FOR IMMEDIATE RELEASE **Media Inquiries:** Judy Pino, 202-869-5218

Justice Thomas Repudiates *Brand X* Decision He Authored, but High Court Denies Cert

Baldwin v. United States

WASHINGTON, DC, February 24, 2020 – Howard and Karen Baldwin got their day in court—and won—but then the *Brand X* doctrine took it all away. The New Civil Liberties Alliance commends Supreme Court Justice Clarence Thomas for dissenting from the Court's denial of a writ of certiorari this morning sought by NCLA's clients in their case against the Internal Revenue Service (IRS).

The *Baldwin v. U.S.* case had asked the court to reconsider the *Brand X* doctrine. Under the Court's 2005 case, ***National Cable & Telecommunications Ass'n v. Brand X Internet Services***, federal courts must defer to federal agencies' reasonable statutory interpretations even when those interpretations contradict a previous court ruling interpreting the same statute and even when those agencies' regulations were written subsequent to the court's interpretation. This absurd rule takes away the civil liberties of citizens like the Baldwins on a regular basis.

Justice Thomas agreed with several arguments NCLA made in its Petition and reply brief regarding the *Brand X* doctrine, and the due process havoc it wreaks. As Justice Thomas explained, "*Brand X* appears to be inconsistent with the Constitution, The Administrative Procedure Act (APA), and traditional tools of statutory interpretation." His "skepticism" of *Brand X*, he added, "begins at its foundation—*Chevron* deference," but he noted that *Brand X* is even more inconsistent with the Constitution than is *Chevron*, and he lamented that the doctrine "has taken this Court to the precipice of administrative absolutism."

Although Justice Thomas himself authored the original decision in *Brand X*, he would "revisit" the doctrine, writing that "it is never too late to 'surrende[r] former views to a better considered position.'"

NCLA released the following statements:
"The Supreme Court had an excellent opportunity to uphold the Constitution. Instead, it left the deeply flawed *Brand X* doctrine in place. Their decision not to take the Baldwins' case and not to reconsider the *Brand X* doctrine will negatively affect judicial independence for years to come. *Brand X* will now continue to dilute the legitimacy and finality of lower court decisions, turning their interpretations of federal statutes into mere advisory opinions whenever they go against the agency. NCLA will look to bring this issue back up in a different case."
—Adi Dynar, NCLA Litigation Counsel

"NCLA hopes that today's denial of cert will nonetheless shed new light and attention on the grotesque *Brand X* decision so that the Court will reconsider the doctrine in a future case. Meanwhile, *Brand X* remains a disaster for citizens like Howard and Karen Baldwin, who do not know whether they can rely on federal court decisions interpreting federal statutes. And *Brand X* remains a disaster for lower courts, whose decisions adverse to agency interpretations will continue to be treated as merely advisory. Finally, *Brand X* will continue to serve as a silver bullet for federal agencies, who are freed to buck adverse decisions from lower federal courts. Any time there is ambiguity, these agencies can simply issue new regulations to avoid future application of decisions they dislike. Such a rule creates incredible *in terrorem* leverage for federal agencies like the IRS to use to violate the civil liberties of regulated parties like the Baldwins—and to intimidate lower federal courts."
—Mark Chenoweth, NCLA Executive Director and General Counsel

CASE BACKGROUND
The Baldwins are producers of films including the Academy Award-winner, *Ray* (2004), about the life of singer Ray Charles. But they are also law-abiding Americans who had overpaid their 2005 income taxes. Four months before the October 15, 2011 deadline for refiling, they mailed their refund claim for $167,663 in overpaid taxes to the Internal Revenue Service by regular United States mail. But the IRS alleges it never received their refund claim and refused to pay. The IRS also argued that a new regulation the agency issued in August 2011—after the Baldwins had mailed in their claim—ended the common-law mailbox rule for refund claims.

The Baldwins were forced to sue the IRS to get their money back, and they won at trial in the U.S. District Court for the Central District of California, which upheld the common law mailbox rule relying on a 1992 U.S. Court of Appeals for the Ninth Circuit interpretation of the identical statutory provision in question here. On appeal, however, the Ninth Circuit, invoking the *Brand X* doctrine, decided that it had to defer to the IRS's new regulation over the court's own prior precedent. The IRS's new regulation did not allow use of extrinsic evidence to prove the Baldwins mailed their tax return on time. The court gave *Chevron* deference to IRS's interpretation and reversed the favorable outcome the Baldwins had obtained after trial in district court.

See full case summary page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar **Philip Hamburger** to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other *pro bono* advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights. For more information visit us online at: **NCLAlegal.org**.