No. 13-113

In the Supreme Court of the United States

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under 26 U.S.C. 6611, interest on an overpayment of tax resulting from the conversion of a taxpayer's deposit in the nature of a cash bond into a tax payment begins to run from (i) the date the deposit was remitted to the Internal Revenue Service or (ii) the date the taxpayer elected to convert the deposit into a payment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not published in the *Federal Reporter* but is reprinted in 508 Fed. Appx. 506. The opinion of the district court (Pet. App. 22a-39a) is unreported but is available at 2010 WL 2231894.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2012. A petition for rehearing was denied on March 25, 2013 (Pet. App. 40a-41a). On June 13, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 24, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When a taxpayer overpays her taxes, she is entitled to interest from the government for the period between the payment and the ultimate refund. To that end, Section 6611 of the Internal Revenue Code provides that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax." 26 U.S.C. 6611(a). Such interest begins to accrue on "the date of the overpayment." 26 U.S.C. 6611(b)(1) and (2). Although the Code does not define the term "date of the overpayment," Treasury regulations provide that "the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability * * * and the dates of payment of all amounts subsequently paid with respect to such tax liability." 26 C.F.R. 301.6611-1(b).[1]

2. This case involves petitioner's claims for additional interest on overpayments of tax with respect to nine tax years between 1983 and 1994. Pet. 5. Portions of the overpayments were attributable to funds that petitioner had initially remitted to the IRS as deposits in order to stop the accrual of interest that petitioner would have owed on any underpayments of tax that might have ultimately resulted from ongoing IRS audits. *Ibid.*; see 26 U.S.C. 6601; Rev. Proc. 84-

[1] Section 6611 provides a cross-reference to 26 U.S.C. 6513 for purposes of determining the date of payment in the case of, *inter alia*, an "[a]dvance payment of tax." 26 U.S.C. 6611(d). The relevant provision of Section 6513, however, is limited to payments "made before the last day prescribed for the payment of the tax," 26 U.S.C. 6513(a), and therefore is not applicable to this case.

58, 1984-2 C.B. 501.[2] Petitioner subsequently requested that the IRS convert the deposits into advance payments of additional tax—*i.e.*, payments of asserted (but yet to be assessed) deficiencies in tax resulting from proposed IRS adjustments—in various amounts with respect to the years at issue. Pet. 5-6.

The parties ultimately determined that petitioner had overpaid its taxes in the relevant years. Pet. 6. Accordingly, Section 6611 required the government to pay interest to petitioner for the period after petitioner made the overpayments. The parties disagreed, however, as to when that period began—*i.e.*, the "date of the overpayment." 26 U.S.C. 6611(b)(1). Petitioner contended that the date of the overpayment was the date on which it remitted the relevant amounts to the IRS as deposits. The government maintained that the date of the overpayment was the date on which petitioner requested that the remittances be converted into payments of tax.

3. Petitioner filed suit on its overpayment-interest claims in the United States District Court for the Eastern District of Michigan.[3] Consistent with its

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[2] Revenue Procedure 84-58 has been superseded by Revenue Procedure 2005-18, which applies to deposits made after October 22, 2004. See Rev. Proc. 2005-18, 2005-1 C.B. 798, 801.

[3] Petitioner's complaint invoked 28 U.S.C. 1346(a)(1) as a ground of jurisdiction in the district court. See Pet. 6-7. In the government's view, Section 1346(a)(1) does not apply to this suit. See pp. 16-17, *infra*. Rather, the only general waiver of sovereign immunity that encompasses petitioner's claim is the Tucker Act, 28 U.S.C. 1491(a), which requires that suit be brought in the United States Court of Federal Claims. In light of controlling circuit precedent holding Section 1346(a)(1) applicable to suits like this one, however, see *E.W. Scripps Co.* v. *United States*, 420 F.3d 589, 596-598

interpretation of Section 6611, petitioner argued that it was entitled to interest accruing from the date that it submitted the remittances to the IRS as deposits. Petitioner relied in large part on the IRS's longstanding administrative practice in the context of *underpayment* interest (*i.e.*, interest that a taxpayer owes the government on late tax payments). That form of interest is governed by a different provision of the Internal Revenue Code, 26 U.S.C. 6601. The IRS has long allowed taxpayers to submit a deposit in the nature of a cash bond as a means of tolling the accrual of underpayment interest under Section 6601 as of the date the deposit is made. See *Rosenman* v. *United States*, 323 U.S. 658, 662-663 (1945); Rev. Proc. 84-58, *supra*. Petitioner argued that, since a deposit in the nature of a cash bond has the same legal effect as a payment of tax for purposes of underpayment interest under Section 6601, the principle of "statutory symmetry" requires that such a deposit be treated as a payment for purposes of overpayment interest under Section 6611.

After a hearing, the district court issued an order and opinion granting the government's motion for judgment on the pleadings and denying petitioner's motion for summary judgment. See Pet. App. 22a-39a. The court concluded that "the Supreme Court's and Sixth Circuit's decisions alone compel the conclusion that [petitioner's] remittances at issue in this case were not 'tax payments,'" and that petitioner therefore "is not entitled to additional overpayment interest from the dates that it remitted deposits in the nature of a cash bond to the dates those remittances

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(6th Cir. 2005), the government did not argue in the courts below that the district court lacked jurisdiction here.

were converted to tax payments." *Id.* at 36a, 37a; see *id.* at 34a-36a.

4. The court of appeals affirmed in an unpublished opinion. See Pet. App. 1a-21a. The court held that, under Section 6611, overpayment interest accrues from the date that the taxpayer requests that a deposit be converted into an advance tax payment, not from the date on which the deposit is initially made.

a. The court of appeals first stated that petitioner's "challenge involves construing a waiver of sovereign immunity in a suit for interest against the government." Pet. App. 7a. The court stated that "the 'no-interest rule' shields the government from liability in suits for interest unless there is a[n] express statutory waiver of sovereign immunity." *Ibid.* (citing, *inter alia*, *Library of Cong.* v. *Shaw*, 478 U.S. 310 (1986)). The court acknowledged that Congress has "clearly" waived immunity from interest on tax overpayments in Section 6611, but described the question in this case as one concerning "the scope of that waiver"—specifically, what constitutes the "date of the overpayment." *Id.* at 8a. Because this Court has instructed courts to "construe any ambiguities in the scope of a waiver in favor of the sovereign," the court of appeals framed the relevant question as whether Section 6611 *clearly* waives the government's immunity from interest accruing on the date a deposit is made but before the taxpayer has elected to convert the deposit into a payment. *Id.* at 8a-9a (quoting *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012)).

The court of appeals also recognized that the narrow-construction principle does not apply "to a statute or section of a statute entirely separate from the one that supplied the waiver of sovereign immuni-

ty itself." Pet. App. 9a n.3 (citing *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003)). The court found that line of authority inapplicable in this case, however, on the ground that "§ 6611 itself waives sovereign immunity for interest on tax overpayments, and both § 6611(a) and (b) specifically state that overpayment interest 'shall be allowed and paid' and contain the key word 'overpayment.'" *Ibid.*

b. The court of appeals concluded that both the government and petitioner had identified "plausible" readings of Section 6611. Pet. App. 11a. The court noted that the government's argument—that petitioner could not be deemed to have made an over*payment* until it had actually converted its deposits into tax *payments*—was "grounded in the ordinary meaning of the terms 'date of the overpayment' and 'payment.'" *Id.* at 10a-11a. The court also stated, however, that petitioner's interpretation had the benefit of reading Sections 6601 and 6611 "symmetrically" in light of the IRS's longstanding practice of allowing taxpayers to toll the accrual of underpayment interest under Section 6601 by remitting a deposit to the government. *Id.* at 11a-12a.

Because it concluded that each party's reading was plausible, the court of appeals found that Congress had not "'unequivocally expressed' its waiver of sovereign immunity for claims to overpayment interest accruing between the date a deposit in the nature of a cash bond was remitted and the date that deposit was converted to an advance tax payment." Pet. App. 12a-13a (quoting *United States* v. *King*, 395 U.S. 1, 3 (1969)). The court rejected petitioner's reliance on a provision of Revenue Procedure 84-58, explaining that

a revenue procedure "is far from an expression of congressional intent as to the scope of a waiver of sovereign-immunity; indeed, it does not even enjoy the status of an agency regulation." *Id.* at 19a. Although the court of appeals favored petitioner's interpretation of a particular provision of the revenue procedure addressing overpayment interest, it held that the provision was "insufficient to render the phrase 'date of the overpayment' in 26 U.S.C. § 6611(b)(1) unambiguous." *Id.* at 18a.

5. Petitioner sought en banc review in the court of appeals. In its en banc petition, petitioner raised for the first time the argument that the only relevant waiver of sovereign immunity in this case is contained in 28 U.S.C. 1346(a)(1), which confers jurisdiction on district courts over "[a]ny civil action against the United States for the recovery of * * * any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Petitioner contended that Section 6611 is not a waiver of sovereign immunity at all and therefore is not subject to the narrow-construction canon. The court of appeals denied rehearing en banc after no judge requested a vote. Pet. App. 40a-41a.[4]

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[4] After the court of appeals called for a response to petitioner's request for rehearing en banc, the government argued that, under this Court's decision in *Shaw*, *supra*, "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." 478 U.S. at 314; see Gov't Resp. to Pet. for Reh'g 4. The Court in *Shaw* held that "[t]he no-interest rule provides an added gloss of strictness upon the[] usual rules" governing sovereign-immunity waivers. 478 U.S. at 318. The government argued that 26 U.S.C. 6611, not 28 U.S.C. 1346(a)(1), supplies the necessary interest-specific waiver of sovereign im-

ARGUMENT

The court of appeals correctly held that, when a taxpayer elects to convert a deposit in the nature of a cash bond into an actual tax payment, overpayment interest under 26 U.S.C. 6611 does not begin to run until the date of the conversion. Petitioner does not argue that any other court has adopted a different construction of Section 6611.

Petitioner contends, however, that the court of appeals' application of general sovereign-immunity principles to the particular statutory language at issue here conflicts with this Court's precedents. Specifically, petitioner argues that the decision below is inconsistent with the principle that the canon requiring courts to construe waivers of sovereign immunity narrowly does not apply "to separate provisions that define the substantive rights at issue." Pet. 12. The court of appeals, however, expressly acknowledged and accepted that principle. See Pet. App. 9a n.3. The court simply concluded that Section 6611 *is* the provision that supplies the relevant waiver of sovereign immunity for claims of overpayment interest, and that the canon of narrow construction for such waivers therefore required that ambiguities in Section 6611 be resolved in the government's favor.

Petitioner further contends that 28 U.S.C. 1346(a)(1) supplies the only waiver of sovereign immunity relevant to this suit. Petitioner forfeited that argument, however, by failing to raise it until his petition for rehearing en banc. In any event, petitioner's reliance on Section 1346(a)(1) is misplaced because that provision does not literally encompass (and,

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munity, and that the panel therefore had correctly applied the sovereign-immunity canon in construing that provision.

a fortiori, does not unambiguously authorize) petitioner's current suit. Further review therefore is not warranted.

1. The court of appeals correctly construed Section 6611 not to require the government to pay overpayment interest between the date a taxpayer makes a deposit in the nature of a cash bond and the date the taxpayer elects to convert the deposit into a payment. The text of Section 6611, in conjunction with pertinent Treasury regulations, establishes that interest begins to accrue only when a deposit in the nature of a cash bond is converted into a payment. Section 6611 provides that interest on a refunded overpayment of tax runs from "the date of the overpayment." 26 U.S.C. 6611(b)(2). Treasury regulations explain that the date of an overpayment of tax is "the date of *payment* of the first amount which (when added to previous payments) is in excess of the [taxpayer's] tax liability." 26 C.F.R. 301.6611-1(b) (emphasis added); see *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531 (1947) (construing the word "overpayment" in the Internal Revenue Code of 1939); see also *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 713 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context.").

When petitioner made the remittances at issue here, it did not request that the remittances be treated as advance tax *payments*, but instead directed that they be held as deposits in the nature of a cash bond. Pet. 5. As a result, petitioner was entitled to demand return of the remittances at any time, which would not have been the case if petitioner had designated them as advance payments of tax. See Pet. App. 5a, 10a. At the time they were made, the remittances therefore

could not have given rise to any overpayments of tax because they were not "payments" as that term is ordinarily understood.

Petitioner does not contend that the remittances were payments when they were made. Rather, petitioner maintains that the subsequent conversions of its deposits into advance payments—at petitioner's request—had the effect of retroactively converting them into payments made on the dates of remittance. That view finds no support in the plain language of Section 6611 or the relevant Treasury regulations. The fact that a deposit in the nature of a cash bond is converted into a payment at some point in time could not retroactively render it a "payment" before that point. Cf. *Commissioner* v. *Indianapolis Power & Light Co.*, 493 U.S. 203, 211-212 (1990) (holding that the determination whether certain customer deposits constituted income to the recipient when received depends on the parties' respective rights and obligations at the time of payment).

Petitioner contends (Pet. 29) that its reading is necessary to harmonize Section 6611 with Section 6601, which governs the payment of interest by a taxpayer to the government on an underpayment of tax. As a matter of administrative practice, the IRS has long allowed deposits to toll the accrual of underpayment interest, a "practice which benefits taxpayers" by allowing them to stop the accrual of interest during the period of an audit. Pet. App. 12a n.4. Petitioner argues in substance that the IRS could not lawfully give such deposits the same practical effect as payments for underpayment-interest purposes under Section 6601 without giving them the same effect for overpayment-interest purposes under Section 6611.

That argument is flawed. The text of Section 6601 does not speak to whether the IRS may allow taxpayers to toll the accrual of underpayment interest by posting a cash bond, and the resolution of that question would not bear on whether a cash bond constitutes a payment under Section 6611. There is nothing anomalous, moreover, about a legal regime in which a cash bond stops the accrual of underpayment interest but does not earn overpayment interest.

It is a long-settled principle of tax law that a "deposit in the nature of a cash bond will stop the running of interest on an amount of underpayment equal to the deposit, but the deposit does not itself earn interest" because "a cash bond is not a payment of tax." H.R. Rep. No. 548, 108th Cong., 2d Sess. Pt. 1, at 304 (2004) (describing "[p]resent [l]aw"). As this Court explained nearly 70 years ago, "it merely carries out the true nature of an arrangement such as this to treat it as an estimated deposit and not as a payment which, if in excess of what should properly have been exacted, entitled the taxpayer to [overpayment] interest." *Rosenman* v. *United States*, 323 U.S. 658, 663 (1945); see *Baral* v. *United States*, 528 U.S. 431, 439 n.2 (2000) (referring to remittances that "a taxpayer under audit [might make] in order to stop the running of [underpayment] interest," and noting that "the taxpayer will often desire treatment of the remittance as a *deposit—even if this means forfeiting the right to interest on an overpayment*—in order to preserve jurisdiction in the Tax Court, which depends on the existence of a deficiency, a deficiency that would be

wiped out by treatment of the remittance as a payment") (emphasis added; internal citation omitted).[5]

Petitioner also points (Pet. 30-31) to Section 5.05 of Revenue Procedure 84-58. But that provision, which contains the only two sentences in the revenue procedure that address overpayment interest, does not support petitioner's view. The first sentence of Section 5.05 states that remittances treated as advance (pre-assessment) payments of tax under the revenue procedure are treated as any other payment of tax for purposes of determining overpayment interest, *i.e.*, they bear overpayment interest from the date of remittance. The revenue procedure, however, contemplates only one situation in which a remittance initially treated as a deposit could subsequently be treated as an advance (pre-assessment) payment of tax.[6] See Rev. Proc. 84-58, 1984-2 C.B. at 502 (Section 4.02(3)). The second sentence of Section 5.05 clarifies that such remittances bear overpayment interest "only from the

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[5] Petitioner is correct (Pet. 30 n.6) that it is now clear—as it was not under the law in effect in 1934 (the year of the remittance in *Rosenman*)—that a remittance in respect of a tax that has yet to be assessed *can* constitute a "payment" of tax. See Current Tax Payment Act of 1943, ch. 120, § 4(d), 57 Stat. 140 (enacting the statutory predecessor of 26 U.S.C. 6401(c)). As *Baral* and the cited 2004 legislative history make clear, however, the aspect of *Rosenman* that is relevant to the merits issue in this case—*i.e.*, the Court's recognition that a remittance need not constitute a "payment" in order to toll the running of *underpayment* interest—was unaffected by that statutory addition.

[6] In other words, Revenue Procedure 84-58 does not contemplate, and therefore does not provide guidance with respect to, the administrative practice that developed whereby the IRS would (as it did in this case) honor taxpayer requests to "convert" their deposits into advance payments of tax. See *Principal Life Ins. Co.* v. *United States*, 95 Fed. Cl. 786, 800 (2010).

date the amount was posted as a payment of tax" pursuant to Section 4.02(3), *id.* at 503, a date distinct from the earlier date of remittance.

From that second sentence, petitioner draws a negative inference that, in all other cases in which a remittance that is initially treated as a deposit is subsequently treated as an advance payment of tax, overpayment interest runs from the date the amount was originally remitted to the IRS. See Pet. 4-5. In addition to failing to recognize that Revenue Procedure 84-58 does not contemplate "conversions" of deposits into advance payments other than as provided in Section 4.02(3), see note 6, *supra*, that questionable inference would contradict decades of IRS practice. See *Rosenman*, 323 U.S. at 663. It is implausible to suppose that the IRS undertook so significant a reversal of policy with respect to overpayment interest in such an oblique manner.

2. Petitioner does not assert that any other court has construed Section 6611 differently than the court below. Petitioner contends (Pet. 10), however, that the court of appeals' decision "directly contravenes this Court's decisions holding that the strict construction canon for waivers of sovereign immunity is limited to the waiver of immunity itself." That argument lacks merit.

a. Petitioner relies on the principle that "the strict construction canon applies only to the waiver of sovereign immunity—not to separate provisions that define the substantive rights at issue." Pet. 12. Consistent with petitioner's argument in this Court, however, the court of appeals recognized that the narrow-construction canon does not apply "to a statute or section of a statute entirely separate from the one that

supplied the waiver of sovereign immunity itself." Pet. App. 9a n.3 (citing *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003)). The court found that principle inapplicable in this case on the ground that "§ 6611 itself waives sovereign immunity for interest on tax overpayments, and both § 6611(a) and (b) specifically state that overpayment interest 'shall be allowed and paid' and contain the key word 'overpayment.'" *Ibid.*

Accordingly, this case does not present the question whether "a court exercising jurisdiction pursuant to a waiver of sovereign immunity [may] invoke the strict construction canon applicable to such waivers to construe a separate statutory provision that creates the substantive rights at issue." Pet. i. The court of appeals adopted petitioner's view that a court may not apply the canon to a separate substantive provision.

b. Petitioner's real dispute is not with the court of appeals' understanding and application of general sovereign-immunity principles, but rather with the court's statute-specific determination that Section 6611 supplies the relevant waiver of sovereign immunity in this case. See Pet. 19 ("One of the central errors committed by the Sixth Circuit below was failing to recognize what constitutes a waiver of sovereign immunity and what constitutes a substantive provision."). Petitioner asserts that the only relevant waiver of sovereign immunity is contained in 28 U.S.C. 1346(a)(1), which confers jurisdiction on district courts over "[a]ny civil action against the United States for the recovery of * * * any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." For several rea-

sons, that argument does not warrant this Court's review.

i. Petitioner does not contend that any court has held that Section 6611 is not a waiver of sovereign immunity. In addition to the court below, the Second Circuit, the Federal Circuit, the Tax Court, and the Court of Federal Claims have all understood 26 U.S.C. 6611 to be a waiver of sovereign immunity. See *Exxon Mobil Corp.* v. *Commissioner*, 689 F.3d 191, 202 (2d Cir. 2012), aff'g 136 T.C. 99, 118-119 (2011); *International Bus. Machs. Corp.* v. *United States*, 201 F.3d 1367, 1371, 1374-1375 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001); *Schortmann* v. *United States*, 92 Fed. Cl. 154, 165 (2010), aff'd, 407 Fed. Appx. 480 (Fed. Cir. 2011).

ii. This Court's determination whether the strict-construction canon applies to Section 6611 would not affect the outcome of this case. For the reasons set forth at pp. 9-13, *supra*, the interpretation of Section 6611 adopted by the courts below is in any event the *better* reading of that provision. And because there is no circuit conflict regarding the ultimate question of statutory interpretation presented here—*i.e.*, whether interest under Section 6611 begins to run from the date of deposit or from the date the taxpayer elects to convert the deposit into a payment of tax—questions concerning the proper *methodology* for resolving that interpretive issue do not warrant this Court's review.

iii. Petitioner's current theory regarding the interplay between 26 U.S.C. 6611 and 28 U.S.C. 1346(a)(1) is particularly unsuitable for this Court's review because petitioner did not argue to the panel that Section 1346(a)(1) supplied the only relevant waiver of sovereign immunity, and the court of appeals did not

pass on that contention. Indeed, in the court of appeals' discussion of a precedent that involved Section 1346(a)(1), the court described Section 1346(a)(1) as "a different provision than the one at issue here." Pet. App. 13a (citing *E.W. Scripps Co.* v. *United States*, 420 F.3d 589, 596-598 (6th Cir. 2005)).[7] This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). The Court should follow that rule here.[8]

iv. Petitioner asserts (Pet. 17 n.1) that Section 1346(a)(1) itself provides the requisite "express congressional consent to the award of interest separate from a general waiver of immunity to suit." *Shaw*, 478 U.S. at 314. Section 1346(a)(1) grants jurisdiction to district courts (concurrent with the Court of Federal Claims) over "[a]ny civil action against the United States for the recovery of * * * any sum alleged to

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[7] Petitioner states (Pet. 7-8) that the court of appeals "dismissed" the relevance of Section 1346(a)(1), which might be taken to suggest that the court was considering petitioner's new argument that Section 1346(a)(1) supplies the relevant waiver of immunity. As is clear from the opinion, see Pet. App. 13a, the court was merely discussing an analogous precedent, not addressing an argument that Section 1346(a)(1) constituted the relevant waiver here.

[8] The court of appeals' order denying rehearing stated that "[t]he panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 40a-41a. Given that petitioner first invoked Section 1346(a)(1) as the only relevant waiver at the rehearing stage, that summary language may have simply referred to the general question whether Section 6611 requires interest payments on deposits before they have been converted into payments.

have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. 1346(a)(1). That language does not literally encompass (and, *a fortiori*, does not unambiguously authorize) petitioner's current suit. Petitioner does not seek to recoup any prior payment made to the government that was "excessive" or "wrongfully collected," but instead seeks *additional interest* on an overpayment that has already been refunded.

Petitioner contends that "[t]he 'any sum' provision * * * readily satisfies the 'separate waiver' requirement" of *Shaw*. Pet. 17 n.1; see Pet. 25, 26. As explained above, however, the term "sum" in Section 1346(a)(1) is modified by the phrase "excessive or in any manner wrongfully collected under the internal-revenue laws." That phrase might encompass interest that the taxpayer has paid over to the IRS and seeks to recoup, as when the IRS assesses additional tax and interest, and the taxpayer pays the full assessment and then sues for a refund. Cf. *Flora* v. *United States*, 362 U.S. 145, 149 (1960). The interest that petitioner seeks here, however, was never in petitioner's possession, and petitioner does not assert that it is either "excessive" or "wrongfully collected." Thus, even apart from the fact that Section 1346(a)(1) does not specifically mention interest, the provision does not literally authorize petitioner's current suit.[9]

v. Statutory provisions requiring the United States to pay interest reflect a significant departure from the

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[9] Because binding Sixth Circuit precedent held that Section 1346(a)(1) vests district courts with jurisdiction over suits like this one, the government did not argue below that the district court lacked jurisdiction over this case. See note 3, *supra*. This Court, however, obviously would not be bound by that circuit precedent.

usual practices that historically have prevailed in this country. See, *e.g.*, *Shaw*, 478 U.S. at 314-316. "[T]he earliest statements of the no-interest rule appear in opinion letters of Attorneys General in response to questions posed by the Comptroller of the Treasurer concerning payment of interest where a private Act of Congress authorized the Treasury Department to pay damages, with no mention of interest on the damages." *Id.* at 316 n.3. Those opinion letters applied the presumption against interest to Acts of Congress that addressed the payment decisions of Executive Branch agencies rather than the remedial authority of courts. Exceptions from the traditional no-interest rule therefore should not lightly be inferred, and even express statutory requirements that the federal government pay interest should be narrowly construed, whether or not the relevant statutes speak directly to *judicial* awards of interest. Cf. *id.* at 318 (explaining that "[t]he no interest rule provides an added gloss of strictness upon [the] usual rules" governing the construction of waivers of sovereign immunity).

3. Petitioner argues that "the lower courts need further guidance from this Court on what constitutes a waiver of sovereign immunity and what constitutes a substantive provision." Pet. 21; see Pet. 18-27. By way of example, petitioner asserts that the Second and Federal Circuits have reached conflicting decisions about whether an uncodified statutory provision pertaining to "interest netting" under 26 U.S.C. 6621(d) constitutes a separate waiver of sovereign immunity. See Pet. 19-20 (citing *Federal Nat'l Mortg. Ass'n* v. *United States*, 379 F.3d 1303, 1305 (Fed. Cir. 2004), and *Exxon Mobil Corp.*, 689 F.3d at 201). Granting review in this case, however, would not re-

solve that issue, because neither the uncodified statutory provision nor Section 6621(d) is at issue here. And both the Federal Circuit and the Second Circuit have viewed 26 U.S.C. 6611 as a waiver of sovereign immunity. See p.15, *supra*.

Petitioner also asserts (Pet. 22) that "tension" exists in this Court's precedents "about what qualifies as an issue of the scope of a waiver of sovereign immunity." But the cases it cites concern completely different issues (exceptions to the Federal Tort Claims Act, time limits on a waiver, and the proper remedy). See Pet. 22-23. Consideration of the question whether Section 6611 constitutes a waiver of sovereign immunity would not give the Court the opportunity to clarify any of those issues. Indeed, in petitioner's view, Section 6611 is not a waiver of sovereign immunity *at all*, thus obviating any question whether the court of appeals "improperly treated the 'date of the overpayment' that triggers interest in § 6611(b)(2) as governing the 'scope' of the waiver." Pet. 24.

Petitioner further argues (Pet. 24) that "the courts of appeals are also confused and in conflict about when the strict construction canon applies to interest provisions." The only conflict petitioner identifies, however, pertains to the issue "whether a party may recover interest on seized property in forfeiture actions, when the relevant statute does not unambiguously provide for such interest." Pet. 25; see Pet. 26 nn.3, 4 (citing cases). The decisions adopting the minority view—that *Shaw* does not preclude the recovery of interest in that context—have no relevance to this case. They each rested on the proposition, immaterial here, that "'there is no issue of sovereign immunity because the Government is not being asked to pay interest, but to

disgorge property that was not forfeited.'" *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998); see *Carvajal* v. *United States*, 521 F.3d 1242, 1245 (9th Cir. 2008) ("[T]he payment of interest on wrongfully seized money is not a payment of damages, but instead is the disgorgement of a benefit actually and calculably received from an asset that [the government] has been holding improperly.") (internal quotation marks and citation omitted; second pair of brackets in original).

4. Petitioner finally contends (Pet. 27-31) that review is warranted because "the proper application of the strict construction canon for waivers of sovereign immunity is unquestionably important." Pet. 27. That is certainly true as a general matter. But petitioner does not explain why this Court's intervention is necessary to review the court of appeals' judgment that Section 6611 does not require the payment of interest from the date of remittance in the unique context of a deposit that is converted into an advance payment of tax, or why the statute-specific question whether Section 6611 constitutes a waiver of sovereign immunity has particular importance. Petitioner correctly notes (Pet. 28) that this Court has on various occasions considered difficult questions relating to sovereign immunity and has not always accepted the government's position. But in the absence of a circuit conflict, no sound reason exists to grant review on the narrow question of statutory construction at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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