will not be considered any earlier than this petition.

Contrary to the central assumption of the government's argument, however, the two cases are not equally effective vehicles for resolving the issues in conflict. As Grapevine explained in its petition, and

as the government concedes, the Seventh Circuit in *Beard* "did not address the regulations' validity or the propriety of the IRS's actions." Grapevine Pet. at 32; *see also* Gov't Resp. Br. at 7. Instead, the Seventh Circuit "found it unnecessary to proceed to the second step of the *Chevron* analysis because it concluded that the text of Section 6501(e)(1)(A) unambiguously allows the IRS to invoke the six-year assessment period." Gov't Resp. Br. at 7. Moreover, as Grapevine explained, and as the government does not dispute, "[e]very other court to consider these issues has rejected the Seventh Circuit's analysis—even those courts that have, nonetheless, ruled in the government's favor." Grapevine Pet. at 32 (citing authorities).

In the present case, by way of contrast, the Federal Circuit considered and decided both of the issues that have been put before this Court. The court of appeals declared ambiguous Congress's intent in enacting the disputed statutory language, *see* Pet. App. 14a-22a, and it went on to find that the regulations were reasonable even though they conflicted with this Court's interpretation in *Colony*. Pet. App. 22a. In addition, the court of appeals specifically addressed Grapevine's argument—supported by *Brand X* and a line of federal court of appeals decisions—that an agency abuses its discretion and the litigation process when, as a party to litigation, that agency seeks to apply new regulations in an attempt to compel an appellate court to reverse a judgment that had been entered against the agency. *See* Pet. App. 30a-31a. The Seventh Circuit did not consider this argument—perhaps because the taxpayers in *Beard* did not advance it. *See* Brief of Appellees at

36-42, *Beard* v. *Comm'r*, No. 09-3741 (7th Cir. July 16, 2010) (*available at* 2010 WL 3950614) (arguing that the Temporary Regulations are not entitled to deference only because they were issued without notice and comment).

The government's position here—that a decision that actually considered and ruled upon all of the issues in conflict is no more suitable than a decision that did not reach all of those issues, *see* Gov't Resp. Br. at 6-8—is contrary to the positions that the government has previously taken before this Court. In each of the three examples set forth below, the government was faced with the same situation, and in each case, the government recommended that the Court grant the petition in the case in which the court of appeals actually considered and decided the issues in conflict.

1. In *Owensboro National Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994), *cert. denied*, 517 U.S. 1119 (1996), this Court was called upon to resolve a conflict among federal and state courts concerning an issue of federal law preemption. *See* Brief for United States, *Stephens* v. *Owensboro Nat'l Bank*, No. 95-74 (U.S. Sept. 13, 1995) (*available at* http://www.justice.gov/osg/briefs/1995/w9574w.txt). The parties agreed, however, that a related petition "provide[d] a better vehicle than [*Owensboro National Bank*] for this Court's consideration of the preemption issue." *Id.* at 12. In the government's view, *Barnett Bank of Marion County, N.A.* v. *Gallagher*, 43 F.3d 631 (11th Cir. 1995), was a superior vehicle because "the court of appeals in that case found it necessary to reach both of the questions that may be pertinent" to this

Court's ultimate resolution of the preemption issue. Brief of United States at 12, *Owensboro Nat'l Bank* v. *Stephens*, No. 95-74 (U.S. Sept. 13, 1995). Moreover, even though, as here, the resolution of the first question might obviate the need to reach the second, the government argued that "it would appear to be preferable to grant review in a case in which the court of appeals considered and decided both questions." *Id.* This Court apparently agreed. It granted the petition in *Barnett Bank*, *see* 515 U.S. 1190 (1995), reversed the court of appeals' judgment in that case, *see* 517 U.S. 25 (1996), and, less than a week after *Barnett Bank* was decided, denied the petition in *Owensboro National Bank*, *see* 517 U.S. 1119 (1996).

2. More recently, in *Commissioner* v. *Banaitis*, the government explained that, because a related case (*Commissioner* v. *Banks*, No. 03-892) split with two separate lines of cases (as compared to *Banaitis*, which implicated only one), the petition associated with that related case "would provide the Court an opportunity to address and resolve the full array of circuit conflicts that have arisen over the question presented in these cases." Reply Brief for the Petitioner at 8, *Comm'r* v. *Banaitis*, No. 03-907 (U.S. Feb. 5, 2004) (*available at* http://www.justice.gov/osg/briefs/2003/2pet/7pet/2003-0907.pet.rep.pdf). As a result, the government argued that the case that split from two lines of authorities—instead of only one—is "a better vehicle for this Court's review." *Id.*[1]

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[1] This is precisely the distinction that exists between this case and *Beard*. The Federal Circuit's decision below created splits involving two lines of authority—*Colony* and the concept, embodied in *Brand X*, that a judicial decision may not be reversed

The Court apparently agreed in part; it granted the petitions in both *Banaitis* and *Banks*, and consolidated the cases for argument. *See* 541 U.S. 958 (2004).

3. Finally, in *Munaf* v. *Geren*, the government acknowledged that a later-filed petition—in *Omar* v. *Harvey*, No. 07-394—presented "the same basic questions," but the government argued that *Omar* was "a better vehicle for considering the full set of issues" that were being placed before the Court. Brief for the Respondents at 10, *Munaf* v. *Geren*, No. 06-1666 (U.S. Sept. 21, 2007). Whereas the court of appeals "upheld the district court's injunction as well as its assertion of jurisdiction in *Omar*," *id.* at 19, in *Munaf*, the court of appeals declined to reach the first issue because it found that the district court lacked jurisdiction to adjudicate the petitioner's claims, *see id.* at 10. As a result, the government argued that *Omar* "provides a better vehicle than [*Munaf*] for considering the full set of issues" implicated by the petitions. *Id.* at 19. In the alternative, the government argued that the petitions in both cases should be granted, and the cases should be consolidated for argument. The Court agreed with this alternative request. It granted the petitions in both cases. *See* 552 U.S. 1074 (2004).

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by executive officers—whereas the Seventh Circuit's decision in *Beard* did not reach the *Brand X* line of authority or spend even a sentence considering the implications of an agency being able to reverse a judgment entered against it through the promulgation of regulations during the course of litigation.

As the government has recognized time and again, when this Court has before it multiple petitions presenting issues on which the federal circuits are divided, it is preferable for the Court to select for review the case that actually considered and decided all of the issues in conflict. Because *Beard* is not such a case, it is a less effective vehicle than the instant case for resolving the issues presently dividing the courts of appeals. Accordingly, the Court should grant the petition here and hold the related petitions in *Beard* (No. 10-1553), *Home Concrete* (No. 11-139), and *Burks* (No. 11-178) until the issues in conflict are resolved by the Court at the merits stage of this case.[2] In the alternative, the Court should grant the petitions in this case and *Beard*—and consolidate them for oral argument—because this case better presents the full array of issues that this Court will be called upon to resolve.

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[2] The government has requested that its petitions in *Home Concrete* and *Burks* be held pending the disposition of *Beard*. *See* Brief of Petitioner at 7-8, *United States* v. *Home Concrete & Supply, LLC*, No. 11-139 (U.S. Aug. 3, 2011); Brief of Petitioner at 7-8, *United States* v. *Burks*, No. 11-178 (U.S. Aug. 11, 2011).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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