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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF GRAPEVINE IMPORTS, LTD. AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

THE IRS MAY NOT INVOKE ITS RULEMAKING AUTHORITY TO MANIPULATE THE OUTCOME OF CASES TO WHICH IT IS A PARTY 6

A. The IRS's Attempt to Invoke the Rulemaking Process to Manipulate Pending Tax Cases Represents a Dangerous Consolidation of Legislative, Executive, and Judicial Functions, and Constitutes an Abuse of Discretion 6

B. The Invocation of Newly-Promulgated Regulations, During the Course of Litigation to Which the Promulgating Agency is a Party, Amounts to an Unacceptable Level of Interference with the Independence of the Judiciary 14

C. The IRS's Claimed Authority is Contrary to the Scheme Congress Enacted to Resolve Taxpayer Disputes 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Auer v. *Robbins*,
519 U.S. 452 (1996) 12

Bowen v. *Georgetown Univ. Hosp.*,
488 U.S. 204 (1988) 7

Burks v. *United States*,
633 F.3d 347 (5th Cir. 2011)
petition for cert. filed, 80 U.S.L.W. 3090
(U.S. Aug. 11, 2011) (No. 11-178) 8, 12

Caterpillar Tractor Co. v. *United States*,
589 F.2d 1040 (Ct. Cl. 1978) 8

Chock Full O' Nuts Corp. v. *United States*,
453 F.2d 300 (2d Cir. 1971) 7, 8

Colony, Inc. v. *Comm'r*,
357 U.S. 28 (1958) 2, 8, 18, 19

Freytag v. *Comm'r*,
501 U.S. 868 (1991) 4, 21, 24

Glidden Co. v. *Zdanok*,
370 U.S. 530 (1962) 24

Grapevine Imports, Ltd. v. *United States*,
636 F.3d 1368 (Fed. Cir. 2011),
petition for cert. filed, 80 U.S.L.W. 3090
(U.S. Aug. 5, 2011) (No. 11-163) 2, 9, 10, 18, 21

Hayburn's Case,
2 U.S. (2 Dall.) 408 (1792) 16, 18, 22

Home Concrete & Supply, LLC v. *United States*,
634 F.3d 249 (4th Cir.),
cert. granted, 132 S. Ct. 71 (2011) 13

Lampf, Pleva, Lipkind, Prupis & Petigrow v.
Gilbertson, 501 U.S. 350 (1991) 17

Mayo Found. for Med. Educ. v. *United States*,
131 S. Ct. 704 (2011) 10, 11, 12

Nat'l Cable & Telecomms. Ass'n v. *Brand X*
Internet Servs., 545 U.S. 967 (2005) 19, 20

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995) .... *passim*

Salman Ranch, Ltd. v. *United States*,
573 F.3d 1362 (Fed. Cir. 2009) 2, 9, 21

Smiley v. *Citibank (South Dakota), N.A.*,
517 U.S. 735 (1996) 10, 11

Talk Am., Inc. v. *Mich. Bell Tel. Co.*,
131 S. Ct. 2254 (2011) 12, 13

Tallahassee Mem'l Reg'l Med. Ctr. v. *Bowen*,
815 F.2d 1435 (11th Cir. 1987),
cert. denied, 485 U.S. 1020 (1988) 8

United States v. *Klein*,
80 U.S. (13 Wall.) 128 (1872) 15, 16, 21

United States v. *Morton*,
467 U.S. 822 (1984) 9, 10

United States v. *Padelford*,
76 U.S. (9 Wall.) 531 (1869) 15

STATUTES

26 U.S.C. § 6501(e)(1)(a) 1, 2

26 U.S.C. § 6226(a) 22

26 U.S.C. § 6226(f) 5, 23, 24

26 U.S.C. § 6226(g) 23

26 U.S.C. § 6229(c)(2) 1

26 U.S.C. § 7441 24

26 U.S.C. § 7443(b) 24

28 U.S.C. § 1491 23

OTHER AUTHORITIES

A. Bickel, *The Least Dangerous Branch* (1962) 19

Federalist Papers (G. Willis ed. 1982) 4, 5, 6, 7, 20

IRS Notice 2000-44,
2000-36 I.R.B. 255 (Sept. 4, 2000) 8

Montesquieu, *Spirit of Laws* bk. XI
(O Piest ed., T. Nugent transl. 1949) 13

Petition for a Writ of Certiorari,
Grapevine Imports, Ltd. v. *United States*,
No. 11-163 (U.S. Aug. 5, 2011) 9

S. Rep. No. 97-275 (1981),
reprinted in 1982 U.S.C.C.A.N. 11 23

INTEREST OF *AMICUS CURIAE*

Grapevine Imports, Ltd. is a party to a related petition pending before this Court, *Grapevine Imports, Ltd.* v. *United States*, No. 11-163, which presents the same fundamental issues that are presented in this case. As such, Grapevine Imports, Ltd. and its tax matters partner, T-Tech, Inc. (collectively, "Grapevine"), have a substantial interest in the resolution of the issues before the Court in this case.[1]

Like Respondents here, Grapevine filed suit against the government, challenging a more-than-three-year-old adjusted tax assessment as untimely. And in like manner, Grapevine argued that the government could not avail itself of the Internal Revenue Code's extended statute of limitations, 26 U.S.C. §§ 6229(c)(2), 6501(e)(1)(A), because an overstatement of basis does not constitute an omission from gross income. Finally, just like here, the government countered Grapevine's suit by promulgating regulations, which it claims alter the outcome not only of future cases, but also of pending cases in which the government is a party.

Even assuming that Congress did not speak to the precise question at issue here, the level to which the government contends an agency may manipulate a judicial proceeding is on stark display in this case.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than Grapevine, its partners, or its counsel—made a monetary contribution specifically for the preparation or submission of this brief.

Despite submitting to the courts' jurisdiction for more than three years unaided by whatever regulatory authority that the IRS purports to possess, the government now claims that the courts essentially have no role in this case other than to adopt the IRS's novel and expansive interpretation of the extended statute of limitations, thereby compelling the courts to enter judgment in the government's favor.

And yet, Grapevine's case presents an even more disturbing example of the level of manipulation that the government argues an agency may exert over judicial proceedings. Unlike here, Grapevine had secured from the trial court a judgment in its favor, and it defended that judgment on appeal in a circuit that had held—consistent with *Colony, Inc.* v. *Commissioner*, 357 U.S. 28 (1958)—that the extended statute of limitations at issue here, 26 U.S.C. § 6501(e)(1)(A), does not apply to an overstatement of basis. *See Salman Ranch, Ltd.* v. *United States*, 573 F.3d 1362 (Fed. Cir. 2009). In Grapevine's case, the government was not deterred—not by an unfavorable trial-court judgment, not even by Supreme Court and circuit-level precedent rejecting the IRS's interpretation. Instead, the government argued for the first time on appeal—and the Federal Circuit agreed—that the IRS could use regulations that were promulgated more than a year after the IRS filed its appeal in the Federal Circuit to reverse the judgment that the Court of Federal Claims had entered in Grapevine's favor. *See Grapevine Imports, Ltd.* v. *United States*, 636 F.3d 1368, 1374-75, 1383-84 (Fed. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3090 (U.S. Aug. 5, 2011) (No. 11-163).

The government's position in both this case and Grapevine's raises serious separation-of-powers concerns, and if adopted, it will have a deleterious effect on the public's confidence in the courts. Make no mistake, the government is arguing that the IRS is empowered to wield the powers associated with all three branches of government—legislative, executive, and judicial—at the same time. According to the government, during the course of litigating specific taxpayer disputes, the IRS may invoke its rule-making authority to dictate the outcome of specific cases to which it is a party, including lower court decisions entered against it.

If a court may be compelled by regulation to adopt the government's position in a case to which the government is a party, then the executive's encroachment on the judicial power is all the more offensive, because a party to the litigation is co-opting the judiciary to enforce that party's dictates. What is more, such power wielded by a litigant undermines Congress's scheme of empowering courts to resolve taxpayer disputes, and worse still, it threatens to undermine the public's confidence in the courts as independent arbiters of those disputes. Adopting the government's position would render the more than three years that Grapevine spent litigating in the Court of Federal Claims an utter waste of time and money. And it would serve as a powerful disincentive for private parties to litigate even the most legitimate tax grievances against the government.

At bottom, if the IRS is permitted to use its regulatory authority to manipulate the outcome of this case, it will undoubtedly invoke that authority to

Grapevine's detriment—and to the detriment of other private parties who find themselves litigating against governmental agencies. Accordingly, Grapevine submits this brief as *amicus curiae* in support of Respondents.

SUMMARY OF ARGUMENT

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag* v. *Comm'r*, 501 U.S. 868, 870 (1991). As James Madison explained: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, at 244 (G. Willis ed. 1982). And in keeping with this truth, the Framers imbued in our Constitution its greatest structural safeguard—"that the power properly belonging to one of the departments[] ought not to be directly and comple[tely] administered by either of the other departments." The Federalist No. 48, at 250.

In the present case, the government is claiming for the executive precisely the kind of consolidated power condemned by our Constitution. According to the government, the IRS may invoke its rulemaking authority during the course of litigating specific tax cases and then use that delegated legislative authority to dictate the outcome of those cases, including in cases—like Grapevine's—in which the IRS had lost in a lower court.

There are at least three problems with this argument. *First*, the power that the executive is claiming here represents a dangerous accumulation of the

three powers of government. The IRS is claiming the authority to serve as legislator, prosecutor, and adjudicator—all at once—through the promulgation of retroactive regulations meant to *enlarge* a statute that Congress enacted to *limit* the IRS's authority to enforce the tax code. According to the Framers, this is the very "definition of tyranny"—where "'the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'" The Federalist No. 47, at 244, 246 (G. Willis ed. 1982) (J. Madison) (quoting Montesquieu).

Second, the power that the executive is claiming here interferes with the structural independence of the judiciary. According to the government, even after the executive has submitted to the jurisdiction of an independent judiciary, it may invoke its rulemaking authority to compel the judiciary to rule in its favor. Although this Court has only had occasion to address *congressional enactments* that interfere with the independence of the judiciary, *see, e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995), unilateral compulsion by the executive is just as offensive to the Constitution.

Third, the power claimed here is contrary to the statutory scheme that Congress enacted for the resolution of taxpayer disputes. As part of that scheme, Congress vested in independent tribunals, not beholden to the executive, the authority to decide the precise substantive dispute at issue here. *See* 26 U.S.C. § 6226(f). The IRS is plainly attempting to circumvent this statutory scheme when, as a party to litigation, it claims for itself the authority to declare what the law is in that very case. Nor can the IRS

defend its conduct based on its authority to issue rules of general applicability. Whatever regulatory authority Congress has vested in the IRS, that general grant must give way to Congress's specific judicial-review scheme—one that did not cede to the executive the power to decide individual taxpayer disputes.

ARGUMENT

THE IRS MAY NOT INVOKE ITS RULEMAKING AUTHORITY TO MANIPULATE THE OUTCOME OF CASES TO WHICH IT IS A PARTY.

A. The IRS's Attempt to Invoke the Rulemaking Process to Manipulate Pending Tax Cases Represents a Dangerous Consolidation of Legislative, Executive, and Judicial Functions, and Constitutes an Abuse of Discretion.

To the Framers of our Constitution, separating the powers of government was a means to prevent a potentially deleterious end: The "accumulation of all powers, legislative, executive, and judicial, in the same hands." The Federalist No. 47, at 244 (G. Willis ed. 1982) (J. Madison). According to Thomas Jefferson: "The concentrati[on of these powers] in the same hands[] is precisely the definition of despotic government." The Federalist No. 48, at 252 (J. Madison quoting T. Jefferson). And James Madison—associating any such accumulation with "tyranny"—rejected the notion that our federal Constitution is "chargeable with the accumulation of power or with a mixture of powers having a dangerous ten-

dency to such an accumulation." The Federalist No. 47, at 244.

In the present case, the government is claiming for the executive precisely the kind of consolidated power condemned by our Constitution. According to the government, the IRS may invoke its rulemaking authority (a delegation of Congress's legislative function) during the course of litigating specific tax cases (an exercise of the IRS's executive authority) and use its delegated legislative authority to dictate the outcome of specific cases to which it is a party (an obvious exercise of judicial power).

Although this Court has never decided the propriety of an agency using its rulemaking authority to manipulate the outcome of pending cases to which the government is a party, this Court has condemned efforts by agency counsel to cloak their legal arguments in the deference that is normally reserved for formal agency rulemaking. In *Bowen* v. *Georgetown University Hospital*, the Court explained that "[d]eference to what appears to be nothing more than an agency's convenient litigation position" is "entirely inappropriate." 488 U.S. 204, 213 (1988).

The lower federal courts, however, have confronted this situation, and for many years they had been near universal in condemning the precise argument the government advances here. Beginning in *Chock Full O' Nuts Corp.* v. *United States*, a tax dispute, the Second Circuit explained that the IRS "may not take advantage of [its] power to promulgate retroactive regulations during the course of a litigation for the purpose of providing [itself] with a defense based on the presumption of validity accorded

to such regulations." 453 F.2d 300, 303 (2d Cir. 1971). Other courts have followed suit—including in a case similar to the one at issue here, *Burks* v. *United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (explaining that, even if *Colony* is not controlling, it is not clear that deference is owed in a "situation where, during the pendency of suit, the [IRS] promulgated determinative retroactive regulations" displacing "prior adverse judicial decisions on the identical legal issue"), *petition for cert. filed*, 80 U.S.L.W. 3090 (U.S. Aug. 11, 2011) (No. 11-178); *see also Caterpillar Tractor Co.* v. *United States*, 589 F.2d 1040, 1043 (Ct. Cl. 1978) (quoting *Chock Full O' Nuts*). And still other courts have concluded that such action is an abuse of agency discretion. *See, e.g.*, *Tallahassee Mem'l Reg'l Med. Ctr.* v. *Bowen*, 815 F.2d 1435, 1452, 1456 (11th Cir. 1987) (holding that the issuance of regulations in an attempt to moot an adverse trial-court judgment in a case where the agency is a party is an "abuse of the interaction between administrative agencies and the courts" and an "abuse [of] the litigation process"), *cert. denied*, 485 U.S. 1020 (1988). Regardless of how it is categorized, the power claimed for the IRS here represents a dangerous consolidation of governmental functions, one that is rife with abuse.

In fact, the IRS has already engaged in abusive conduct in these very cases. Having failed to give prior notice that it considered the substantive transaction at issue here not properly allowable under the tax code, the IRS issued a notice that purported to have retroactive effect. *See* IRS Notice 2000-44, 2000-36 I.R.B. 255 (Sept. 4, 2000). Thereafter, the IRS argued, for the first time in roughly fifty years,

that *Colony* did not preclude the agency from availing itself of the Internal Revenue Code's extended statute of limitations. Still, the IRS did not exercise its rulemaking authority, even after the courts began to reject its incorrect interpretation of *Colony*. Only after it suffered set backs in the two federal appellate courts to consider the issue did the IRS promulgate regulations purporting to overrule the growing number of cases (in the trial and appellate courts) that were rejecting its position. In *Grapevine* in particular, the IRS waited more than three years—and after it had lost in the trial court—before promulgating the regulations at issue here.[2]

In an attempt to defend the IRS's authority to manipulate the judicial process, the government argues that this Court "[c]onfront[ed] exactly th[is] scenario in *United States* v. *Morton*, 467 U.S. 822 (1984)," and implies that *Morton* held that an

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[2] Even more troubling, the government—in opposing a motion by Grapevine to consolidate its appeal with a related case, *Salman Ranch, Ltd.* v. *United States*, No. 2008-5053 (Fed. Cir.)—argued to the Federal Circuit that Grapevine's case should be stayed, because Grapevine might have the benefit of a favorable decision in *Salman Ranch*. *See Grapevine*, 636 F.3d at 1374. Rather than honor that representation, however, the IRS promulgated the regulations at issue here after the Federal Circuit handed the taxpayers a victory in *Salman Ranch*, *see* 573 F.3d at 1377, and then argued that the regulations deprived Grapevine of the benefit of that decision, *Grapevine*, 636 F.3d at 1374-75. *See also* Petition for a Writ of Certiorari at 7-10, *Grapevine Imports, Ltd.* v. *United States*, No. 11-163 (U.S. Aug. 5, 2011). By applying to Grapevine's case the newly-promulgated, made-for-litigation regulations, the Federal Circuit blessed the IRS's bait and switch, thereby rendering meaningless the three years of litigation in which the government and Grapevine had engaged up to that point in time.

agency's status as a party has no bearing on whether the agency may invoke its rulemaking authority in pending litigation. U.S. Br. at 40. But *Morton* stands for no such proposition.

In *Morton*, this Court did not hold that an agency may reverse an adverse judgment by regulation or otherwise manipulate the judicial process. To the contrary, the opinion in *Morton* makes clear that this Court was compelled to reverse the lower courts' decisions—and rule in the government's favor—based on the "plain language of the statute." 467 U.S. at 826-29. After reaching that conclusion (one that is fully consistent with *Chevron*'s first step), the Court went on to observe that regulations, issued after the lower courts issued their decisions, provided *further support* for the Court's interpretation of "the plain language of the statute." *Id.* at 836.

To be sure, the Court also observed in a footnote that it found inconsequential the fact that the regulations at issue were not promulgated "until after [the] suit was brought." *Id.* at 835 n.21. But this is clear *dicta*. The Court did not consider, let alone decide, any of the issues presented here. Thus, *Morton*'s holding falls well short of establishing that an agency may use new regulations to compel an appellate court to adopt its litigating position or, as occurred in *Grapevine*, reverse what otherwise would have been a loss for the government.

The government also defends the IRS's authority to manipulate the judicial process by quoting out of context certain statements that this Court made in *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), and *Mayo Foundation for Medical Educa-*

tion v. *United States*, 131 S. Ct. 704 (2011). *See* U.S. Br. at 40. But neither case held that an agency may use its rulemaking authority to achieve the result the government is seeking here.

In *Smiley*, the government was not even a party to the case, and as a result, this Court had no occasion to address the issues presented here. 517 U.S. at 737-38. Thus, at most, *Smiley* stands for a completely unrelated and far more limited proposition—that, in a case where an agency is *not a party* to litigation, a court may defer to a regulation even though that regulation was prompted by a problem that was identified in that very litigation. *Id.* at 741. In such a situation, however, the agency is not using its rulemaking authority to snatch for itself victory from the jaws of judicial defeat; rather, it is addressing a problem identified by private parties that Congress intended for that agency to resolve. *See id.* at 740-41. Moreover, in that situation, the agency is wearing but one hat—that of delegated lawmaker.

Similarly, *Mayo Foundation* did not address the central issues presented herein. As the Court in *Mayo Foundation* explained, the lawsuit underlying the Mayo Foundation's appeal was filed "*[a]fter*" the IRS promulgated the regulations at issue in that case. 131 S. Ct. at 710 (emphasis added). Thus, contrary to the government's assertion, *Mayo Foundation* could not have addressed an agency's ability to invoke its rulemaking authority to manipulate the outcome of pending cases in which the agency is a party. U.S. Br. at 40 (quoting out of context *Mayo Found.*). Rather, *Mayo Foundation* noted, consistent with *Smiley*, that if the government is seeking to ap-

ply a regulation on a *prospective* basis in a *subsequent* case, then it is immaterial that *prior* litigation identified a problem that the agency sought to resolve through the promulgation of those regulations. *See also Burks*, 633 F.3d at 360 (explaining that *Mayo Foundation* did not involve a situation where, "during the pendency of suit, the treasury promulgated determinative, retroactive regulations [in the wake of] prior adverse judicial decisions on the identical legal issue").

Finally, even if the government could somehow transform these inapposite statements and *dicta* into authoritative holdings of this Court, those transformed holdings would warrant reexamination. Just last Term, Justice Scalia correctly called for the reexamination of an otherwise settled principle of administrative law—that courts should defer to an agency's interpretation of its own regulations, *see, e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 461 (1996)—because that principle was imbued with separation-of-powers concerns. *See Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). As Justice Scalia explained:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

Id. (quoting Montesquieu, *Spirit of Laws* bk. XI, ch. 6, at 151-52 (O Piest ed., T. Nugent transl. 1949)). Moreover, Justice Scalia properly noted that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," which thereby "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.*

Even greater concerns are at play here. The IRS has not waited until "future adjudications" to invoke its interpretation. Rather, it has claimed for itself the authority to serve as legislator, prosecutor, and adjudicator—all at once—through the promulgation of *retroactive* regulations meant to enlarge a statute that Congress enacted for the exact opposite purpose—to limit the IRS's authority to proceed against taxpayers.

At every turn of these cases, the IRS has used its rulemaking authority in a manner that can only be classified as "arbitrary" and abusive. *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring). As Judge Wilkinson explained below, what the IRS seeks to do here threatens to "disrupt[]" the "balance" of power between courts and agencies, and presents "a lack of accountability and a risk of arbitrariness." *Home Concrete & Supply, LLC* v. *United States*, 634 F.3d 249, 259-60 (4th Cir.) (Wilkinson, J., concurring), *cert. granted*, 132 S. Ct. 71 (2011). At the very least, the IRS's efforts in this case to wield the powers associated with all three branches of government should be set aside as arbitrary and capricious.

B. The Invocation of Newly-Promulgated Regulations, During the Course of Litigation to Which the Promulgating Agency is a Party, Amounts to an Unacceptable Level of Interference with the Independence of the Judiciary.

The government's position here also would amount to a serious invasion of the structural independence of the judiciary. According to the government, even after the executive has submitted to the jurisdiction of an independent judiciary, the executive nevertheless may invoke its rulemaking authority to compel the judiciary to rule in its favor.

In *Plaut* v. *Spendthrift Farm, Inc.*, this Court identified three categories of legislation "that require federal courts to exercise the judicial power in a manner that Article III forbids." 514 U.S. 211, 218 (1995). Although these forms of interference differ from the form of interference at issue here—the types of offensive conduct identified in *Spendthrift Farm* all involved *congressional enactments*, whereas here, the conduct is embodied in *unilateral executive action*—the result is the same: What another branch seeks to do here is repugnant to the independence of the judiciary. Indeed, there are significant parallels between the authority that the executive is claiming here for itself and the offensive enactments that this Court discussed in *Spendthrift Farm*. Moreover, because an agency's rulemaking authority exists by the grace of Congress, that agency cannot claim to have *more* authority than Congress to interfere with the affairs of the judiciary.

The first type of offensive enactment indentified by this Court in *Spendthrift Farm* arose in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). In that case, the Court wrestled with "a statute that was said '[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it.'" *Spendthrift Farm*, 514 U.S. at 218 (quoting *Klein*, 80 U.S. at 146). The statute at issue provided that individuals whose property was seized during the Civil War could recover that property, or receive compensation for it, upon proof to the Court of Claims that they had remained loyal to the Union. In *Klein*, the claimant had received a presidential pardon, which this Court had previously held must be treated as conclusive proof of loyalty, *see United States* v. *Padelford*, 76 U.S. (9 Wall.) 531 (1869). As a result, the Court of Claims ordered judgment on that basis. The United States then appealed that judgment to this Court. While that appeal was pending, Congress enacted legislation providing that a pardon was inadmissible as proof in support of a claim; that a pardon, without an express disclaimer of guilt, was presumptive proof of *disloyalty*; and that the courts, including the Supreme Court, must dismiss for want of jurisdiction any pending claims based on a pardon. *See Klein*, 80 U.S. at 129.

This Court held the supervening statute unconstitutional and affirmed the judgment of the Court of Claims. *Id.* at 146-48. In the process, the Court questioned the power of Congress to "prescribe rules of decision to the Judicial Department of the government in cases pending before it"—a rule designed to resolve "a cause in a particular way," *id.* at 146—and explained that Congress may not effectively di-

rect the reversal of a decision because that "decision, in accordance with settled law, must be adverse to the government and favorable to the suitor," *id.* at 147.

The second type of unconstitutional interference—according to the Court in *Spendthrift Farm*—is "exemplified" by *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), which "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch," *Spendthrift*, 514 U.S. at 218. In *Hayburn's Case*, five of the six Supreme Court justices, serving at the time on the regional circuit courts, found unconstitutional an act that directed the judges of those courts to determine whether veterans of the Revolutionary War qualified for a pension, but which permitted the Secretary of War to refuse to follow the courts' recommendations. 2 U.S. at 408-10 & n.*. As the justices explained in a series of opinions reported in *Hayburn's Case*, such revision and control is "radically inconsistent with the independence of [the] judicial power which is vested in the courts." *E.g., id.* at 410 n.* (Wilson and Blair, J.J.); *see also id.* (Iredell, J.) (explaining that the act "subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution").

The third type of unconstitutional interference was identified for the first time in *Spendthrift Farm* itself. As the Court explained, "only courts [were] involved" in the application of the legislation at issue in *Spendthrift Farm*, whereas in the earlier-discussed cases, there was some executive involvement. 514 U.S. at 218. Thus, the Court went on to

identify a third category of legislation that offends the Constitution: legislation that requires the "federal courts to exercise '[t]he judicial Power of the United States' in a manner repugnant to the text, structure, and traditions of Article III." *Id.* at 217 (citation omitted).

In *Spendthrift Farm*, a lower court had dismissed with prejudice a prior action between the parties involving allegations of securities fraud. The lower court deemed the plaintiff's prior action untimely under this Court's then-recent interpretation of the applicable statute of limitations in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991). Congress responded by adopting legislation authorizing litigants who were aggrieved under *Lampf* to file a motion to reinstate any action previously dismissed with prejudice. *See Spendthrift Farm*, 514 U.S. at 213-15. Thereafter, the plaintiffs in *Spendthrift Farm* attempted to avail themselves of the new law, but the lower courts refused.

On appeal, this Court affirmed the lower courts' denial of reinstatement on the ground that the law required federal courts to exercise the judicial power in a manner repugnant to Article III. As the Court explained, once a judgment achieves finality, it "becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Id.* at 227.

Here, the source of interference is slightly different than those discussed in *Spendthrift Farm*, but it is impermissible interference nonetheless: The ex-

ecutive is unilaterally invoking a general grant of rulemaking authority to dictate the outcome of pending cases to which it is a party. If anything, the interference at issue here is more offensive than that discussed in *Spendthrift Farm*, because the executive is acting without express authorization from Congress. *Cf. Hayburn's Case*, 2 U.S. at 408-10 & n.* (striking down a statutory scheme that expressly authorized the executive to sit in review of the judiciary).

To be sure, *Spendthrift Farm* was decided on principles of finality (once all appeals are exhausted, the judgment embodies the final word of the judicial department on a given case or controversy), whereas here and in *Grapevine*, the parties have not yet exhausted the appeals process. Thus, *Spendthrift Farm* acknowledges that "*Congress* can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." 514 U.S. at 226 (emphasis added).

In the present case, however, the government is not requesting that the Court honor its obligation to apply for the first time on appeal a new enactment of Congress. Quite the opposite. Congress has not amended the statute at issue in any meaningful sense since this Court decided *Colony* more than a half century ago. *See* Resp. Br. at 5-9.

Instead, the government is arguing that this Court must defer to unilateral executive action compelling the judicial department to achieve the execu-

tive's ends. Indeed, in this very case, the government is arguing that this Court must defer to an interpretation advanced by a party to the litigation, involving a statute designed to limit that party's authority—without any direction from Congress, and involving an interpretation contrary to Congress's clear intent.

In a situation such as this one, an agency may not manipulate the outcome of pending cases simply because the appeals process has not yet been exhausted. After all, "the finality or lack of it in judicial judgments is rather a matter of degree." Alexander Bickel, *The Least Dangerous Branch* 117 (1962). Under strict adherence to principles of finality, an agency could overrule a decision of this Court by promulgating contrary regulations *after* this Court entered its decision, but before the matter was committed to the lower court for the entry of a final judgment. Thus, an agency's authority to promulgate rules of general effect must give way to a more important interest: the judiciary's independence from compelled manipulation by a party to litigation.

Indeed, this Court has strongly suggested that, absent express congressional direction, agencies may not use their rulemaking authority to manipulate the judicial process. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (emphasizing that judicial decisions may not be "revers[ed] by executive officers"); *see also id.* at 1016-17 (Scalia, J., dissenting). In *Brand X*, this Court held that FCC regulations, which were contrary to a *previous* judicial interpretation of an ambiguous statute, were entitled to deference, but only in *subsequent*

litigation. *Id.* at 982-84. Importantly, in responding to Justice Scalia's criticism that the Court's holding effectively allowed the executive department to "revise[], over-turn[], or refuse[]" to give full faith and credit to judgments of the judicial department, 545 U.S. at 1017 (Scalia, J., dissenting), the Court was adamant that its holding did not amount to such a troubling result. In particular, the Court emphasized that by requiring courts to give deference to an agency's "decision to construe a[n ambiguous] statute differently from a court" in a *subsequent* case, the Court was not announcing a rule that subjected current or prior judicial decisions to reversal by executive officers. *See id.* at 983.

The level of manipulation here amounts to such a reversal. Moreover, such a finding does not call into question the continued validity of *Brand X*. Under *Brand X*, an agency may promulgate regulations—even regulations that are contrary to a prior judicial interpretation of an ambiguous statute—but the agency may only invoke that regulation on a *prospective* basis, and only in *subsequent* litigation. *See* 545 U.S. at 982-84.

The government's contrary position, if adopted, will undermine the independence of the judiciary in the eyes of the public, and weaken the institutional clout upon which the judiciary relies to ensure the enforcement of its judgments. After all, the judiciary is wholly dependent on the executive to enforce its judgments. *See, e.g.*, The Federalist No. 78, at 394 (G. Willis ed. 1982) (A. Hamilton) (explaining that the judiciary "may truly be said to have neither Force nor Will, but merely judgment; and must ulti-

mately depend upon the aid of the executive arm even for the efficacy of its judgments"). Litigants will not bring suits in courts involving the government if the executive is viewed as pulling the strings, and the executive has no incentive to respect the authority of the judiciary to render decisions adverse to it if the executive can achieve during the pendency of litigation a result that a court would not otherwise award to it. That is precisely what happened to Grapevine, where the government acknowledged that, without application of its newly-minted regulations, it would have lost the case under the Federal Circuit's precedent in *Salman Ranch*. *See Grapevine*, 636 F.3d at 1375.

In the end, unilateral compulsion by the executive in situations where it is a party to litigation is just as offensive to the judiciary as a congressional enactment requiring the judiciary to undo the finality of its judgments. When the executive submits to litigation, it submits to the resolution of that dispute by an independent judiciary. *Cf. Klein*, 80 U.S. at 144 ("It was argued that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfill its obligations."). No party should be able to dictate the outcome of pending litigation—not even the executive.[3]

[3] Although Grapevine litigated in the Court of Federal Claims, rather than an Article III court, the government has not confided its manipulation to legislative courts (which nevertheless exercise "judicial" power, *Freytag*, 501 U.S. at 890-91). The government argues in this very case (which arises from a

C. The IRS's Claimed Authority is Contrary to the Scheme Congress Enacted to Resolve Taxpayer Disputes.

Not only does the executive's unilateral action here infringe upon the independence of the judiciary, but it also infringes upon the statutory scheme that Congress enacted for the resolution of taxpayer disputes. In this sense, the power that the executive defends here is worse than what it claimed for itself in *Hayburn's Case*, because at least in *Hayburn's Case*, the executive was acting at the direction of Congress when it chose to disregard judicial pronouncements. 2 U.S. at 410 n.*. Here, by contrast, the IRS can point to no such express authorization from Congress—and there are, in fact, contrary directions from the legislature.

The statutory scheme enacted by Congress to resolve taxpayer disputes holds no place for executive adjudication. Congress did not empower the Commissioner of Internal Revenue to decide taxpayer disputes, subject to review only for an abuse of discretion. Rather, Congress placed such disputes in the hands of the federal district courts, the Tax Court, and the Court of Federal Claims. *See, e.g.*, 26 U.S.C. § 6226(a). In partnership cases such as this one, each court is empowered to "determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper alloca-

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federal district court) that, even if this Court does not find its arguments persuasive, it *must* adopt them so long as they are not unreasonable. *See* U.S. Br. at 37-40.

tion of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item." *Id.* § 6226(f). Moreover, "[a]ny determination by a court under this section shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Federal Claims, as the case may be, and shall be reviewable as such," *id.* § 6226(g), by the courts of appeals and, ultimately, by this Court.

It is beyond question that the courts that Congress vested with the authority to resolve taxpayer disputes—the federal district courts, the Tax Court, and the Court of Federal Claims—are entitled to independence from executive manipulation. The United States District Courts are Article III courts, and their independence from the executive is preordained by that stature. However, the remaining courts (the tax and claims courts), though Article I legislative courts, are likewise imbued by Congress with independence from executive manipulation.

When Congress established the Court of Federal Claims, it intended to establish a "truly independent" tribunal with the power to "enter dispositive orders" and "final judgment[s]" against the United States. S. Rep. No. 97-275, at 8, 22 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 18, 32. Indeed, Congress expressly vested in that court "jurisdiction to render judgment upon any claim against the United States." 28 U.S.C. § 1491. It is virtually impossible to imagine how the Court of Federal Claims could exercise such authority if—as the IRS did to Grapevine—the executive is permitted to promulgate rules as a means

of reversing that court's judgments. *Cf. Glidden Co.* v. *Zdanok*, 370 U.S. 530, 554-55 (1962) (explaining that final judgments that were issued by the predecessor of the Court of Federal Claims, the Court of Claims, were not subject to "executive revision").

Even the Tax Court is an independent, "Article I legislative court," exercising "judicial, rather than executive, legislative, or administrative, power." *Freytag*, 501 U.S. at 890-91; *see also* 26 U.S.C. § 7441. The judges are not beholden to the Commissioner of Internal Revenue, but rather, are appointed independently by the President and confirmed, on advice and consent, by the Senate. 26 U.S.C. § 7443(b). More importantly, the decisions of the Tax Court "are not subject to review by either the Congress or the President." *Freytag*, 501 U.S. at 891. Thus, "[t]he Tax Court remains independent of the Executive and Legislative Branches." *Id.*

The upshot of all of this is that Congress vested in independent tribunals, not beholden to the executive, the authority to decide the precise substantive dispute at issue here. *See* 26 U.S.C. § 6226(f). The IRS is plainly attempting to circumvent this statutory scheme when, as a party to litigation before these courts, it claims for itself the authority to declare what the law is in those very cases.

Nor can the IRS defend its conduct here based on its authority to issue rules of general applicability. Whatever the IRS's authority to expand a statute of limitation designed to inhibit the IRS from enforcing stale tax assessments, that general grant of rulemaking authority must give way to Congress's specific

judicial-review scheme—one that left the executive powerless to decide individual tax disputes.

Moreover, unlike a "*general statute*," which "may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism," *Spendthrift Farm*, 514 U.S. at 228 (emphasis added), here the executive cannot escape the charge that it has availed itself of its general regulatory authority to favor itself in cases pending against it. In the end, such party-sponsored manipulation would render impotent the power Congress vested in the courts to decide taxpayer disputes.

Finally, even putting to one side the IRS's structural assault on the judicial-review process enacted by Congress, it is hard to conceive of taxpayers availing themselves of such a process if courts are subject to executive manipulation. Taxpayers will be rightly hesitant to undertake a lengthy and expensive challenge, even to the most unjust assessment, if the IRS is empowered to use its rulemaking authority to enact a belated defense to those claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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