No. 98-396

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF TEXAS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC RESOLUTION FUND
AS RECEIVER OF FIRST SOUTH, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1825(b)(3) and the doctrine of sovereign immunity exempt the Federal Deposit Insurance Corporation from tax sanctions imposed under state law and from the exhaustion of state administrative requirements for challenging such sanctions.

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OPINIONS BELOW

The order of the Texas Supreme Court denying the petitions for review (Pet. App. 1-2) is unreported. The memorandum opinion of the Texas Court of Appeals (Pet. App. 3-5) and the order of the District Court of Tarrant County, Texas (Pet. App. 6-7) are also unreported.

JURISDICTION

The Texas Supreme Court entered its order on June 5, 1998. The petition for a writ of certiorari was filed on September 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, Congress waived the Federal Deposit Insurance Corporation's (FDIC) immunity from ad valorem taxes "to the same extent, according to its value as other real property is taxed." 12 U.S.C. 1825(b)(1). In so doing, Congress expressly reserved the FDIC's immunity from tax penalties or sanctions:

> The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

12 U.S.C. 1825(b)(3). Section 1819, 12 U.S.C., separately provides that the FDIC may be sued in state court.

2. In February 1990, in its capacity as manager of the Federal Savings and Loan Insurance Corporation's Resolution Fund, as receiver for First South Savings, the FDIC came into possession of three pieces of real property in Tarrant County, Texas. Pet. 1. At the time the FDIC acquired the land, the Tarrant County Appraisal District categorized the property as "qualified open-space" or "agricultural use" land, which entitled it to be appraised for state tax purposes on the basis of its production value. Pet. 1-2; see Tex. Tax Code Ann. §§ 23.41, 23.51 (West 1992); see also Tex. Const. art. 8, § 1-d-1. Two years later, the Tarrant County Appraisal District notified the FDIC that the land no longer qualified for appraisal as an agricultural use because it was not being used for agricultural purposes. Pet. 1-2.

Petitioners then sought to impose "rollback taxes" upon the property for tax years 1987 to 1991, pursuant to Section 23.55 of the Texas Tax Code. See also Tex. Const. art. 8, § 1-d-1(a) (amended 1995). Section 23.55(a) provides that, when land that has been specially appraised pursuant to Section 23.41 of the Texas Tax Code is withdrawn from agricultural use, the owner becomes liable for an additional assessment that is equal to the difference between the taxes actually imposed on the land for each of the preceding five years and the taxes that would have been imposed had the land been taxed on a market-value basis, rather than at its production value, during those years. Section 23.55 refers to that charge as a "sanction." Tex. Tax Code Ann. § 23.55(f), (g), and (j) (West 1992 & Supp. 1998).

3. Petitioners filed suit against the FDIC in state court to recover the rollback taxes, penalties, and interest. The trial court initially ruled in favor of petitioners, but then granted the FDIC's motion for a new trial. Pet. 2. The trial court subsequently granted summary judgment for the FDIC on the ground that the rollback taxes "are a penalty and that the FDIC is not liable for the payment of such taxes, or any interest thereon," citing 12 U.S.C. 1825(b)(3). Pet. App. 7.

The Texas Court of Appeals affirmed. Pet. App. 3-5. The court held that "[t]he FDIC is immune from liability for 'rollback taxes' under the doctrine of sovereign immunity because the taxes are penalties and there is no express congressional waiver of immunity for such a penalty." *Id.* at 4. The court also rejected petitioners' argument that the FDIC should have exhausted its state administrative remedies for challenging the tax assessment, holding that sovereign immunity may be raised at any time. *Ibid.*

The Texas Supreme Court declined to review the court of appeals' judgment. Pet. App. 1-2.

ARGUMENT

The question presented for review turns upon the construction and application of state, not federal, law. Because both state courts agreed in their interpretation of Texas law and because the court of appeals' ruling does not conflict with any ruling of this Court or of any other court, this Court's review is not warranted.

1. Section 1825(b)(3), 12 U.S.C., preserves the FDIC's immunity from the payment of "any amounts in the nature of penalties or fines" imposed by state tax authorities. Petitioners contend (Pet. 3-5) that the state courts erred in holding that the rollback taxes authorized by Texas law are "in the nature of penalties or fines" and thus fall within Section 1825(b)(3)'s prohibition. That claim does not merit further review.

First, while the meaning of Section 1825(b)(3) is ultimately a question of federal law, see *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 565 (1921), the lower courts' analyses of and petitioners' arguments about the character of rollback taxes turn entirely upon state law. See Pet. App. 4, 7; Pet. 4-5 (citing Texas statutory provisions, Texas cases, opinions of the Texas Attorney General, and studies by the Texas Legislative Council and House Study Group); see also *Resolution Trust Corp.* v. *Tarrant County Appraisal Dist.*, 926 S.W.2d 797, 803-805 (Tex. Ct. App. 1996) (relying on state law authorities to hold that rollback tax is a penalty). Neither court purported to construe the language of Section 1825(b)(3); they simply applied its literal terms and concluded that the character of the rollback taxes under state law placed the sanctions squarely within Section 1825(b)(3)'s exemption. Accordingly, to grant

petitioners any relief, this Court would have to overrule the state courts' unanimous conclusions—both here (Pet. App. 4, 7) and in *Tarrant County*, 926 S.W.2d at 805—that the state tax at issue is a penalty designed to sanction property owners for ceasing to use their property for agricultural purposes. This Court should not grant a writ of certiorari to second-guess state courts' consistent construction of state tax law. Cf. *Johnson* v. *Fankell*, 117 S. Ct. 1800, 1804 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.").

Second, the court of appeals' decision does not conflict with any ruling of this Court or any other federal or state court, and petitioners do not suggest otherwise. Petitioners' reliance (Pet. 5) on *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), is misplaced. *Kurth Ranch* did not hold that all taxes are sanctions; the dicta petitioners cite referred in such terms only to taxes on illegal conduct. *Id.* at 771.

Third, the court's determination that the rollback taxes fall within Section 1825(b)(3)'s prohibition is correct. To be barred, the exaction need be only "in the nature of" a penalty. The Texas statute that authorizes the rollback tax repeatedly refers to the assessment as a "sanction." Tex. Tax Code Ann. § 23.55 (f), (g), and (j) (West 1992 & Supp. 1998). The Texas Constitution and the Texas Attorney General also adopt that characterization. Tex. Const. art. 8, § 1-d-1(a) (amended 1995); Op. Tex. Att'y Gen. No. DM-448 (1997) (rollback tax is a "penalty" for taking property out of agricultural production); see also State Property Tax Board, *Manual for the Appraisal of Agricultural Land* 2, 31 (1990) (repeatedly describing the tax as a "penalty").

The court of appeals' construction of Section 1825(b)(3), moreover, comports with the rule that waivers of sovereign immunity must be "strictly construed in favor of the United States." *E.g.*, *United States* v. *Idaho ex rel. Director, Idaho Dep't of Water Resources*, 508 U.S. 1, 7 (1993) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991)). Absent a waiver, governmental instrumentalities are immune from all forms of penalties. *Ault*, 256 U.S. at 563-565.

2. Petitioners argue (Pet. 6-7) that, even if the rollback tax is a penalty, it does not fall within Section 1825(b)(3). That claim is without merit. Section 1825(b)(3)'s plain language embraces all assessments "in the nature of" penalties or fines. Petitioners' effort to rewrite the statute to apply only to late fees (Pet. 6-7) finds no home in the statutory language. And petitioners' reliance on *ejusdem generis* overlooks that the list of examples in Section 1825(b)(3) is prefaced by the word "including," which expands, rather than contracts, the Section's scope. In addition to lacking any basis in the statutory text or common understanding of the term "including," petitioners' argument identifies no conflict with the ruling of another court that would warrant this Court's review.

Petitioners' claim (Pet. 7-8) that the FDIC remains liable for the interest that accrued on the penalties, even if it was under no legal obligation to pay the penalties, is devoid of merit and was properly rejected by both Texas courts. Pet. App. 4, 7.

3. Lastly, petitioners contend (Pet. 8-9) that the FDIC was barred from raising Section 1825(b)(3) as a defense to petitioners' suit because the FDIC failed to exhaust state administrative remedies for challenging the imposition of the tax penalty. The state court resolved this question of Texas administrative pro-

cedure against petitioners (Pet. App. 4), and the state court's interpretation of the scope and operation of its own administrative procedures presents no substantial federal question for this Court to review. See *Johnson*, 117 S. Ct. at 1804. In any event, sovereign immunity cannot be waived by the acts of individual governmental officials. *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513-514 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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