NO. 13-113

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest federation of business companies and associations.

It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of national concern to American business.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of the Chamber's intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

This is such a case. The Sixth Circuit's decision, if broadly applied, would make it much easier for the government to withhold money properly owed to businesses—such as petitioner Ford Motor Company ("Ford")—and other entities and persons seeking monetary payments due from the government. This case involves interest on an undisputed tax refund, but as shown below, the Sixth Circuit's analysis could apply to disputed refund claims, as well as claims asserting breach of contract, copyright and patent infringement, and tort injuries. Because the Chamber's members are frequently parties to actions seeking monetary payments from the government in a variety of contexts, the Chamber has a substantial interest in the issues raised in this case.

SUMMARY OF ARGUMENT

Federal and state governments alike are entitled to sovereign immunity from suit in courts of law. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) (federal); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (state). But governments waive that immunity in many contexts. Among other things, sovereign-immunity waivers ensure the enforcement of contracts and thereby facilitate necessary government contracting relationships. They also ensure that persons and entities injured by wrongful government actions are not left without redress for their injuries.

A statutory provision arguably waiving sovereign immunity is "construed strictly in favor of the sovereign," i.e., against the asserted waiver. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (quotation omitted). But once the court determines

that the government has consented to suit, the substantive rules of decision governing the suit are not subject to a similar pro-government presumption. *See* Pet. 11-15 (citing cases); *infra* at 7. The government is already free to determine whether it will be subject to particular types of monetary actions, and it is equally free to specify, through the governing statute, the terms on which monetary recovery may be had. The government has no need for, or entitlement to, the further benefit of a court-made rule requiring the statute authorizing monetary recovery to be strictly construed against the very recovery it authorizes.

The lower courts unfortunately have not been clear or consistent on this important principle. The Petition sets forth the courts' confusion (*see* Pet. 18-27); the Chamber in this brief focuses on the significance of the error exemplified by the Sixth Circuit's decision in this case, which conflates the construction of a statutory provision waiving sovereign immunity with the construction of distinct provisions establishing the substantive right of recovery. That flawed analysis creates a needless and unfair obstacle to monetary recovery that would be applicable in many contexts, including cases brought by taxpayers, government contractors, and victims of government malfeasance. If upheld, the Sixth Circuit's decision would preclude individuals and companies from recovering monetary payments to which they are entitled; leave some individuals and companies without redress intended by Congress for their contract, tort, and other injuries; and frustrate the ability of the federal government to contract with private parties. Certiorari should be granted.

ARGUMENT

I. QUESTIONS CONCERNING THE SCOPE AND EFFECT OF SOVEREIGN-IMMUNITY WAIVERS ARISE IN A WIDE RANGE OF SUITS AGAINST THE FEDERAL AND STATE GOVERNMENTS

Although the federal and state governments are generally entitled to immunity from suits for monetary (and other) relief, governments can and often do waive that immunity.

This case involves the waiver of sovereign immunity for tax-overpayment refunds, which is a uniquely important area for U.S. companies. The federal government collects hundreds of billions of dollars in business income taxes each year. *See* Internal Revenue Service, 2012 Data Book, at 3. A significant portion of those tax payments are eventually returned as refunds. In 2012, for example, the I.R.S. returned nearly $44 billion to companies. *Id.* Long before a company receives a refund, however, its advance payments are deposited directly into the U.S. Treasury—to the Treasury's benefit. Companies, of course, often seek (and are entitled to) overpayment interest on those funds, as Ford did in this case. The question presented here is of overriding importance to those businesses. Indeed, Ford's interest claim alone is worth some $470 million. *See* Pet. 6. Billions more are potentially at stake for other companies.

Courts have addressed and construed sovereign-immunity waivers in this important context, *see, e.g.*, *Exxon Mobil Corp. v. Comm'r*, 689 F.3d 191, 201-02 (2d Cir. 2012); *Fannie Mae v. United States*, 469 F.3d

968, 972-73 (Fed. Cir. 2006), but the issue also arises in many other contexts involving monetary claims by business entities against the government, including:

- government contracts, *see M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010); *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009)
- torts, *see Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003); *Saks, Inc. v. United States*, 218 F. App'x 350, 350-51 (5th Cir. 2007) (per curiam)
- copyright and patent infringement, *Zoltek Corp. v. United* States, 672 F.3d 1309, 1318 (Fed. Cir. 2012) (patent infringement); *Blueport Co. v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008) (copyright infringement), and
- counterclaims regarding environmental clean-up, *see United States v. Azrael*, 765 F. Supp. 1239, 1244-45 (D. Md. 1991); *United States v. W. Processing Co., Inc.*, 761 F. Supp. 725, 728-29 (W.D. Wash. 1991).

Questions about how courts should interpret waivers of sovereign immunity also arise in several categories of claims typically brought by individuals, such as those involving employment discrimination, *see Bullock v. Napolitano*, 666 F.3d 281, 283-84 (4th Cir.), *cert. denied*, 133 S. Ct. 190 (2012); *Munoz v. Mabus*, 630 F.3d 856, 861-62 (9th Cir. 2010), and civil and criminal forfeiture, *see United States v. Craig*, 694 F.3d 509, 511-12 (3d Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3502 (U.S. Feb. 25, 2013) (No. 12-1046); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 613-15 (10th Cir. 2000); *United States*

v. Bein, 214 F.3d 408, 415 (3d Cir. 2000); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998).

The range of contexts in which courts must construe sovereign-immunity waivers demonstrates the broad importance of the Sixth Circuit's decision in this case. A decision addressing the strict construction canon (or other principles of sovereign immunity) in one particular substantive area may not remain confined to that particular substantive area. This Court has, for example, cited authority arising from a fiduciary breach claim brought under the Indian Tucker Act when analyzing the Age Discrimination in Employment Act's waiver provision. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) for the proposition that the strict construction canon does not apply to separate, substantive statutory provisions). Likewise, the Second Circuit invoked this Court's decision in *Mitchell*, where the underlying dispute involved alleged mismanagement of Indian lands, to analyze a waiver of sovereign immunity in a tax case. *See Exxon*, 689 F.3d at 202. The impact of the Sixth Circuit's erroneous decision below is thus unlikely to be confined to suits brought under the particular tax statute at issue in this case, or even to tax claims more generally.

The issue presented is one of broad significance, and it merits further review by this Court.

II. THE DECISION BELOW ESTABLISHES AN ERRONEOUS RULE OF CONSTRUCTION POTENTIALLY APPLICABLE TO ALL SUITS FOR MONETARY RELIEF AGAINST THE GOVERNMENT

The Sixth Circuit held in this case that because waivers of sovereign immunity must be strictly construed against waiver, the statute authorizing Ford's tax refund claim likewise must be strictly construed against Ford. That decision cannot be reconciled with this Court's precedents holding that only the waiver provision itself is to be strictly construed, leaving the separate substantive provision to be construed in accordance with standard interpretive rules. As the Court has explained, "where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity.'" *Gomez–Perez*, 553 U.S. at 491 (quoting *White Mountain Apache Tribe*, 537 U.S. at 472-73); *see Mitchell*, 463 U.S. at 218–19. That distinction is grounded in the recognition that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld," such that the courts are "not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.); *see Mitchell*, 463 U.S. at 219 (same); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) (same). In other words, once the court has determined that the government has agreed to enter the playing field, the court does not then tilt the field in the government's favor.

This case should exemplify the correct interplay between the controlling interpretive principles. As explained in the Petition, two statutory provisions are relevant here. Pet. 15-18. The first, 28 U.S.C. § 1346(a)(1), grants district courts jurisdiction over claims against the United States for recovery of erroneously assessed taxes "or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." That provision establishes the waiver of sovereign immunity required for Ford to bring its claim against the United States. *See United States v. Williams*, 514 U.S. 527, 531 (1995) (§ 1346(a)(1) is a waiver of sovereign immunity); *E.W. Scripps Co. v. United States*, 420 F.3d 589, 596-97 (6th Cir. 2005) (same). The second relevant provision, 26 U.S.C. § 6611, establishes the substantive basis for Ford's claimed right to interest on the refund of its earlier tax overpayments. Under this Court's precedents, the strict construction canon should apply only to the waiver provision, § 1346(a)(1). The substantive provision, § 6611, then would be construed neutrally to determine whether Ford possesses the right to interest that Ford asserts.

The Sixth Circuit, however, conflated the distinct interpretive rules. Because "§ 6611 itself waives sovereign immunity for interest on tax overpayments," the court explained, "the strict construction principle applies." Pet. App. 9a n.3; *see id.* at 7a ("[W]hen interpreting § 6611, we bear foremost in mind that Ford's challenge involves construing a

waiver of sovereign immunity in a suit for interest against the government.").[2]

Under the Sixth Circuit's erroneous logic, virtually *any* claim seeking monetary relief from the government could face a strong presumption disfavoring such relief. Because such claims necessarily are asserted pursuant to some statutory provision waiving sovereign immunity (unless the government has waived immunity by its conduct, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002)), essentially any statutory right to monetary recovery could be reimagined as a waiver of immunity from suit for such recovery. Thus reimagined, the

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[2] The Sixth Circuit conflated the inquiries in part because it overread *Library of Congress v. Shaw*, 478 U.S. 310 (1986). *See* Pet. App. 7a. In *Shaw,* a Title VII case, this Court held that prejudgment interest is permitted as an element of unliquidated damages only where Congress expressly waives immunity from *both* the claim for compensatory damages *and* the claim for prejudgment interest, since they were historically understood as distinct claims. *Id.* at 314. And such waivers, the Court explained, must be strictly construed. *Id.* at 318. But Ford here did not seek prejudgment interest as an element of an award for an unliquidated damages amount on a civil judgment. Ford instead sought interest on a fixed sum indisputably owed to it under a statute expressly mandating the payment of interest on tax overpayments (26 U.S.C. § 6611). There is no comparable history of "common-law courts in England"—or America—treating a claim for that kind of interest as a distinct claim "founded upon agreement." *Id.* at 314-15. There is thus no basis for importing the strict construction rule concerning sovereign-immunity waivers to the statutory question whether interest follows the overpayment refund as a matter of course. And, in any event, because (as the government has not disputed in this case, *see* Pet. 7) the waiver of sovereign immunity in 28 U.S.C. § 1346(a)(1) extends to claims for the recovery of interest as well, the court's reliance on *Shaw* is misplaced.

claim for recovery would become a claim of waiver, and hence subject to the strict construction rule. The consequence, in many cases, would be to preclude the claimant from recovering money the claimant would be entitled to under neutral interpretive rules.

This case illustrates the point. The Sixth Circuit recognized that Ford's interpretation of the statutory provision governing its right to recover overpayment interest was "strong," Pet. App. 11a; that Ford's reading of the relevant administrative rule was "superior" to the IRS's "strained," "flawed" interpretation, *id.* at 17a, 18a, 20a; that the government's interpretation "strips away from the [rule] the very protection it was designed to furnish," *id.* at 17a-18a; and that the government's position was "contradicted" by a prior IRS pronouncement, *id.* at 18a n.6. Despite these strong indications that the court believed Ford had the better position on the substantive merits, the Sixth Circuit nonetheless adopted the interpretation of § 6611 most favorable to the government. As a result, Ford was precluded from recovering over $470 million in overpayment interest to which it likely would have been entitled under § 6611, were that provision construed neutrally. *See* Pet. 6.

Nothing about the Sixth Circuit's conclusion, however, is unique to these particular tax laws. In any case involving a claimed statutory authorization for monetary relief, the Sixth Circuit's approach would stack the deck against the claimant. There is no legal basis, or practical need, to give the government such special favor when its citizens are seeking

to enforce or establish its monetary obligations to them.

American businesses frequently find themselves parties to disputes in which they seek to recover money from the government. The uncertainty over the proper application of the strict construction canon creates added burdens for companies and the government alike—forcing them to continually relitigate the bounds of the canon's application. This Court should grant certiorari and give those boundaries their proper definition.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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