No. 10-469

In the Supreme Court of the United States

JOHN K. BALDWIN, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE NORTHERN MARIANA
ISLANDS, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to issue a writ of mandamus requiring the district court to order a jury trial, where petitioner inadvertently failed to make a timely jury demand.

2. Whether, in denying petitioner's request for mandamus relief, the court of appeals erred in declining to overturn the district court's conclusion that petitioner's "red-lined" draft of a case management statement, attached to an e-mail to government counsel, did not constitute a written demand for a jury trial that had been properly served on the government.

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OPINIONS BELOW

The order of the court of appeals denying mandamus (Pet. App. 1) is unreported. The opinion of the district court (Pet. App. 2-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2010. A petition for rehearing, which the court construed as a motion for reconsideration, was denied on July 8, 2010 (Pet. App. 7). The petition for a writ of certiorari was filed on October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 27, 2009, petitioner filed a federal income-tax refund suit in the United States District Court for the Northern Mariana Islands. Petitioner's complaint did not contain a jury demand. The government filed its answer on October 23, 2009. Pet. App. 43-44.[1]

As required by Federal Rule of Civil Procedure 26(f), the parties met and conferred by telephone on November 4, 2009. Pet. App. 3. The issue of a jury trial did not arise during the conference. *Ibid.* The following day, government counsel e-mailed a proposed joint case-management plan to petitioner's attorney. The government's proposed plan stated that the case would be tried to the court, without a jury. *Ibid.*

Four days later, on November 9, 2009, petitioner e-mailed to the government a revised version of the proposed joint plan. Pet. App. 3. In the document petitioner e-mailed to the government, the government's statement that the case would be tried to the court had been crossed out and replaced with the statement "This is a jury case." *Id.* at 14. Later in the day on November 9, the parties conferred by telephone to attempt to resolve the differences between their proposed plans. *Id.* at 3.

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[1] Petitioner is a sophisticated businessman who has set up layers of business entities and has engaged in tax-shelter transactions. 09-CV-00033 Docket Entry No. 28, at 6 n.3 (Dec. 31, 2009) (Dkt. No. 28). The government anticipates that the issues to be tried will include, *inter alia*, whether complicated, high-dollar deals (between potentially related entities) were in fact real and created actual debts that became worthless; whether stock that may not have been publicly traded also became worthless and, if so, in what year; and whether petitioner, rather than an affiliated person or entity, paid for various expenses and would be entitled to certain deductions in the year claimed. *Ibid.*

Because they were unable to reach an agreement, no joint plan was filed. *Ibid.*

Instead, on November 11, 2009, the parties filed separate proposed case-management plans. Pet. App. 3. In its plan, the government stated that petitioner had not timely made a jury demand. Dkt. No. 15, at 4 (Nov. 11, 2009). Petitioner, by contrast, asserted in his proposed plan that

> [petitioner] is entitled to a jury trial under 28 USC § 2402, which grants a right to jury trial, upon request, in any action against the United States under 28 USC § 1346(a)(1) to recover wrongfully assessed and/or collected taxes, interest and/or penalties. If the United States disputes that this request is timely, [petitioner] will move the Court to declare it so, or, in the alternative, move to dismiss without prejudice under Fed. R. Civ. P. Rule 41(a) and refile the Complaint.

Dkt. No. 17, at 3-4 (Nov. 11, 2009).

On the same day, petitioner filed a pleading entitled "Demand for Jury Trial" (Dkt. No. 16 (Nov. 11, 2009)), which stated that petitioner "hereby demands a jury trial with respect to all issues so triable." Three days later, petitioner filed a document styled a "certificate of service" stating that the "annexed Draft Proposed Case Management Order containing a Notice of Jury Demand was served on the United States by [e-mail] * * * on Monday, [November] 9, 2009." Pet. App. 18. Attached to petitioner's "certificate of service" was the e-mail he had sent the government on November 9, which contained the "red-lined" version of the government's proposed joint case management plan. *Id.* at 21-30.

Rule 38(b), as in effect prior to December 1, 2009, provided:

> On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d).

Rule 39(b) then, as now, provided: "Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded."

The government moved to strike petitioner's November 11 jury demand as untimely, on the ground that it had been served more than ten days (excluding Saturdays, Sundays and holidays, per Rule 6(a), plus three days for service, per Rule 6(d)) after the filing (on October 23, 2009) of the government's answer. Dkt. No. 22 (Dec. 19, 2009).[2] In response, petitioner contended that the red-line changes in the November 9 e-mail constituted a timely jury demand because the document containing those changes had been served on the government within ten days of the government's answer and had been filed with the court on November 14. Dkt. No. 24 (Dec. 23, 2009). Petitioner's counsel also submitted an affidavit (Pet. App. 33-37) stating that a jury demand had been included in a draft of the complaint, but that the demand had been "incorrectly deleted" from the complaint and was not included on the civil cover sheet. Petitioner also argued that if the district court consid-

[2] The last day for serving a jury demand in this case was November 9, 2009.

ered the November 11 document entitled "Demand for Jury Trial" to be the jury demand, the court should excuse the late filing under Rule 39(b) or, alternatively, should find that the failure was "excusable neglect" under Rule 6(b). Dkt. No. 24, at 6-9.

The district court granted the government's motion to strike the jury demand. Pet. App. 2-6. The court found that the "draft case management statement exchanged by e-mail between the parties" did not "constitute[ ] a 'written demand' and 'filing' as required by Federal Rule of Civil Procedure 38(b)." *Id.* at 2. The court explained:

> To elevate an informal e-mail exchange of draft case management plans to the status of "service" does not comport with the technical sense with which that word is used in the Rule. The working drafts exchanged by counsel by e-mail before the separate proposed case management plans were actually filed do not qualify as documents which could be "filed" with the court. Finally, it is undisputed that [petitioner's] actual filing was not accomplished until after the 10 day limit had elapsed.

Id. at 5.

The district court declined to grant petitioner relief under Rule 39(b). Pet. App. 5-6. The court concluded, based on the decision of the court of appeals in *Pacific Fisheries Corp.* v. *H.I.H. Casualty & General Insurance, Ltd.*, 239 F.3d 1000 (9th Cir.), cert. denied, 534 U.S. 944 (2001), that its discretion to grant relief under Rule 39(b) should not be exercised if the failure to timely request a jury trial was due to "oversight or inadvertence." Pet. App. 5. Because the court determined that petitioner's failure to include the jury demand was

due to "oversight or inadvertence," it found that it could "not exercise its discretion to order a jury trial despite the failure to timely demand one." *Id.* at 5-6. The court also stated that it "is to the benefit of the parties and the court's administration of its docket when the federal rules are fully observed." *Id.* at 6.

Petitioner filed a petition in the court of appeals for a writ of mandamus, which the court denied in a summary order. Pet. App. 1. The court of appeals subsequently denied reconsideration and reconsideration en banc. *Id.* at 7.

ARGUMENT

Petitioner identifies no sound reason for concluding either that the court of appeals erred in denying mandamus relief, or that such relief would have been granted if a similar request had been made to another court of appeals. Further review is not warranted.

1. Petitioner's invocation (Pet. 9-10, 28) of the "hallowed" constitutional right to trial by jury is misplaced in the circumstances of this case, for there is no Seventh Amendment right to jury trial in a case brought against the United States. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Petitioner's right to a jury trial is purely statutory, see 28 U.S.C. 1346(a)(1) and 2402, and has no constitutional dimension. Petitioner also contends (Pet. 16) that he paid $5 million in taxes to litigate his case before a jury in the district court, rather than choose a bench trial in the Tax Court. As this Court observed in *Dobson* v. *Commissioner*, 320 U.S. 489, 495 (1943), however, jury trials are frequently waived in tax refund cases brought in district court.

2. As the court of appeals correctly concluded, "[p]etitioner has not demonstrated that this case war-

rants * * * the extraordinary remedy of mandamus. *See Bauman* v. *United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." Pet. App. 1. "[T]hree conditions must be satisfied" before an appellate court may issue a writ of mandamus. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-381 (citation and internal quotation marks omitted). Second, "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 381 (brackets and internal quotation marks omitted). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Ibid*; see *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947) (stating that the writ of mandamus is a "drastic and extraordinary remed[y]" that is "reserved for really extraordinary causes"). Petitioner cannot satisfy those requirements.

As a threshold matter, the question whether the district court properly granted the government's motion to strike petitioner's jury demand can be resolved on direct appeal, rendering the extraordinary remedy of mandamus unnecessary. In fact, all but one of the court of appeals decisions on which petitioner relies were issued on direct appeals *after* the cases had proceeded to judgment in the district courts. See *Andrews* v. *Columbia Gas Transmission Corp.*, 544 F.3d 618, 628, 632-633 (6th Cir. 2008) (affirming the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after a bench trial); *Pacific Fisheries Corp.* v. *HIH*

Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002-1003 (9th Cir.) (same), cert. denied, 534 U.S. 944 (2001); *SEC* v. *Infinity Group Co.*, 212 F.3d 180, 186, 195-196 (3d Cir. 2000) (same), cert. denied, 532 U.S. 905 (2001); *BCCI Holdings (Luxembourg), S.A.* v. *Khalil*, 214 F.3d 168, 172-173 (D.C. Cir.) (same), cert. denied, 531 U.S. 958 (2000); *Farias* v. *Bexar County Bd. of Trs. for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 873 (5th Cir.) (same), cert. denied, 502 U.S. 866 (1991); *Parrott* v. *Wilson*, 707 F.2d 1262, 1267-1268 (11th Cir.) (same), cert. denied, 464 U.S. 936 (1983); *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.) (same), cert. denied, 445 U.S. 945 (1980); *Malbon* v. *Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940-941 (4th Cir. 1980) (same); see also *Members* v. *Paige*, 140 F.3d 699, 703-704 (7th Cir. 1998) (reversing the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after the district court granted summary judgment in favor of the defendants); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 199-200 (1st Cir. 1987) (affirming on direct appeal the district court's decision to grant the plaintiff's belated request for a jury trial); *Merritt* v. *Faulkner*, 697 F.2d 761, 766-767 (7th Cir.) (*Merritt*) (reversing the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after a bench trial), cert. denied, 464 U.S. 986 (1983); *United States* v. *191.07 Acres of Land*, 482 F.3d 1132, 1135-1136 (9th Cir. 2007) (holding that a party may raise the question of his right to a jury trial on direct appeal even if the party stipulated to a bench trial after his request for a jury trial was denied).[3]

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[3] *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408 (10th Cir. 1992), is the only court of appeals case cited by petitioner that did not involve a

Thus, if the district court in this case ultimately rules in the government's favor after a bench trial, petitioner can raise as a claim of error on appeal the contention that he was improperly denied his right to trial by jury. And if the bench trial culminates in a judgment favorable to petitioner, the question whether the district court properly struck petitioner's jury demand will be of no continuing practical importance. Petitioner cites *no* case in which a court of appeals has granted a petition for mandamus relief on the ground that the district court abused its discretion in failing to grant an untimely request for a jury trial.[4]

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direct appeal. In *Nissan*, however, the Tenth Circuit denied the defendant's petition for mandamus relief on the ground that the defendant's "failure to make a timely jury demand was [not] caused by anything other than mere inadvertence." *Id.* at 409.

[4] This Court's decisions granting mandamus relief in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962) (*Dairy Queen*), and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) (*Beacon Theatres*), are not to the contrary. Neither *Dairy Queen* nor *Beacon Theatres* involved an untimely request for a jury trial. Instead, the district courts in both cases decided to try the plaintiffs' equitable claims first and their legal claims second, an approach that would have resulted in the plaintiffs' loss of their right to jury trials on factual issues common to both their equitable and legal claims. In reversing those decisions, this Court held that "only under the most imperative circumstances * * * can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Dairy Queen*, 369 U.S. at 472-473 (quoting *Beacon Theatres*, 359 U.S. at 510-511). The Court therefore found that mandamus relief was warranted. *Beacon Theatres*, 359 U.S. at 511; *Dairy Queen*, 369 U.S. at 479-480. In this case, there is no danger that petitioner's right to a jury trial will be lost if he is required to raise the issue of the district court's denial of his jury demand on direct appeal. If the court of appeals agrees with petitioner that his request was improperly denied, it can reverse the district court's judgment and remand for a new trial, as the Seventh Circuit did in *Merritt*, 697 F.2d at 768.

The denial by the court of appeals of petitioner's request for mandamus relief was proper for the additional reason that petitioner failed to establish that his right to the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Petitioner contends that a "widespread circuit conflict" exists on the issue whether a jury demand that is untimely due to oversight or inadvertence may be excused under Rule 39 (Pet. 7-10); that the Ninth Circuit applies a uniquely strict standard (Pet. 12-14); and that his untimely request for a jury trial would have been granted under "*any* of th[e] standards" used by the eleven other courts of appeals (Pet. 4, 15-23). None of those contentions has merit.

No circuit conflict exists on the question whether a district court *may* deny an untimely jury demand that is attributable to the moving party's oversight or inadvertence. To be sure, the Ninth Circuit has gone further than other courts of appeals in explicitly holding that "[a]n untimely request for a jury trial *must* be denied unless some cause beyond mere inadvertence is shown." *Pacific Fisheries*, 239 F.3d at 1002 (emphasis added). Other circuits, however, have uniformly concluded that a district court does not abuse its discretion when it denies a belated request for a jury trial that resulted from the requesting party's oversight or inadvertence. The Eleventh Circuit, for example, has held that "when reviewing a lower court's denial of a belated jury request * * * considerable weight [is given] to the movant's excuse for failing to make a timely jury request. If that failure is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion." *Parrott*, 707 F.2d at 1267 (citations omitted). The Sixth Circuit has similarly stated that "a district court will not abuse its discretion in de-

nying a Rule 39(b) motion if the only justification offered for failure to demand a jury trial is mere inadvertence." *Andrews*, 544 F.3d at 632 (citation omitted). The other circuits apply a similar approach. See *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 356-357 (2d Cir. 2007) ("[I]nadvertence in failing to make a timely jury demand does not warrant a favorable exercise of discretion under Rule 39(b)."") (citations and quotation marks omitted); *Olympia Express, Inc.* v. *Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 352 (7th Cir. 2007) ("Rule 39(b) allows the district court to grant an untimely demand for a jury, but only * * * if a good reason for the belated demand is shown.") (citations omitted); *Infinity Group*, 212 F.3d at 195 (noting that, although it is not a "mechanical rule," the Third Circuit "generally den[ies] relief when the only basis for such relief advanced by the requesting party is the inadvertence or oversight of counsel") (citation and quotation marks omitted); *Farias*, 925 F.2d at 873 (under Fifth Circuit law, "[i]t is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . when the failure to make a timely jury demand results from mere inadvertence on the part of the moving party") (citations and quotation marks omitted); *Littlefield*, 614 F.2d at 585 (finding that the district court did not abuse its discretion in denying a Rule 39(b) motion where the movant "offer[ed] no justification for the failure to make an appropriate demand other than inexperience"); *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) ("[W]e hold today that it would not be an abuse of discretion to deny relief pursuant to Rule 39(b) when the failure to make a timely jury demand results from nothing more than the mere inadvertence of the moving party.") (citations omitted); *BCCI Holdings*, 214 F.3d at

172 (holding that "mere inadvertence" is a "very weak" justification for a failure to make a timely demand for a jury trial); *General Tire & Rubber Co.* v. *Watkins*, 331 F.2d 192, 197 (4th Cir.) (holding that a district court should grant an untimely jury request only under "exceptional circumstances"), cert. denied, 377 U.S. 952 (1964).

Thus, notwithstanding the varying articulations by the courts of appeals of how the discretion of a district court under Rule 39(b) should be exercised and reviewed, virtually every court of appeals either refuses to excuse inadvertence of counsel under Rule 39(b), or declines to reverse a district court's determination refusing to do so. In this case, the district court concluded that petitioner's failure to make a timely jury demand was "accurately characterized as 'oversight or inadvertence.'" Pet. App. 6. Although the court stated that "existing Ninth Circuit precedent" precluded it from excusing petitioner's untimeliness under Rule 39(b), see *ibid.*, the district court did not suggest that it would have granted such relief if it had possessed the discretion to do so. To the contrary, in denying petitioner's belated request for a jury trial, the court observed that "it is to the benefit of the parties and the court's administration of its docket when the federal rules are fully observed." *Ibid.* As the cases cited above make clear, it is unlikely that any court of appeals would have concluded that the district court abused its discretion in relying on these reasons to deny petitioner's untimely request. Those decisions indicate both that petitioner had no "clear and indisputable" right to mandamus relief, *Cheney*, 542 U.S. at 380-381, and that the denial of

relief here by the court of appeals did not create a circuit conflict warranting this Court's review.[5]

3. Petitioner also argues that the Ninth Circuit's refusal to grant mandamus was "patently erroneous" (Pet. 24) because petitioner's November 9 e-mail attaching a red-lined draft case management plan constituted a written jury demand that was timely filed and served in compliance with Rule 38(b). That argument lacks merit and does not warrant this Court's review.

As the district court correctly explained, "[t]o elevate an informal e-mail exchange of draft case management plans to the status of 'service' does not comport with the technical sense with which that word is used in the Rule." Pet. App. 5.[6] At the very least, petitioner's argument that timely service occurred here is not so obviously correct as to give rise to a "clear and indisputable" right to mandamus relief, and petitioner can raise the issue again on direct appeal if the district court rules in the government's favor after a bench trial. In any event, petitioner's fact-bound contention that the November 9 e-mail constituted "servi[ce]" of a jury demand within

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[5] It is also unlikely that petitioner was entitled to relief under Rule 6(b), even if the rule applies here. As this Court stated in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), "inadvertence * * * do[es] not usually constitute 'excusable' neglect" under Rule 6. *Id.* at 392.

[6] The district court also suggested (Pet. App. 5, 6) that petitioner's failure to *file* the jury demand within the relevant ten-day period constituted an additional breach of Rule 38(b). As petitioner explains (Pet. 24-25), and as the government acknowledged below (Dkt. No. 28, at 4 n. 2), Rules 38(b)(2) and 5(d) require only that filing must occur within a reasonable time after service. That point is of no consequence, however, because (as the district court correctly determined) petitioner's jury demand was not served on the government within the requisite ten-day period.

the meaning of Rule 38(b) raises no legal issue of broad significance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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