No. 13-113

In the Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Ford Motor Company (Ford) has no parent corporation. There are publicly-traded corporations that may, from time to time, own more than 10% of Ford's stock as trustee or independent fiduciary for various employee plans. The most recent trustee owner in this capacity is State Street Corporation.

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As explained in the petition (at 10-18), the Sixth Circuit grounded its decision on an invocation of the strict construction canon for waivers of sovereign immunity that squarely conflicts with this Court's precedents. In response, the government does not dispute—as the Chamber of Commerce has amplified in its amicus brief supporting certiorari—that the proper application of the strict construction canon is "'unquestionably important.'" Opp. 20. The government does not deny that the Sixth Circuit grounded its decision on the canon. And tellingly, the government does not attempt to defend the Sixth Circuit's decision on its terms. Instead, the government focuses its efforts on *avoiding* the question presented. Those efforts not only fail, but simply underscore the need for this Court's review.

In seeking to ensure that the government does not abuse the heavy advantage afforded by the strict construction canon, this Court has made clear that the canon is confined to *waivers of sovereign immunity*—and does not extend to separate, substantive provisions. But as the decision below exemplifies, the lower courts have struggled with this rule—and, indeed, remain deeply conflicted and confused over application of the canon. Pet. 18-27. The government's response underscores that the government remains intent on overextending the canon to seize undue advantage in litigation and thwart congressionally-sanctioned remedies. This Court's review is needed. And this case, in which the decision below indisputably turned on application of the strict construction canon, provides an excellent vehicle in which to provide it.

I. THE SIXTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENTS

1. This Court has repeatedly held that the strict construction canon for waivers of sovereign immunity applies only to the waiver of sovereign immunity—and not to separate, substantive provisions. *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983); *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008). *Gomez-Perez* is instructive. There, the Court held that the waiver of sovereign immunity for the claim at issue, 29 U.S.C. § 633a(c), must satisfy the strict construction canon, but the "substantive provision outlawing 'discrimination,'" *id.* § 633a(a), did not need to "surmount the same high hurdle." 553 U.S. at 491.

The Sixth Circuit's decision directly conflicts with those precedents. In this case, 28 U.S.C. § 1346(a)(1) waives the government's immunity from suit, and 26 U.S.C. § 6611 is the substantive provision upon which petitioner's claim is based. Section 1346(a)(1)—like § 633a(c) in *Gomez-Perez*—authorizes a certain category of "civil actions" against the United States and grants district courts "original jurisdiction" over those suits. 28 U.S.C. §1346(a)(1). It is, as this Court has recognized, a classic waiver of sovereign immunity. *United States v. Williams*, 514 U.S. 527, 530-31 (1995). By contrast, § 6611 does not refer to civil actions, jurisdiction, or courts. 26 U.S.C. § 6611. Instead, it provides taxpayers a substantive right to overpayment interest, stating that "[i]nterest shall be allowed and paid upon any overpayment" of a tax and setting forth the parameters of that right. *Id.* § 6611(a), (b)(2).

These provisions neatly fit the paradigm recognized by this Court's decisions: § 1346(a)(1) is a "'jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law,'" and § 6611 is the "'substantive righ[t]" that forms the basis for petitioner's claim. *United States v. Bormes*, 133 S. Ct. 12, 16-17 (2012) (citation omitted). Under the *Mitchell* line of cases, the strict construction canon applies *only* to § 1346(a)(1). The Sixth Circuit directly contravened that rule when it applied the canon as the dispositive factor in its merits analysis of how much interest petitioner was owed under § 6611. The court's decision—from start to finish—is explicitly grounded on the canon. Pet. 8.

2. The government tries to defuse this clear conflict by stating (at 8) that the Sixth Circuit "simply concluded that Section 6611 *is* the provision that supplies the relevant waiver of sovereign immunity." But tellingly, the government never actually endorses or defends the conclusion that § 6611 is a waiver of sovereign immunity. Likewise, the government carefully states that numerous courts have "all understood" § 6611 as a waiver of sovereign immunity, Opp. 15, but it never says those decisions were *correct*. The government's failure to defend that position in the face of numerous decisions treating § 6611 as a waiver of sovereign immunity increases the need for review.

Indeed, the government has previously recognized that § 6611 is *not* a waiver of sovereign immunity. In *E.W. Scripps Co. v. United States*, 420 F.3d 589 (6th Cir. 2005), the government recognized that § 6611 does *not* "waive immunity *from suit*," but instead "grants a substantive right to interest on overpayments of tax." U.S. Reply 12, *Scripps*, 420 F.3d 589. In that case, the

government candidly acknowledged that: "I.R.C. § 6611(a) merely grants a substantive right to statutory interest. It says nothing at all concerning whether the Government may be sued to force the payment of such interest . . . , the terms on which any consent to suit is granted, or what courts may entertain such a suit." *Id.* at 13. Petitioner agrees.

Correctly differentiating between (1) the waiver of sovereign immunity and (2) the substantive provision sought to be enforced is critical to the proper application of the strict construction canon. Without this Court's guidance, the government can continue to obfuscate the issue—as it did before the Sixth Circuit here—and exploit the confusion in the lower courts on what is the waiver of sovereign immunity to which the strict construction canon applies. Pet. 19-21. Allowing the government to cast substantive provisions as waivers of sovereign immunity permits the government to circumvent the *Mitchell* rule.

3. The government also suggests (at 8 (citing Pet. App. 9a n.3)) that there is no need for this Court's review on the ground that the Sixth Circuit "expressly acknowledged and accepted" the *Mitchell* rule. That argument is mistaken. While the Sixth Circuit did mention *Gomez-Perez* and *White Mountain*—in a footnote—it obviously missed the import of those cases because it stated that the Court had only "*arguably* softened its use of the strict construction principle since the 1990s," Pet. App. 9a n.3 (emphasis added), and then proceeded to contravene those decisions. There is nothing "arguabl[e]" about the Court's repeated—and recent—decisions reining in the government's invocation of the strict construction

canon and making clear that it does not extend beyond the waiver of sovereign immunity itself. Pet. 11-15.

In one sense, it is perhaps unfair to fault the court of appeals for failing to follow this Court's decisions. That is because—while the government claims to recognize the teachings of this Court's decisions before this Court—in the court of appeals the government openly questioned how "far the reasoning of *Mitchell* and *White Mountain* may legitimately extend" and maintained that "[t]he Court's extension of the reasoning of *White Mountain* and *Mitchell* beyond Tucker Act claims in *Gomez-Perez* is arguably dicta." U.S. Reh'g Opp. 4 & n.2. In other words, the government itself—which has an inherent incentive always to press the strict construction canon—has not received the message from this Court's decisions.

II. THE GOVERNMENT'S EFFORTS TO AVOID THE QUESTION PRESENTED FAIL

Instead of defending the Sixth Circuit's decision on its own terms, the government strains to identify reasons to avoid review of the "unquestionably important" issue presented here. Its efforts fail.

A. The Question Is Properly Presented

Contrary to the government's argument (at 15-16) the question presented was both pressed and passed upon below. The question presented is whether a court exercising jurisdiction pursuant to a waiver of sovereign immunity may apply the strict construction canon to the substantive right at issue. Pet. i. Petitioner has consistently maintained that the courts below had jurisdiction under § 1346(a)(1), which is necessarily a waiver of sovereign immunity. Pet. 6-7. The government—below—agreed that jurisdiction was

proper under § 1346(a)(1), *id.*, citing *Scripps*, which held that § 1346(a)(1) "waived [the government's] sovereign immunity with respect to suits for interest on overpayments of tax that are brought in federal district court." 420 F.3d at 598. When the government invoked the strict construction canon for waivers of sovereign immunity, petitioner responded that "the Supreme Court has rejected" a "double strict-construction requirement," citing *White Mountain*. Pet'r CA6 Reply 17. And in its petition for rehearing, petitioner made precisely the same argument it makes here. The government never suggested below that that argument had been forfeited (because it was not).

The question presented was also passed upon below. The Sixth Circuit necessarily exercised jurisdiction under § 1346(a)(1) because it affirmed the district court's judgment *on the merits*, rather than dismissing for lack of jurisdiction. The Sixth Circuit discussed the key precedents—*Gomez-Perez* and *White Mountain*—and erroneously dismissed them. Pet. App. 9a n.3.[1] And in denying rehearing—after calling for a response and after the parties had plainly briefed the question presented here—the panel stated that it "ha[d] further reviewed the petition for rehearing and conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 40a-41a.

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[1] The court's odd statement that §1346(a)(1) was not at issue, Pet. App. 13a, was apparently based on its (erroneous) agreement with the government that *two* waivers were required—one for jurisdiction (§1346(a)(1)) and one for interest (§ 6611).

B. Jurisdiction Is Proper Under § 1346(a)(1)

Contradicting its position below, the government also tries to avoid review by arguing (at 3 n.3 & 17 n.9)—for the first time in this case—that § 1346(a)(1) does not waive sovereign immunity with respect to petitioner's overpayment interest claim. Having secured the merits judgment below on the premise that the courts below *had* jurisdiction under § 1346(a)(1), the government should not be permitted to evade review by arguing that jurisdiction is actually *lacking* under § 1346(a)(1). Indeed, that argument is tantamount to a confession by the Solicitor General that the Sixth Circuit erred in deciding the merits. In any event, the government is wrong about § 1346(a)(1).

Section 1346(a)(1) is not limited to actions to recover "prior payment" of funds that were "collected" by the IRS. Opp. 17. As relevant here, § 1346(a)(1) grants jurisdiction 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." 28 U.S.C. § 1346(a)(1) (emphasis added). This Court long ago recognized that interest fits within the broad phrase "any sum." *Flora v. United States*, 362 U.S. 145, 149 (1960). And when, as petitioner alleges here, the government "does not compensate the taxpayer for the time-value of the tax overpayment, the Government has retained more money than it is due, *i.e.*, an 'excessive sum.'" *Scripps*, 420 F.3d at 597.

But the more important point here is that the government's assertion—after litigating this case for years on the admitted premise that § 1346(a)(1) supplies jurisdiction to entertain petitioner's suit—that § 1346(a)(1) does not, after all, confer jurisdiction is

itself a reason to grant review. Section 1346(a)(1) is a bedrock jurisdictional grant for claims against the government. The question whether § 1346(a)(1) waives sovereign immunity for overpayment interest claims, whether that waiver satisfies the "separate waiver" requirement of *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), and whether *Shaw* even applies at all here, are issues bound up in the question presented. Pet. 24-27. That the government *disagrees* with the Sixth Circuit on this important jurisdictional premise only underscores the need for this Court's review.

Moreover, if the government were right, then the proper disposition would be to vacate the decision below and remand the case with instructions to transfer the case to the Court of Federal Claims, where the government admits (at 3 n.3) jurisdiction *would* be proper. The Solicitor General's position that the lower court lacked jurisdiction to issue a judgment on the merits cannot justify leaving in place the Sixth Circuit's ruling. At a minimum, that position warrants an order granting certiorari, vacating the decision below in light of the Solicitor General's statement that the court lacked jurisdiction, and remanding the case. *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam); *see also, e.g.*, *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002) (vacating and remanding with instructions to transfer case to Tenth Circuit under 28 U.S.C. § 1361).

C. The Government's Merits Arguments Are Non-Responsive And Unavailing

The government's merits arguments are non-responsive to the question presented and, in any event, fail for reasons recognized by the Sixth Circuit.

Because petitioner's interpretation of § 6611 is at least "plausible"—as both the Sixth Circuit (Pet. App. 11a) and district court (*id.* at 37a) agreed—the court's invocation of the strict construction canon was decisive here. Even the government recognizes that. Opp. 6-7. Certiorari is warranted because the court of appeals applied the canon to the substantive provision at issue—in direct conflict with this Court's precedents. Petitioner is not asking this Court to resolve the merits of its overpayment-interest claim in the first instance. It seeks review of the threshold sovereign immunity issue that was dispositive below and has confounded the lower courts. If the Court agrees with petitioner on that issue, it should reverse the decision below and remand for reconsideration of the merits.

In any event, the government's position on the merits is at odds with the statute, the IRS's own revenue procedure, and the venerable time-value-of-money principle. Because the remittance date is indisputably considered "the date paid" under 26 U.S.C. § 6601 for purposes of *underpayment* interest, it follows that the remittance date is "the date of the overpayment" in § 6611(b)(2). The provisions are "functionally parallel," both effectuate the use-of-money principle, and use "very similar language." Pet. App. 4a, 11a, 14a. The same remittance cannot have a different date of payment based on whether the IRS determines that the taxes have been under—or, as here, *over*—paid.

The government's position also contravenes its own revenue procedure. Pet. 30-31. The government's assertion (at 12) that Revenue Procedure 84-58 does not contemplate the conversion of a deposit into a payment fails to account for the plain language of

Section 5.05—which is why the Sixth Circuit found the government's interpretation was "strained." Pet. App. 17a. The phrase "[r]emittances treated as payments of tax," Rev. Proc. 84-58 § 5.05, 1984-2 C.B. 501, includes remittances—like the one at issue here—that are initially categorized as deposits, but ultimately treated as payments. Moreover, the government has no answer for the structure of the rule, which makes clear that the government's position is an inapplicable exception to the general rule. Pet. 30.

The Sixth Circuit was right that petitioner has (at the least) a "strong case" on the merits of its statutory interpretation. Pet. App. 11a. But the court erroneously ruled for the government on the ground that petitioner could not meet the *clear-statement* rule for waivers of sovereign immunity. *Id.* at 20a-21a.[2]

III. THIS COURT'S GUIDANCE IS NEEDED

The government has repeatedly pressed the limits of the strict construction canon. Pet. 28. And it does so here too. Having secured a merits ruling based on an overextension of the canon, the government now uses evasive tactics to avoid review and secure a $470 million windfall in overpayment interest due to petitioner. But even the government agrees that the question presented is "'unquestionably important.'" Opp. 20 (citation omitted). Indeed. As the Chamber of

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[2] The government's citation (at 9) of *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), is misleading. The government abandoned any reliance on *Chevron* deference principles below, presumably because it recognized that its litigating position was at odds with the IRS's prior interpretations. Pet'r CA6 Br. 43-51; Pet'r CA6 Reply 1.

Commerce explained (at 4-6), issues relating to the effect and scope of waivers of sovereign immunity arise in a wide range of suits against the federal and state governments that affect businesses and individuals.

The decision below starkly illustrates the confusion in the lower courts on these important issues. But it is hardly an outlier. Pet. 18-27. The government does not even try to address the widespread conflict and confusion in the courts below on the question presented (*id.*)—including the circuit conflict over what is a waiver of sovereign immunity, Opp. 18-19, and the circuit conflict over when the government must disgorge interest on wrongfully seized property (analogous to the interest it received on petitioner's tax overpayments), *id.* at 19-20. Nor does the government defend the Sixth Circuit's determination that the "scope" of the waiver was at issue, or try to reconcile that conclusion with this Court's cases. *Id.* at 19.

In the end, perhaps the most revealing factor in favor of certiorari is the unusual nature of the government's response. As a practical matter, the Solicitor General's response might best be viewed as a confession of error—or at least a *confirmation* of error. The government refuses to defend the Sixth Circuit's decision on its own terms; the government tries to knock the legs out from under that decision by arguing (for the first time in this case) that the court lacked jurisdiction to enter the decision; and the government focuses on baseless theories for avoiding the question presented. That unconventional approach is a good sign that the Solicitor General appreciates that the Sixth Circuit's decision is wrong on its terms—the terms that matter here. Allowing that decision to stand will only foster further confusion in the lower

courts and invite continued overreaching by the government in asserting the strict construction canon.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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