No. 02-1537

In the Supreme Court of the United States

TOWNER LEEPER AND LAFONNE LEEPER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

JONATHAN S. COHEN
SARA ANN KETCHUM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-3361

QUESTION PRESENTED

Whether petitioners may recover damages against the United States under Section 7433 of the Internal Revenue Code when they failed to show that they sustained "actual, direct economic damages * * * as a proximate result of" (26 U.S.C. 7433(b)(1)) the unlawful acts of a revenue officer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-7a) is not published in the *Federal Reporter* but is *re-*

[1] Petitioners have misstated the caption of this case. This suit was brought against the United States, not against the Commissioner of Internal Revenue. Pet. App. 8a. While the statute on which petitioners rely authorizes "a civil action for damages against the United States" (26 U.S.C. 7433(a)), it authorizes no recovery against any other party.

printed in 51 Fed. Appx. 928. The opinion of the district court (Pet. App. 8a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. The petition for rehearing was denied on December 26, 2002. The petition for a writ of certiorari was filed on March 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Towner Leeper is an attorney and a certified public accountant. He had practiced tax law for forty years at the time of the incidents involved in this case. Petitioner LaFonne Leeper is his wife. Pet. App. 9a, 16a.

During 1996, petitioners owed past-due federal income taxes of approximately $39,000. Pet. App. 10a. After several unsuccessful efforts to obtain payment of those taxes from Mr. Leeper, an internal revenue officer levied upon and seized a judgment that Mr. Leeper had obtained against a former client. *Ibid.* After being served with the notice of seizure, Mr. Leeper filed an administrative appeal, which he subsequently abandoned. *Id.* at 11a.

After the administrative appeal was abandoned, the revenue officer caused a notice of the public auction of the judgment to be served personally on Mr. Leeper on August 7, 1996. That notice listed the date of the proposed sale as August 22, 1996, at 10:00 a.m., and set forth a required minimum bid of $15,000. Pet. App. 12a, 13a, 34a.[2] Mr. Leeper made no attempt to postpone or

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[2] Petitioners' contention (Pet. 9) that the minimum bid was based on the amount of tax due rather than on the value of the property is not supported by the record. Petitioners owed approxi-

cancel the proposed sale. *Id.* at 13a-14a. Mrs. Leeper was not separately served with the notice of sale or notice of minimum bid. *Id.* at 15a.

At the sale held on August 22, 1996, the judgment was purchased by Richard Aguilar of Cash Investments, Inc. for $40,022, more than twice the minimum bid amount. Pet. App. 12a; 6/16/99 Tr. 52, 76.[3] Petitioners lacked funds to bid at the sale and were not represented at the sale. Pet. App. 12a, 14a-15a. Although Mr. Leeper had prior notice of the sale, petitioners took no steps to invalidate the sale. *Id.* at 14a-15a. Approximately two months after the tax sale, Mr. Aguilar sold the judgment for $200,000, payable over the course of a year. 6/16/99 Tr. 76-79.

2. In 1998, petitioners filed this suit against the United States under 26 U.S.C. 7433 to recover damages that they allegedly sustained as a result of the failure of the revenue officer to make personal service on Mrs. Leeper. The district court held (i) that Mrs. Leeper was a co-owner of the judgment sold at the tax sale under Texas community property law and (ii) that the revenue officer's failure to give her separate notice of the sale violated the requirement of 26 U.S.C. 6335(b) that each "owner" of the property be given notice of sale. Pet. App. 15a. The court nonetheless held that

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mately $39,000 at the time the minimum bid price was established, not $15,000. Pet. App. 10a. The evidence established that the revenue officer based the value of the property on information she received from local investors and then made appropriate adjustments for uncertainty of collecting the judgment and for the forced nature of the sale. 6/16/99 Tr. 26-28; Pet. App. 34a.

[3] "R." references are to the numbered volumes and page numbers of the original record on appeal as repaginated by the Clerk of the district court. "Tr." references are to the two volumes of the transcript of the trial held on June 16-17, 1999.

petitioners were not entitled to damages because they were "unable to prove by a preponderance of the evidence that" this violation of Section 6335 "was a proximate cause of any damages." Pet. App. 15a-16a.

3. The court of appeals affirmed. Pet. App. 4a-7a. The court held that the district court was "not clearly erroneous" in finding that petitioners failed to establish any actual damages as a proximate result of the failure to serve Mrs. Leeper with notice of the sale. *Id.* at 6a.

In a petition for rehearing, petitioners argued for the first time that the failure to give separate notice of the tax sale to Mrs. Leeper violated her constitutional right to the due process of law. The court of appeals denied the rehearing petition without comment. Pet. App. 2a.

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. Section 7433(a) of the Internal Revenue Code, as in effect during the years relevant to this case, provides a cause of action for damages against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. 7433(a) (1994). In such an action, a taxpayer may recover "actual, direct economic damages sustained" as a proximate result of the employee's wrongful conduct up to a limit of $1,000,000. 26 U.S.C. 7433(b).[4]

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[4] 26 C.F.R. 301.7433-1(b)(1) defines "actual, direct economic damages" for this purpose as follows:

This Court has stated that the "correct measure of damages" for an economic loss is generally "the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no [wrongful] conduct." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972). See *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661-662 (1986). Applying this general principle to Section 7433(b), the measure of "economic damages sustained" in this case would be the excess of (i) what petitioners *would* have received at the tax sale if the revenue officer had given notice of that sale to Mrs. Leeper (as well as to Mr. Leeper) over (ii) what was actually received at that sale.[5]

Mrs. Leeper testified, however, that she left all decisions about tax matters to her husband and that she

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> Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer as the proximate result of the reckless or intentional actions of an officer or an employee of the Internal Revenue Service. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.

[5] Even if damages occurred, they would be recoverable under this statute only if they were the "proximate result" of the failure to give such notice to Mrs. Leeper, as well as to Mr. Leeper. 26 U.S.C. 7433(b)(1). The term "proximate result" is borrowed from the tort law concept of "proximate cause." A demonstration of proximate cause requires a showing that the conduct complained of "was a substantial contributing factor in bringing about the harm alleged." *Robertson* v. *Allied Signal, Inc.*, 914 F.2d 360, 366-367 (3d Cir. 1990). Thus, once the taxpayer has made a showing of a violation of the Code or regulations, she must next demonstrate (i) that she incurred damages that "but for" the violation would not have incurred and (ii) that the violation was "a substantial contributing factor" to those damages. See *Information Resources, Inc.* v. *United States*, 996 F.2d 780, 784-785 (5th Cir. 1993).

would not have taken any action even if she had received notice. 6/17/99 Tr. 184-185; Pet. App. 15a. She further testified that, even though she learned of the sale of the judgment a day or two after the sale, she took no steps to set aside the sale. 6/17/99 Tr. 184; Pet. App. 15a. The district court properly concluded from this testimony (and from the fact that Mr. Leeper also took no steps to prevent or set aside the sale) that Mrs. Leeper was "unable to prove by a preponderance of the evidence that [the revenue officer's] reckless disregard of her right to notice was a proximate cause of any damages." Pet. App. 15a-16a.[6]

2. Petitioners err in asserting (Pet. 6-7) that the decision in this case conflicts with decisions from other circuits. Indeed, in the only other appellate decision directly on point, the Third Circuit similarly held in *Kabakjian* v. *United States*, 267 F.3d 208, 213 (2001), that taxpayers who had not suffered damages from a violation of the notice provisions of 26 U.S.C. 6335 could not recover damages for that violation under 26 U.S.C. 7433. In *Kabakjian*, a revenue officer served taxpayers with notices of seizure and sale by certified mail, rather than in person as required by 26 U.S.C. 6335. 267 F.3d at 210-211. The Third Circuit held that taxpayers could not recover damages under 26 U.S.C. 7433 in that case, however, because "[t]hey did not show 'actual, direct economic damages sustained' as a 'proximate result' of the technical noncompliance with the statutory notice requirements." 267 F.3d at 214. The reasoning and

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[6] Petitioners' description of this reasoning as "pure speculation" (Pet. 9) is contradicted by their acknowledgment (Pet. 5-6) that the district court's conclusion was based on Mrs. Leeper's own testimony.

holding of *Kabakjian* thus directly supports the conclusion of the court of appeals in this case.

The cases on which petitioners rely for an asserted conflict among the circuits (Pet. 6) are inapposite. Although the taxpayers in *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991), and *Kulawy* v. *United States*, 917 F.2d 729 (2d Cir. 1990), sought a remedy for violations of the tax sale notice provisions of 26 U.S.C. 6335, those suits were brought under 28 U.S.C. 2410 (not under 26 U.S.C. 7433) and they sought only equitable relief, not damages. Section 2410 provides a waiver of sovereign immunity for taxpayers to challenge the procedural validity of a tax lien that the government claims on property to which taxpayers seek to quiet title. *Goodwin*, 935 F.2d at 1064; *Kulawy*, 917 F.2d at 733. In an action under Section 2410, the only relief available is "equitable relief affecting title," not damages. *Kulawy*, 917 F.2d at 736. In order to receive equitable relief under 28 U.S.C. 2410, a taxpayer need not show any actual prejudice from the procedural defect. *Goodwin*, 935 F.2d at 1065; *Kulawy*, 917 F.2d at 735. In contrast, before damages may be awarded under 26 U.S.C. 7433, the taxpayers must establish that they suffered "actual, direct economic damages * * * as a proximate result" of the government's action. 26 U.S.C. 7433(b)(1). The cases that afford equitable relief under Section 2410 are thus inapposite to the present case because they do not consider, and do not apply, the entirely different and specific textual restrictions on awards of damages under Section 7433 of the Internal Revenue Code.[7] See *Kabakjian*, 267 F.3d at 213.

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[7] In *Goodwin* and *Kulawy*, the courts of appeals held that, for the purpose of seeking equitable relief under 28 U.S.C. 2410, a

Petitioners also err in asserting that the holding that "there were no damages" (Pet. 10) in this case conflicts with the decision of the Sixth Circuit in *Verba* v. *Ohio Casualty Ins. Co.*, 851 F.2d 811 (1988). In *Verba*, an individual who purchased property at a federal tax sale brought suit to set aside a judgment lien on the property that was junior to the tax lien. The district court granted relief to the purchaser, but the court of appeals reversed. Applying the decision of this Court in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), the court of appeals held that the notice given to the junior lien holder was constitutionally inadequate and that the tax sale therefore did not extinguish the junior lien. 851 F.2d at 816. The issue addressed in *Verba* did not involve, and the court in that case did not address, the parameters of a cause of action for damages under 26 U.S.C. 7433. That decision is thus plainly inapposite to this case.[8]

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merely technical violation of the notice provisions of 26 U.S.C. 6335 is a sufficient procedural irregularity to permit an equitable challenge to the seizure and sale of a taxpayers' property. *Goodwin*, 935 F.2d at 1065; *Kulawy*, 917 F.2d at 734, 736. In the present case, the district court similarly concluded that a technical failure to comply with the notice requirements of Section 6335—serving only one of the two affected spouses–was sufficient to establish a violation that could permit a claim for damages to proceed. Pet. App. 14a-15a. That holding was impliedly accepted without comment by the court of appeals in this case (*id.* at 5a-6a), and plainly does not conflict with *Goodwin* and *Kulawy*, as petitioners erroneously contend (Pet. 6-7).

[8] Petitioners seek to advance a new claim (Pet. 10) that the failure to notify Mrs. Leeper of the tax sale violated her right to due process. Petitioners first sought to raise this claim in their petition for rehearing, which the court of appeals declined to address. See page 4, *supra*. That claim is therefore not properly before the Court, for this Court "ordinarily 'do[es] not decide in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
JONATHAN S. COHEN
SARA ANN KETCHUM
Attorneys

JUNE 2003

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first instance issues not decided below.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (quoting *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)).