No. 01-1584

In the Supreme Court of the United States

NATIONSBANK OF TEXAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

TERESA E. MCLAUGHLIN
ELLEN PAGE DELSOLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 13208 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66, 107 Stat. 469) which reinstated federal estate and gift tax rates of 53 and 55 percent, is constitutional.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 01-1584

NATIONSBANK OF TEXAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-17) is reported at 269 F.3d 1332. The opinion of the Court of Federal Claims (Pet. App. 19-35) is reported at 44 Fed. Cl. 661.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2001. The petition for rehearing was denied on January 29, 2002 (Pet. App. 36-37). The petition for a writ of certiorari was filed on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Ellen Clayton Garwood died on March 20, 1993. The executor of her estate—petitioner NationsBank of Texas—challenges the constitutionality of the legislation enacted in August 1993 that reinstated the federal estate tax rates of 53 and 55 percent for the estates of decedents dying on or after January 1, 1993.

a. Under the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 402, 95 Stat. 300, the highest federal estate and gift tax rates were to be reduced from 70 percent to 50 percent over a four-year period. As a consequence, the highest estate tax rates in effect in 1984 were to be 53 and 55 percent, and those rates were to fall to 50 percent after that year. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 21, 98 Stat. 506, delayed this decrease, however, by extending the 1984 top rates (50 and 53 percent) until 1988. The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10401(a), 101 Stat. 1330-430, then again extended these top rates until 1993. Pet. App. 3-4.

In late 1992, Congress passed a bill that would have again deferred the decrease in the top estate and gift tax rates until 1998. See H.R. Conf. Rep. No. 1034, 102d Cong., 2d Sess. 178-179 (1992). That bill was not presented to the President until a time within ten days of adjournment, however, and became subject to a pocket veto when the President thereafter declined to sign it. As a result, the top estate tax rates dropped to 50 percent on January 1, 1993. Pet. App. 4.

b. When decedent died in March 1993, the top estate tax rate was thus 50 percent. Even before decedent died, however, legislation was proposed in February 1993 to restore the top former estate tax rates of 53 and 55 percent. See *National Taxpayers Union, Inc.* v.

United States, 68 F.3d 1428, 1430 n.1 (D.C. Cir. 1995). That legislation was enacted in August 1993 and was signed into law as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA), Pub. L. No. 103-66, § 13208, 107 Stat. 469. Section 13208 of that Act restored the top estate tax rates of 53 and 55 percent previously in force and made those rates effective with respect to the estates of all decedents dying on or after January 1, 1993. The estate represented by petitioner is thus subject to these tax rates. Pet. App. 4.

2. Petitioner filed a timely federal estate tax return and paid the estate taxes due on decedent's gross estate at the tax rates required by the OBRA. Petitioner thereafter filed an administrative claim for refund, contending that the reinstatement of the preexisting top rates under the OBRA effected an unconstitutional retroactive increase in taxes. Petitioner claimed a refund of $1,320,190, which was the amount by which the taxes paid at the 53 and 55 percent top rates exceeded the tax due if the 50 percent top rate applied instead. Pet. App. 20-22, 45-62.

3. The administrative refund claim was not granted, and petitioner brought this suit for refund in the Court of Federal Claims. Petitioner asserted that the retroactive rates imposed by the OBRA violated the separation of powers doctrine, the Apportionment Clause, the Ex Post Facto Clause, the Takings Clause, the Due Process Clause and the equal protection component of the Fifth Amendment. Pet. App. 22-34 The Court of Federal Claims, however, upheld the Act against all constitutional challenges. *Id.* at 19-35.

The court first rejected petitioner's argument that allowing the rate change to have retroactive effect would "undo President Bush's pocket veto in violation of the separation of powers doctrine." Pet. App. 23.

The court noted that there is no constitutional prohibition against the reintroduction and enactment of legislation that had been previously defeated or pocket vetoed. *Id.* at 24. The court also disagreed with petitioner's contention that the retroactive rate increase violated the Apportionment Clause, noting that the estate tax is a transfer tax, not a direct tax that requires apportionment. *Id.* at 26-27. The court further concluded that there was no violation of the Due Process Clause because the period of retroactivity was modest and the rate increase was neither arbitrary nor irrational. *Id.* at 28. The court rejected petitioner's contention that the rate change infringed upon the equal protection guarantee, since no "other group" received treatment more advantageous than decedent's estate. *Id.* at 29. And, given the modest period of retroactivity, the court concluded that the rate change was not "so arbitrary and capricious as to amount to confiscation" implicating the Takings Clause. *Id.* at 31. Finally, the court rejected petitioner's contention that the application of the rate increase to decedent's estate violated the Ex Post Facto Clause, for it is well established that the prohibition of that Clause applies only to criminal laws. *Id.* at 32.

4. a. The court of appeals affirmed. Pet. App. 1-13. The court first rejected petitioner's argument that the enactment of a retroactive rate change after a pocket veto violates the separation of powers doctrine. It noted that the statute "independently met the constitutional requirements for enactment, namely passage by both houses of Congress and approval by the President," and that nothing in the Constitution prohibits the enactment of legislation that has the same subject matter as legislation previously defeated or rejected by a pocket veto. *Id.* at 6. The court also rejected

petitioner's Apportionment Clause challenge, noting that the estate tax is not a direct tax, but a tax on the transfer of property at death, and that the rate increase, "even applied retroactively, does not change the character of the estate tax from a non-direct tax to a direct tax." *Id.* at 7. The court also held that the Ex Post Facto Clause is not implicated in this case because that prohibition "applies solely to criminal enactments." *Ibid.* (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)). The court emphasized that petitioner timely paid the tax, and no "criminal penalty" is at issue in this case. *Id.* at 8. The court further concluded that the statute passes muster under the Due Process Clause because it advances the rational purpose of "treating similarly situated taxpayers similarly" by imposing "a uniform fifty-five percent rate on estate tax transfers regardless of the particular month in which they occur." *Id.* at 11. The court noted that the eight-month period of retroactivity is "modest" and that Congress acted "promptly [to fill] the temporal gap" in rates. *Ibid.* Finally, the court rejected petitioner's contention that the statute violates the equal protection guarantee. The statute "did not discriminate against any narrow class of taxpayers because it did not treat any 'other group' more advantageously." *Id.* at 12. Instead, it "promoted tax equity" (*ibid.*) by preventing decedents who died during the gap period from enjoying "more advantageous treatment" (*id.* at 13) than those dying before or afterwards.

b. Judge Plager dissented. Pet. App. 13-17. He argued that the retroactive estate tax rate increase "is simply unfair" and "should be unconstitutional." *Id.* at 13. Addressing only the Ex Post Facto Clause, Judge Plager urged that the courts should "assign *Calder v.*

Bull and its progeny to the historic dustbin where they belong." *Id.* at 16.

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. This Court has emphasized that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Recognizing that a degree of retroactivity often serves a rational legislative purpose, this Court has repeatedly rejected constitutional challenges to the retroactivity of tax legislation. *E.g.*, *United States* v. *Carlton*, 512 U.S. 26 (1994) (upholding limitation on estate tax deduction for sales of employer securities to employee stock ownership plans to estates of decedents that had owned the stock in question at death, as applied to estate that purchased and sold stock before enactment); *United States* v. *Hemme*, 476 U.S. 558 (1986) (upholding transition rule requiring reduction of unified credit by 20 percent of exemptions allowed under prior law); *United States* v. *Darusmont*, 449 U.S. 292 (1981) (per curiam) (upholding retroactive decrease in minimum tax exemption, as applied to taxpayer who would have incurred no tax liability on his capital gain under law in effect at time of sale); *Welch* v. *Henry*, 305 U.S. 134 (1938) (upholding 1935 Wisconsin statute repealing income tax exemption for dividends of corporations doing majority of business in that State, as applied to dividends received in 1933); *Milliken* v. *United States*, 283 U.S. 15, 24-25 (1931) (upholding increase in estate

tax rate for gifts in contemplation of death, as applied to preenactment gift).

Indeed, as the Court has noted, retroactivity is a common feature of tax legislation. "Congress 'almost without exception' has given general revenue statutes effective dates prior to the dates of actual enactment." *United States* v. *Carlton*, 512 U.S. at 32-33 (quoting *United States* v. *Darusmont*, 449 U.S. at 296). Such retroactive effect, "confined to short and limited periods required by the practicalities of producing national legislation," is a "customary congressional practice." *United States* v. *Carlton*, 512 U.S. at 33 (quoting *United States* v. *Darusmont*, 449 U.S. at 296-297).

Contrary to petitioner's contention (Pet. 18), there was nothing arbitrary or irrational about the decision of Congress in August 1993 to reinstate—for all estates of decedents who died *during* 1993—the top estate tax rates that prevailed *prior* to 1993. A retroactive tax statute does not violate the Due Process Clause when it has "a rational legislative purpose" and the period of retroactivity is "modest." *United States* v. *Carlton*, 512 U.S. at 30-31, 32-33. The rate reinstatement in 1993 was intended "[t]o raise revenue, to address the Federal deficit, to improve tax equity, and to make the tax system more progressive." H.R. Rep. No. 111, 103d Cong., 1st Sess. 644 (1993). These are unquestionably legitimate legislative goals. And, the statute's eight-month period of retroactivity is shorter than the fourteen-month period upheld as "modest" in *Carlton*. 512 U.S. at 32-33.

The due process claim raised by petitioner in this case has been rejected in numerous other decisions that have upheld the limited retroactive feature of this legislation. See *Quarty* v. *United States*, 170 F.3d 961, 965-969 (9th Cir. 1999); *Kane* v. *United States*, 942 F.

Supp. 233, 234 (E.D. Pa. 1996), aff'd by unpublished order, 118 F.3d 1576 (3d Cir. 1997) (Table); see also *National Taxpayers Union, Inc.* v. *United States*, 68 F.3d at 1438. There are no conflicting decisions. Review by this Court is therefore not warranted.

2. a. Since this tax legislation is consistent with due process, there is no basis for petitioner's contention (Pet. 17) that the statute violates the Takings Clause of the Constitution. See *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641 (1993). No "taking" is effected when Congress exercises its taxing power. *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 24 (1916). The rate restoration effected by this statute was reasonably designed to enhance tax equity, by subjecting the estates of decedents dying during 1993 to tax at the same rates applicable to the estates of all other decedents dying since 1984. A lawful tax does not constitute a "taking" without just compensation. *Quarty* v. *United States*, 170 F.3d at 969-970; *Kane* v. *United States*, 942 F. Supp. at 234.

b. Contrary to petitioner's contention (Pet. 23), the equal protection guarantee is not implicated by Section 13208. Equal protection is not denied unless the tax "in fact bears unequally on persons or property of the same class." *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 190 (1945). Section 13208 has the obvious purpose of ensuring equal—rather than disparate—treatment of similarly situated taxpayers. It imposes on the estates of persons who died between January and August 1993 the same estate tax rates that apply to

the estates of persons who died before 1993 and after August 1993.[1]

c. Petitioner also errs in contending (Pet. 5) that Section 13208 violates the Apportionment Clause. This Court has repeatedly held that the federal estate tax is a tax on specific transfers of property, not a direct tax on individuals that requires apportionment. See *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 355 (1988); *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945); *Tyler* v. *United States*, 281 U.S. 497, 502 (1930). In *Milliken* v. *United States*, 283 U.S. at 24, the Court rejected the precise argument made by petitioner in this case—that a retroactive increase in the rate converts an otherwise indirect tax into a direct tax. The challenge to Section 13208 under the Apportionment Clause has therefore correctly been rejected by the several courts that have addressed it. See *Quarty* v. *United States*, 170 F.3d at 970-971; *Kane* v. *United States*, 942 F. Supp. at 234; see also *National Taxpayers Union, Inc.* v. *United States*, 68 F.3d at 1438.

d. Petitioner further errs in claiming (Pet. 8) that this statute should be struck down as an unconstitutional attempt to circumvent the pocket veto of H.R. 11, 102d Cong., 1st Sess. (1991). Nothing in the Constitution prevents Congress from reenacting vetoed legislation with the same content in a new bill. *The Pocket Veto Case*, 279 U.S. 655, 679 n.6 (1929); *Kennedy*

---

[1] Even a tax classification that effects different treatment of similarly-situated taxpayers must be upheld if it bears a rational relationship to a legitimate governmental interest. *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983). The limited retroactivity of Section 13208 has the rational purposes of increasing revenue to reduce the deficit and promoting tax equity. It therefore plainly meets this standard. *Quarty* v. *United States*, 170 F.3d at 967.

v. *Sampson*, 511 F.2d 430, 436 n.17 (D.C. Cir. 1974). The OBRA was not a resuscitation of H.R. 11; it was an entirely new bill (H.R. 2264, 103d Cong., 1st Sess. (1993)) that was introduced during the first session of the new 103rd Congress. The OBRA was passed by both Houses of Congress and signed by the President in 1993. It thus independently satisfied the constitutional requirements for the enactment of legislation. Pet. App. 6.

e. Finally, there is no merit to petitioner's contention (Pet. 9-16) that Section 13208 violates the constitutional prohibition against ex post facto laws. In the two centuries since the Court first addressed the Ex Post Facto Clause in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), the Court has consistently held that this Clause applies only to criminal enactments and has no bearing on retroactive civil legislation. See *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (1990); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); *Bankers' Trust Co.* v. *Blodgett*, 260 U.S. 647 (1923); *Johannessen* v. *United States*, 225 U.S. 227, 242 (1912). There is no occasion for reexamining that rule in this case, which is a civil action seeking a tax refund. While tax laws, like many other civil laws, are subject to enforcement by criminal sanctions, this case involves only a civil remedy; it is not a criminal case.[2] As noted by the majority below, "[i]f the entire tax code were criminal, every retroactive tax law would become an unconstitutional *ex post facto* enactment," a

---

[2] Petitioner also ignores that willfulness is required for criminal violations involving the filing of returns and payment of tax. 26 U.S.C. 7201, 7203, 7206(1), 7207. In this case, petitioner paid the tax and sued for a refund. No criminal sanctions of any type are relevant to this civil action.

result that would plainly be at odds with the repeated recognition by this Court of the authority of Congress to enact retroactive tax legislation. Pet. App. 8; see, *e.g.*, *United States* v. *Carlton*, 512 U.S. at 30.

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

TERESA E. MCLAUGHLIN
ELLEN PAGE DELSOLE
Attorneys

JUNE 2002