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IN THE  
Supreme Court of the United States

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CURR-SPEC PARTNERS, L.P., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

This Court has long required that all federal courts recognize the inherent limited nature of their own subject matter jurisdiction. To further that end, the Court has required the lower courts, including the Tax Court, to constantly examine their jurisdiction and, whenever jurisdiction is questioned, to presume its absence and require the party invoking it to carry the burden of proof.

In the instant case, the Tax Court ignored the narrow jurisdictional constraints on its authority to adjudicate matters relating to the return filed by a partnership. In particular, Congress has directed that the Tax Court's authority to hear and resolve matters concerning a partnership is limited to the partnership and its return. The Tax Court, however, ignored this restriction and looked to the tax return of the individual partners in order to avoid the limitations bar that would otherwise apply to the proceeding against the partnership. In affirming, the Fifth Circuit sharpened and expanded its conflict among the circuits.

When a Federal court sidesteps its obligations in the face of a challenge to its jurisdiction, or by judicial interpretation expands its subject matter jurisdiction, this Court obligates the Court of Appeals to enforce this Court's rules for limiting jurisdiction. This occurs either by making its own determination or by mandating that the court below address the challenge. The Tax Court below (a) failed to determine whether it had the subject matter jurisdiction to decide a matter concerning a statute of limitation, (b) failed to impose the burden of proof on the party seeking the exercise of jurisdiction in its favor on that matter, and (c) failed to determine the

effect of jurisdiction in its judicial interpretation of a statute of limitation.

Two questions are presented:

1. Whether the Fifth Circuit erred in affirming the Tax Court's interpretation of a statute of limitation resulting in judicial expansion of its jurisdiction beyond the scope set by Congress.
2. Whether the D.C. and Federal Circuit Courts, and now the Fifth Circuit, erred by (a) failing to consider subject matter jurisdiction in their interpretation of a non-jurisdictional statute, resulting in judicial expansion of jurisdiction, and (b) dividing from seven other Circuits that interpreted the same statute based on limited subject matter jurisdiction.

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Curr-Spec Partners, L.P. v. Commissioner of Internal Revenue*, 579 F.3d 391 (5th Cir. 2009). The Fifth Circuit affirmed the September 24, 2007 decision of the United States Tax Court reported at *Curr-Spec Partners, LP, Curr-Spec Managers, LLC, Tax Matters Partner v. Commissioner of Internal Revenue*, T.C. Memo. 2007-289 (2007).

**JURISDICTION**

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**RELEVANT PROVISIONS INVOLVED**

*United States Constitution, Art. I, § 8*

The Congress shall have power...to constitute tribunals inferior to the Supreme Court...

*United States Constitution, Art. III, § 2*

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States...

*Internal Revenue Code, 28 U.S.C. § 6226(f):*

(f) Scope of judicial review

A court with which a petition is filed in accordance with this section shall have jurisdiction 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 allocation 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.

*Internal Revenue Code, 28 U.S.C. § 6231(a)(3) and (4):*

(3) Partnership item

The term “partnership item” means, with respect to a partnership, any item required to be taken into account for the partnership’s taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) Nonpartnership item

The term “nonpartnership item” means an item which is (or is treated as) not a partnership item.

## **STATEMENT**

This case is governed by the unified partnership audit and litigation procedures established by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324, 648-671 (“TEFRA”). The TEFRA unified partnership procedures require a special proceeding, focused solely on a partnership’s tax return and those legal and factual matters related to the partnership as a whole, distinct, independent, and wholly

segregated from all legal and factual matters related to any individual partner. The relevant statute, 26 U.S.C. 6226(f), empowers a court hearing a partnership case to hear and decide only those partnership items for the tax year relating to an FPAA (a "notice of final partnership administrative adjustment" which the Commissioner issues to change a partnership return). As described succinctly by the Eleventh Circuit:

TEFRA created, *inter alia*, a new scheme for partnerships, pursuant to which partnership items would no longer be audited partner-by-partner. Rather, under TEFRA, all common partnership items are evaluated in one uniform proceeding to determine those items applicable to all partners. Thereafter, individual partner-level proceedings are held as to items unique to the partners.<sup>1</sup>

No legal or factual matter unique to an individual partner may be heard in a TEFRA partnership case because litigation of individual partner facts and legal issues occurs in later separate, individual partner cases.<sup>2</sup> Similarly, in those later, separate, individual partner cases, TEFRA jurisdictionally bars the trial court from deciding any matter related to the partnership tax return as changed by the FPAA. These mutually exclusive limits on subject matter jurisdiction keep the trial courts focused as Congress intended.

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<sup>1</sup> *Rose v. Comm'r.*, 07-12245, 11 n. 9 (11th Cir. 4-24-2008)(unpublished).

<sup>2</sup> *See Callaway v. Comm'r.*, 231 F.3d 106, 108 and 117 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).

In the Tax Court below, Curr-Spec brought an action for judicial review under § 6226 of the TEFRA Unified Partnership Procedures in response to the government's FPAA purporting to change its 1999 partnership tax return. Curr-Spec pled the bar of the statute of limitations because the government issued its FPAA more than three years after the 1999 tax return filing date. The Commissioner answered by pleading that the Tax Court should rely instead on the filing dates of the individual partner returns and decide the FPAA limitations under nonpartnership statute of limitations of § 6501 (a). Curr-Spec moved to dismiss such allegations for lack of jurisdiction but the Tax Court denied petitioner's plea to jurisdiction. Notably, the Tax Court did not require the government to establish the jurisdictional basis supporting its attempt to rely on the individual partner's statute of limitations, notwithstanding the terms of TEFRA.

The Fifth Circuit affirmed and denied Curr-Spec's motion for rehearing *en banc* on October 15, 2009.

### **REASONS FOR GRANTING THE PETITION**

#### **I. Review is Warranted to Restrain Improper Judicial Expansion of Federal Court Subject Matter Jurisdiction in the Interpretation of a Statute of Limitation.**

Federal courts are courts of limited jurisdiction; they possess only that power authorized by the Constitution and by Congress.<sup>3</sup> This Court frequently

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<sup>3</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1984); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

writes<sup>4</sup>:

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction. . . ." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

This Court guards against expansion by judicial interpretation by presuming all matters lie outside this limited jurisdiction<sup>5</sup> and by imposing the burden of establishing the contrary on the party asserting jurisdiction.<sup>6</sup> The Tax Court, a special Article I court, exercises Article III judicial power in the same way, with subject matter jurisdiction limited by Congress, as the federal district courts exercise theirs.<sup>7</sup>

Congress enacted the unified partnership audit and litigation procedures, 26 U.S.C. § 6221, *et. seq.*, and created a two-step procedure that begins with a partnership only case limited solely to partnership items, the result of which binds all partners. Thereafter,

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4 *Rasul v. Bush*, 542 U.S. 466, 489 (2004).

5 *Id.*; see also *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

6 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

7 *Freytag v. Commissioner*, 501 U.S. 868, 890-891 (1991); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-851 (1986).

Congress called for separate proceedings involving individual partners—limited to nonpartnership items and barring consideration of the previously determined partnership items. The relevant jurisdictional provision for a step-one partnership case is 26 U.S.C. 6226(f), which limits the scope of jurisdiction for such a partnership case to those legal and factual matters related to the partnership *qua* partnership:

(f) Scope of judicial review

A court with which a petition is filed in accordance with this section shall have jurisdiction 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 allocation 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.

TEFRA defines a "partnership item" in 26 U.S.C. § 6231 (a)(3):

The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for the purposes of [subtitle F], such item is more appropriately determined at the partnership level than at the partner level.

Conversely, TEFRA defines a "nonpartnership" item in 26 U.S.C. § 6231 (a)(4) as any item that is not a partnership item. As noted by the Second Circuit<sup>8</sup>, the distinction governs jurisdiction which "turns on the classification, for the purposes of subtitle F, of the items to which the tax deficiencies were attributable. If those items were classified as partnership items, subchapter C [the TEFRA partnership procedures] would apply. See I.R.C. §§ 6221, 6211(c), 6216 (4). If those items were classified as nonpartnership items, then subchapter C could not apply. See, e.g., I.R.C. § 6226 (f); *Maxwell*, 87 T.C. at 788." *Id.* at 117. (*emphasis in original*)

The Fifth Circuit decided *Weiner v. U.S.*<sup>9</sup>, the seminal authority establishing the standard by which TEFRA trial courts determine whether a matter is a partnership item or not. The *Weiner* opinion requires that a decision about the FPAA statute of limitations, which it decided is a partnership matter, may be decided solely in a step-one partnership-only case "because the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such a result would contravene the purposes of TEFRA."<sup>10</sup> Concerning the substantive FPAA limitations issue, the Fifth Circuit held that "the FPAA statute of limitations determination challenged in this case *deals with facts specific to the partnership*. The

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8 *Callaway v. Comm'r.*, 231 F.3d 106 (2nd Cir. 2000).

9 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

10 *Id.* at 156-7.

*court need not consider...an individual's communications with the IRS."*<sup>11</sup>

Because individual partner statutes of limitations under § 6501 (a) are legal issues solely concerning individual partners based on individual partner filing dates, and do not affect the partnership as a whole, TEFRA jurisdiction flowing from § 6226(f) bars them from being litigated in Curr-Spec's partnership-level case below. However, Curr-Spec brought a TEFRA step-one partnership case in the Tax Court under 26 U.S.C. § 6226 claiming that the Commissioner issued its FPAA purporting to change Curr-Spec's 1999 partnership tax return beyond the three-year period of 26 U.S.C. § 6229 from the return filing date. The Commissioner answered that the FPAA was timely pursuant to § 6501 (a) because it issued within three years of the filing of 2000 and 2001 year tax returns *of an individual partner*. Curr-Spec moved to strike, for lack of jurisdiction, the Commissioner's § 6501 (a) allegations about individual partner tax return filing dates. The Tax court denied the motion.

The Tax Court theorized that if Curr-Spec were correct it could not apply its precedent in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*,<sup>12</sup> that purports to interpret the relationship between § 6229 as the TEFRA statute of limitations and § 6501 (a), the general limitations under the Internal Revenue Code.<sup>13</sup> However,

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<sup>11</sup> *Id.* at 157 (*emphasis added*).

<sup>12</sup> *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*, 114 T.C. 533 (2000), *appeal dismissed and remanded*, 249 F.3d 175 (3d Cir. 2001).

<sup>13</sup> *Curr-Spec v. Comm'r*, T.C. Memo 2007-289 at 9 n.4.



*Rhone-Poulenc* did not consider or address the antecedent question of whether the Tax Court must first address whether the individual partner statute of limitations would be within the Tax Court's competence given the jurisdictional restrictions of § 6226(f). Accordingly, it gave no force to this Court's presumption against subject matter jurisdiction and, quite to the contrary, simply assumed its jurisdiction—in the face of a statute and statutory scheme intentionally drawn by Congress to narrow the Tax Court's power to issues concerning the partnership as distinct from its constituent partners.

The Fifth Circuit affirmed. Rather than determine whether the Tax Court possessed the jurisdiction in a TEFRA step-one partnership case to decide a strictly partnership issue based on facts unique to any partner, the Court below erred by re-examining the *Rhone-Poulenc* holding and affirming both that case and the Tax Court's decision in this case below. It committed this error by failing to determine whether § 6501 (a) limitations could, in any way, be a partnership item under § 6231 (a)(3) as the prerequisite for jurisdiction. Instead, the Circuit Court below merely saw Curr-Spec's jurisdictional challenge as a novel attack on *Rhone-Poulenc* rather than as a plea to the Tax Court's jurisdiction. It ultimately erred by failing to follow the law of this Court, which as early as 1799 established a presumption against jurisdiction<sup>14</sup> and imposes the burden on the proponent of expanding jurisdiction.<sup>15</sup>

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14 *Kokkonen*, 511 U.S. at 377 citing *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

15 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178,

Because Curr-Spec's appeal to the Fifth Circuit focused on the Tax Court's lack of jurisdiction, the Fifth Circuit ruled that the Tax Court had jurisdiction based on § 6226(d)(1) which provides that every partner

shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person*, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.<sup>16</sup>

The Circuit Court below erred by disregarding the fact that no partner made such an appearance and therefore the jurisdiction granted by 26 U.S.C § 6226 (d)(1) was never invoked.

The Fifth Circuit erred by deferring to, and affirming, the Tax Court's decision that the FPAA statute of limitations, clearly a partnership item, could be decided based on the nonpartnership limitations under § 6501 (a) using facts unique to individual partners. This Court, by contrast, holds that special Article I courts, such as the Tax Court, have "no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional, see *Schor, supra*, at 845,"<sup>17</sup> By refusing to substantively consider Curr-Spec's

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182-183 (1936).

16 *Curr-Spec Partners*, 579 F.3d at 395-96 (*emphasis in the original*).

17 *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring, citing *CFTC v. Schor*, 478 U.S. 833, 844 (1986)).

jurisdictional challenge, the Tax Court erred by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."<sup>18</sup>

The Fifth Circuit's error, in deferring to the Tax Court's judicial expansion of its jurisdiction, divided it from every other Circuit Court interpreting the FPAA limitations based, limited jurisdiction in TEFRA cases, merits this Court's review.

**II. Review is Warranted to Resolve a Lopsided Split Between the Seven Circuits interpreting the Statute of Limitations based on Subject Matter Jurisdiction and the Three Circuits that Ignore Jurisdiction.**

The Fifth Circuit below wrote, that by interpreting § 6229 as they did they were following *Rhone-Poulenc* and two Circuit Courts:<sup>19</sup> the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner*<sup>20</sup> and the Federal Circuit's opinion in *AD Global Fund, LLC v. United States*.<sup>21</sup> As additional justification, the Fifth Circuit wanted to avoid creating a split with these other Circuit Courts ("We are always chary to create a circuit split.")<sup>22</sup> However, the Court of Federal Claims in *AD Global Fund* acknowledged a recent split from the

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18 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).

19 *See Curr-Spec Partners*, 579 F.3d at 396-7.

20 *Andantech L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003).

21 *AD Global Fund, LLC v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

22 *Curr-Spec Partners*, 579 F.3d at 399 n. 37.

broad authority already in existence concerning whether partnership limitations are partnership items to be decided by reference to the partnership and not its partners, well before the Federal Circuit affirmed its decision:

While this court agrees with defendant that the most recent court decisions were in defendant's favor, the circuits have split regarding the proper interpretation of section 6229(a). *Compare Weiner v. United States*, 389 F.3d 152 (5th Cir. 2004) (viewing section 6229(a) as separate statute of limitations), and *Callaway v. Comm'r*, 231 F.3d 106 (2d Cir. 2000) (same), with *Andantech, L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003) (holding that section 6229(a) operates as extension of time rather than separate statute of limitations).<sup>23</sup>

On one side of this argument, most Circuit Courts correctly limit the jurisdiction of a trial court, when faced with a TEFRA partnership statute of limitations challenge, to legal and factual issues related to the subject partnership: The First Circuit in *CC&F W. Operations Ltd. Pship. v. Commissioner*;<sup>24</sup> the Second Circuit in a series of opinions;<sup>25</sup> the Fifth Circuit in *Weiner* prior to

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<sup>23</sup> *AD Global Fund, LLC v. United States*, 67 Fed. Cl. 657, 660 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007).

<sup>24</sup> *CC&F W. Operations Ltd. Pship. v. Commissioner*, 273 F.3d 402, 405 (1st Cir. 2001) (deciding the case based on Sec. 6229 as the sole statute of limitations for assessment of tax from partnership items).

<sup>25</sup> *Chimblo v. Comm'r*, 177 F.3d 119, 125 (2d Cir. 1999) ("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Callaway v. Commissioner*, 231 F.3d 106 (2d Cir. 2000)(discussed at length *infra*); *Madison Recycling*

this case, discussed at length *infra*, and other Fifth Circuit cases;<sup>26</sup> the Sixth Circuit;<sup>27</sup> the Seventh Circuit in *Kaplan v. U.S.*;<sup>28</sup> the Ninth Circuit in *Monetary II Ltd. Pship. v. Commissioner*;<sup>29</sup> and the Eleventh Circuit in *Davenport Recycling Assocs. v. Comm'r* and in *Monahan v. Comm'r*.<sup>30</sup> As late as November 2009 and on notice of the jurisdictional defect in its *Rhone-Poulenc* decision,

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*Associates v. Commissioner*, 295 F.3d 280 (2d Cir. 2002)(construing IRC § 6229 as the sole statute of limitations for partnership items and IRC § 6229(a) solely by reference to the partnership return filing: "In this case, absent extensions, any FPAA for Madison's 1982 taxable year should have been issued by April 15, 1986.")

26 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

27 *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (Table) 1998 WL 537579, at \*3 ("It is well established that [FPPA] statute of limitations challenges are considered to a partnership item").

28 *Kaplan v. United States*, 133 F.3d 469, 473 (7<sup>th</sup> Cir. 1998) ("this kind of statute of limitation challenge concerns a partnership item" and IRC § 7422 (h) "deprives the federal judiciary of subject matter jurisdiction in individual tax refund challenges involving partnership items.").

29 *Monetary II Ltd. Pship. v. Commissioner*, 47 F.3d 342, 344 (9th Cir. 1995) ("the limitations period for assessing any income tax attributable to a partnership expires three years after the partnership files its return for the tax year in question. 26 U.S.C. § 6229 (a)").

30 *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255, 1260 (11<sup>th</sup> Cir. 2000) ("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Monahan v. Comm'r*, 321 F.3d 1063, 1065 n. 2 (11th Cir. 2003)("TEFRA provides a mechanism to suspend the statute of limitations with respect to the individual partners to dovetail with the proceedings at the partnership level. Normally, the period for assessing any tax with respect to a partnership item for a specific partnership taxable year is three years from the date the partnership return is filed. 26 U.S.C. § 6229 (a)").

the Tax Court identified the Tenth Circuit as another Circuit Court with which it disagrees.<sup>31</sup> Even the Third Circuit, which reviewed an interlocutory appeal of the Tax Court majority's sharply divided *Rhone-Poulenc* decision, refused to endorse its judicial expansion of federal court jurisdiction.<sup>32</sup> Thus, eight and perhaps nine or ten Circuits properly police the limits of Federal court jurisdiction. Although these decisions employ different rationales, all "have reasoned that because the FPAA limitation issue affects the partnership as a whole," and thus is a partnership item, it should not be litigated in an individual partner proceeding or decided based on individual partner facts, as such a different "result would contravene the purposes of TEFRA."<sup>33</sup>

A very recent case from the Sixth circuit reinforces the understanding of the majority:

The key change wrought by TEFRA is that tax treatment of all so-called "partnership items" must be determined at the partnership level, not at the partner level. *See* I.R.C. § 6221; *Monti v. United States*, 223 F.3d 76, 78-79 (2d Cir. 2000). ...Conversely, if a partner's tax liability stems from *nonpartnership* items, the IRS may initiate deficiency proceedings against that partner individually without first proceeding against the partnership. *See Callaway v. Commissioner*, 231

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31 *LVI Invest. v. Comm'r*, 2009-254, slip op. at \*8-9 (T.C. 11-9-2009) (rejecting the Tenth Circuit's decision in *Anderson v. United States*, 62 F.3d 1428 (10th Cir. 1995) along with the decisions of the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits.)

32 *Rhone-Poulenc*, 249 F.3d at 183.

33 *Weiner*, 389 F.3d at 156-57.

F.3d 106, 108 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).<sup>34</sup>

Meanwhile, the Federal (*AD Global Fund*) and D.C. (*Andantech*) Circuits opine that the FPAA limitation issue in a TEFRA partnership case brought under § 6226 may be decided based on § 6501 (a) which are legal and factual issues related to individual partners.

What these decisions have in common is no analysis of whether § 6501 (a), and the individual partner tax return filing dates, present a legal and factual issue properly characterized as a partnership item under § 6231 (a)(3)—the jurisdictional prerequisite for a TEFRA partnership case under § 6226. This case, for the first time, squarely presents that question for this Court's review.

The D.C. Circuit's *Andantech* decision illustrates the resulting jurisdictional "heads the government wins—tails the taxpayer loses" aspect of this case. On the one hand, it fails to enforce TEFRA's jurisdictional limits in § 6226 (f) by deciding (as urged by the Government) the partnership statute of limitations based on individual partner statute of limitations under § 6501 (a), thus expanding jurisdiction to defeat the partnership's statute of limitations defense.<sup>35</sup> Yet, just a few pages later it reviews § 6226 (f)<sup>36</sup> to determine if subject matter

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<sup>34</sup> *Desmet v. Comm'r.*, 581 F.3d 297, 302 (6th Cir. 2009)(*emphasis in original*).

<sup>35</sup> *Andantech*, 331 F.3d at 976-9.

<sup>36</sup> "[P]ursuant to § 6226(f), subject matter jurisdiction is limited to determin[ing] all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among the partners, and [certain penalties]."

jurisdiction extends to "a determination that the entity is not a partnership for such taxable year" and thus holding for the Government.<sup>37</sup> No more perfect example exists which so completely violates this Court's bar to one sided jurisdictional qualifications by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."<sup>38</sup>

In sum, the Federal, D.C. Circuits, and the Fifth Circuit below, broke with the vast majority of Circuit Courts by expanding TEFRA's limited jurisdiction by judicial interpretation. Whether or not the Federal and D.C. Circuits violated this Court's mandate against such expansion inadvertently, the Fifth Circuit below did so consciously and intentionally—warranting this Court's review.

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*Andantech*, 331 F.3d at 981.

37 *Id.* at 981.

38 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).



**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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