No. 02-1170

In the Supreme Court of the United States

ERIC TEST AND ODELIA BRAUN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *Gilmore* v. *United States*, 372 U.S. 39 (1963), should be overruled.

2. Whether the Court should consider the constitutionality of a court of appeals rule giving no precedential effect to unpublished opinions when that rule played no role in, and had no effect on, the resolution of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is reported at 49 Fed. Appx. 96. The opinion of the Tax Court (Pet. App. 6a-17a) is unofficially reported at 80 T.C.M. (CCH) 766.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2002. On December 23,2002, Justice O'Connor extended the time within to file a petition for a writ of certiorari to and including January 29, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the period relevant to this case, Odelia Braun (petitioner) was employed as an assistant professor at the University of California, San Francisco (UCSF).* Pet. App. 7a. In that capacity, she served as the director of the Center for Prehospital Research and Training (CPRT), which had been formed by UCSF to provide training and public education for emergency medical preparedness and cardio-pulmonary resuscitation. *Id.* at 7a-8a.

Separately from her job with UCSF, petitioner consulted with private businesses in establishing procedures to recognize and treat cardiac emergencies until public emergency response personnel could arrive on the scene. Pet. App. 8a-9a. For the San Francisco Giants baseball team, petitioner created a prototype emergency response system that located defibrillators in the baseball stadium for prompt treatment of cardiac arrest. *Ibid.*

In May 1992, petitioner formed plans to create a company in connection with her consulting work. The new business was to be called "Save-a-Life Systems" (SLS). Its goal was to lead a consortium of defibrillator vendors, private employers, and a training and implementation team headed by petitioner in placing equipment and trained personnel in locations (such as private work areas and recreational facilities) where heart seizures were most likely to occur. Pet. App. 9a. In 1994, petitioner entered into negotiations with a manufacturer of defibrillators who was interested in investing in her new company. *Id.* at 10a.

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* Eric Test is a party to this case only because he filed a joint tax return with his spouse, Odelia Braun.

In November 1993, however, the State of California had initiated an audit of the UCSF Department of Medicine and of CPRT, which petitioner headed. Pet. App. 10a. The State audit was precipitated by allegations of noncompliance with university policy. During the audit, petitioner received assurances that her position with CPRT was secure and, in June 1994, UCSF extended petitioner's contract as director of CPRT through June 1995. The State thereafter made its audit report available to the public in November 1994. *Ibid.*

Between July and November 1994, several articles about CPRT and the State audit appeared in San Francisco newspapers. Pet. App. 11a. Petitioner was concerned that adverse publicity from these articles would impact her efforts to obtain funding for SLS. Petitioner consulted with attorneys regarding leaks of information to the media regarding the State audit and the potential impact of adverse publicity on her professional reputation. *Ibid.*

Around the same time, petitioner consulted with a public relations firm regarding media response strategy and the preparation of press releases on her behalf. As a result of adverse publicity from the San Francisco news coverage of the State audit, petitioner put the incorporation and development of SLS on hold. Pet. App. 11a-12a.

2. On her federal income tax return for the 1994 tax year, petitioner deducted $87,300 on Schedule C for legal and professional fees. The Commissioner determined that these legal fees were deductible as a Schedule A miscellaneous itemized deduction instead of as a Schedule C deduction. Pet. App. 12a. Unlike Schedule C deductions, miscellaneous itemized deductions are reduced by two percent of adjusted gross

income and are also subject to the alternative minimum tax. 26 U.S.C. 56(b)(1)(A), 67(a).

3. Petitioner sought review of the Commissioner's determinations in the Tax Court. The Tax Court, however, agreed with the Commissioner that petitioner's legal fees were deductible as a Schedule A miscellaneous itemized deduction rather than as a Schedule C deduction. Pet. App. 6a-17a. The court noted that under 26 U.S.C. 162(a), ordinary and necessary legal expenses are deductible by an individual under Schedule C only when the expense is directly connected with, or proximately results from, a trade or business of the taxpayer. The court explained that (Pet. App. 13a-14a (emphasis added)):

> The deductibility of legal fees depends on the origin and character of the claim for which the expenses were incurred and whether the claim bears a sufficient nexus to the taxpayer's business or income-producing activities. *See United States v. Gilmore*, 372 U.S. 39, 83 S.Ct. 623, 9 L.Ed.2d 570 (1963). The Supreme Court stated that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test". *Id.* at 49. Thus, in order *for petitioner's legal fees to be deductible on her Schedule C, the origin of those legal services must have been rooted in SLS, her Schedule C business.*

The court then concluded that (*id.* at 14a (emphasis added)):

> *Based upon the record, the origin of petitioner's legal fees stems from her status as an employee of UCSF, and not from her Schedule C trade or business.* The event that prompted petitioner to

> hire attorneys in 1994 was the State audit of CPRT and the impending release of the audit report. While the record is replete with testimony from petitioner regarding the reasons she retained legal counsel, it is also replete with evidence that the event that prompted the legal services was the State audit. The billing detail from petitioner's attorneys indicates that the majority of their services concerned the impending release of the State's audit report and centered around the State audit of CPRT. The billing detail further indicates that the legal services performed were directly related to her employment with UCSF as director of CPRT. Indeed, the entire record indicates that petitioner hired attorneys in response to the State audit of CPRT.
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> * * * [W]e are bound by the rule established by *United States v. Gilmore*, *supra*, to look to the origin of the underlying claim and not the consequences. Petitioner's motives for hiring attorneys and exploring her legal options simply are not relevant. The origin of the claim herein was not in the trade or business of SLS but rather in petitioner's activities as an employee of UCSF.

Because the claim or event that prompted petitioner to incur legal fees did not arise in connection with her Schedule C trade or business, the court sustained the Commissioner's determination that the legal fees were deductible as unreimbursed employee miscellaneous business expenses on Schedule A. Pet. App. 13a-14a.

4. The court of appeals affirmed. Pet. App. 3a-5a. In a brief memorandum opinion, the court agreed with the Tax Court that the "origin of the claim" test established

by this Court in *Gilmore* is dispositive in this case. Under that test (*id.* at 5a),

> the issue before the Tax Court was not whether Dr. Braun sought legal advice because she was a University of California at San Francisco (UCSF) employee or because she was a concerned Schedule C business owner. Instead, the Tax Court was required to look to the event that prompted Dr. Braun to seek legal services. * * * If the origin of those legal services was rooted in Dr. Braun's Schedule C business, she could have deducted the legal services on her Schedule C.

The court of appeals upheld the Tax Court's finding that the origin of the claim in this case was not in the Schedule C trade or business but instead in petitioner's activities as an employee of UCSF. Pet. App. 5a. The court therefore affirmed the lower court's holding that petitioner's legal fees were deductible only as unreimbursed employee business expenses and not under Schedule C. *Ibid.* The court also noted that the summary disposition set forth in its brief memorandum opinion "is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3." *Id.* at 3a-4a n.*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As both of the courts below correctly concluded, the deductibility of the legal fees at issue in this case is squarely controlled by *United States* v. *Gilmore*, 372 U.S. 39 (1963). In *Gilmore*, the Court established the

rule that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test." *Id.* at 49. The Court has routinely followed *Gilmore* and applied its test in resolving similar subsequent cases. See, *e.g*, *Woodward* v. *Commissioner*, 397 U.S. 572, 578 (1970); *Commissioner* v. *Tellier*, 383 U.S. 687, 689 (1966).

Petitioner does not contend that the "origin of the claim" test was incorrectly applied in this case. Instead, she contends (Pet. i, 7-12) that the Court should overrule the *Gilmore* decision in which that test was adopted. There is, however, no conflict in the circuits nor any other reason to warrant reconsideration of the long settled principles established in the *Gilmore* case.

2. Petitioner errs in asserting (Pet. 12-21) that this case presents the question whether courts of appeals may establish rules of practice under which they designate certain decisions as non-precedential.

The brief memorandum opinion issued by the court of appeals in this case states that its disposition *in this case* "is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3." Pet. App. 3a-4a n.*. And, Ninth Circuit Rule 36-3 states that "[u]npublished dispositions and orders of this Court may not be cited to or by the courts of this circuit, except [that t]hey may be cited to this court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel." 9th Cir. R. 36-3(b)(i).

Petitioner argues (Pet. 12-21) that this rule is unconstitutional because it limits the precedential effect of the court's unpublished decisions. While courts have expressed differing views on this issue (compare

Anastasoff v. *United States*, 223 F.3d 898 (8th Cir. 2000), vacated as moot, 235 F.3d 1054, with *Hart* v. *Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001)), the question whether unpublished opinions have no precedential effect played no role in, and had no effect on, the outcome of this case. The court of appeals properly relied on the decision of this Court in *Gilmore* as the controlling precedent. It did not refuse to give precedential force to any decisions of Ninth Circuit panels or to decisions of any other court of appeals. The question whether the challenged Ninth Circuit rule is constitutional is therefore not presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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