No. 23-2319

IN THE

United States Court of Appeals for the Fourth Circuit

BANK OF AMERICA CORPORATION, f/k/a NationsBank, f/k/a BankAmerica Corporation, f/k/a FleetBoston Financial Corporation, f/k/a BankBoston Corporation, f/k/a Summit Bancorp, f/k/a MBNA Corporation, f/k/a Merrill Lynch & Company, Incorporated,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of North Carolina
No. 3:17-cv-00546, Judge Robert J. Conrad, Jr.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, each *amicus curiae*, the Chamber of Commerce of the United States of America, Business Roundtable ("BRT"), the Securities Industry and Financial Markets Association ("SIFMA"), and American Bankers Association ("ABA"), makes the following disclosure:

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Dated: May 28, 2024

/s/ Lauren Willard Zehmer
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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. The District Court's Interpretation Rewrites Section 6621(d) and Cannot Be Squared with Other Provisions of the Internal Revenue Code 8

A. By Disregarding the Plain Language of Section 6621(d), the District Court Carved Out an Arbitrary Exception to Interest Netting that Is Absent from the Text. 9

B. Section 6621(d) Should Be Interpreted Consistently with Other Provisions of the Internal Revenue Code. 12

1. Overpayments and Underpayments Are Netted Under the Internal Revenue Code. 13

2. The Internal Revenue Code Recognizes that a Post-Merger Entity Succeeds to all Pre-Merger Assets and Liabilities. 15

3. Congress Has Imposed Temporal Limits throughout the Internal Revenue Code. 16

II. The District Court's Approach Would Undermine the Purpose of Section 6621(d), Which Conferred Broad Interest-Netting Authority to Address a Basic Inequity in the Internal Revenue Code 18

A. Section 6621(d) Was Designed to Address a Fundamental Inequity in the Internal Revenue Code. 18

B. Section 6621(d) Was Enacted in Response to the IRS's Pattern of Improperly Declining to Net Interest. 21

III. The District Court's Approach Ignores the Realities of Tax Compliance. 24

IV. The Fundamental Unfairness in the District Court's Interpretation Would Harm a Broad Range of Businesses. 27

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Page(s)

Cases

Estate of Bartell v. Comm'r,
147 T.C. 140 (2016) 25

Comm'r v. Engle,
464 U.S. 206 (1984) 12

Helvering v. Morgan's Inc.,
293 U.S. 121 (1934) 12

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 16

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 11

Magma Power Co. v. United States,
101 Fed. Cl. 562 (2011) 22, 23, 27

McCreary Cnty., Ky. v. ACLU of Ky.,
545 U.S. 844 (2005) 18

Russello v. United States,
464 U.S. 16 (1983) 17

United States v. Wong Kim Bo,
472 F.2d 720 (5th Cir. 1972) 18

Wells Fargo & Co. v. United States,
119 Fed. Cl. 27 (2014) 11, 13, 19

Wells Fargo & Co. v. United States,
827 F.3d 1026 (Fed. Cir. 2016) 11, 15, 16, 20, 21, 23

Statutes

26 U.S.C.
§ 30D(h) 17
§ 39 25
§ 168(k) 17
§ 381(c)(2) 17
§ 1031(a)(3) 17
§ 1033(a)(2)(B) 17
§ 6213 17
§ 6402(a) 13
§ 6501 17
§ 6501(a) 25
§ 6502 17
§ 6511 17
§ 6511(a) 24
§ 6601(a) 4
§ 6611(a) 4
§ 6621(a)(1) 4
§ 6621(a)(2) 4
§ 6621(d) 4, 6, 8, 9, 17
§ 6751(b) 17
§ 7701(a)(1) 14
§ 7701(a)(14) 14
§ 7805(b) 25

Legislative History

Conf. Rep. No. 99-841 (1986) 21

Conf. Rep. No. 101-964 (1990) 22

H.R. Rep. No. 103-826 (1994) 22

H.R. Rep. No. 104-506 (1996) 21, 22, 23

H.R. Rep. No. 105-364 (1997) 7, 19, 20, 24

S. Rep. No. 105-174 (1998) 19, 20

Regulations

26 C.F.R. § 1.368-2 .... 15, 16

26 C.F.R. § 1.905-3 25

Internal Revenue Service Guidance

IRS Chief Counsel Advice Mem. 200407015,
2004 WL 276550 (Feb. 13, 2004) 10

IRS Field Serv. Advice Mem. 200017003,
2000 WL 1873995 (Oct. 19, 1999) 10

IRS Field Serv. Advice Mem. 200212028,
2002 WL 442928 (Jan. 16, 2002) 10

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United States - M&A Statistics (last visited May 23, 2024) 27, 28

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Report to the Congress on Netting of Interest on Tax Overpayments and Underpayments (1997) 23

Summ. J. Order, *Bank of Am. v. United States*,
No. 3:17-cv-00546-RJC-DSC (Feb. 14, 2023), ECF No. 83 9

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, it advocates on legislation, regulation, and business policy affecting retail

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[1] *Amici* file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and all parties to the appeal have consented to the filing of this brief. *Amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

and institutional investors, equity and fixed income markets, and related products and services. It serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

Business Roundtable is an association of chief executive officers of America's leading companies representing every sector of the U.S. economy and with employees in every state. Business Roundtable works to promote a thriving United States economy and economic opportunity for all Americans by advocating for sound public policies.

The ABA is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $23.7 trillion banking industry and its 2.1 million employees. ABA members provide banking services in each of the 50 states and the District of Columbia. Among them are state banks and savings associations of all sizes.

In the decision below, the district court interpreted Section 6621(d) to create a windfall for the IRS by imposing unfair consequences on the nation's business community. Section 6621(d) was enacted to ensure that when a taxpayer owes zero taxes to the federal government due to an equivalent underpayment (i.e., a balance owed to the IRS) and overpayment (i.e., a balance owed from the IRS to a taxpayer), that taxpayer also owes zero interest. But the district court's ruling carves out an arbitrary exception to that statutory command: It would deny interest netting under Section 6621(d) to post-merger entities that owe no net taxes if the relevant underpayments and overpayments relate to pre-merger tax years. That approach contradicts the text, structure, history, and purpose of Section 6621(d); ignores the realities of corporate tax compliance; and if accepted, would deny interest netting to a large portion of the statute's intended beneficiaries.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted Section 6621(d) to address a basic unfairness in the Internal Revenue Code (the "Code"). In the decision below, however, the district court has rewritten the provision in a way that furthers the very inequity that the statute was designed to prevent.

When the federal government owes money to a taxpayer due to an overpayment of taxes, the government must pay interest on the overpayment amount. *See* 26 U.S.C. § 6611(a). Similarly, when a taxpayer owes taxes to the government due to an underpayment of taxes, the taxpayer must pay interest on the underpayment amount. *See* 26 U.S.C. § 6601(a). The Code is structured such that corporate taxpayers pay more interest for underpayments than the government pays them for overpayments. *See* 26 U.S.C. § 6621(a)(1), (2) (prescribing the over- and underpayment interest rates).

That differential in interest rates can lead to unfair results. Specifically, even when a corporate taxpayer has equal overpayments and underpayments—and therefore owes *zero* net taxes—that taxpayer could nonetheless owe interest to the federal government. Congress fixed that fundamental unfairness by enacting Section 6621(d), which directs that "the same taxpayer" with "equivalent underpayments and overpayments" should pay "zero" net interest to the federal government. 26 U.S.C. § 6621(d).

Here, the district court carved out an arbitrary and inequitable exception to that statutory command. It determined that a post-merger

entity (Bank of America) could not apply interest netting under Section 6621(d) for equivalent underpayments and overpayments of the company's pre-merger entities (Bank of America and Merrill Lynch). But that *guarantees* the unfair outcome that Section 6621(d) was designed to *prevent*. By virtue of the merger, Bank of America and Merrill Lynch have become a single corporate entity and the "same taxpayer" both prospectively and retrospectively. No one disputes that Bank of America, as the post-merger entity, is now fully responsible for all the tax liabilities of its pre-merger companies and is also entitled to all overpayments from those companies for pre-merger years. Nor is it disputed that, for certain periods before the merger, the pre-merger entities' equivalent tax underpayments and overpayments cancel out to zero. But under the district court's approach, Bank of America owes the federal government net *interest* despite owing nothing in *taxes* for those overlapping periods.

That is a gratuitous penalty for the taxpayer and an unearned windfall for the IRS. More importantly, it contradicts the text, structure, history, and purpose of Section 6621(d).

First, the district court's interpretation is inconsistent with the plain text of Section 6621(d). Section 6621(d) states that, "[t]o the extent that, *for any period*, interest is payable . . . on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be *zero* for such period." 26 U.S.C. § 6621(d) (emphases added). Although Congress intended this provision to apply broadly, the district court arbitrarily narrowed it by inserting an extra word ("made") to create a temporal limitation (requiring that the taxpayer be the "same" at the time the payments are deemed made) that exists nowhere in the text. In any event, as a result of the merger, Bank of America and Merrill Lynch should be considered the "same taxpayer" irrespective of any temporal limitation read into the statute.

Second, the district court's construction of Section 6621(d) cannot be reconciled with other provisions of the Internal Revenue Code. For example, other tax provisions make clear that post-merger entities succeed to all pre-merger assets and liabilities, and that pre-merger entities' outstanding over- and underpayments can be offset against each other post-merger. Further, the Code is full of explicit temporal

limitations of various sorts—illustrating that when Congress intends to impose such constraints, it says so. Congress chose not to do so in Section 6621(d).

Third, the picture becomes clearer still when Section 6621(d)'s purpose and history are considered. Congress enacted Section 6621(d) to ensure that the "different interest rates provided for overpayments and underpayments" would never result in charging interest when no taxes are due. *See* H.R. Rep. No. 105-364, pt. 1, at 64 (1997). The statute was enacted against a backdrop of IRS recalcitrance about exercising its interest-netting authority. Congress responded by enacting Section 6621(d)—a statute that was written to authorize interest netting wherever a taxpayer has equal overpayments and underpayments. Despite the precept underlying Section 6621(d), the IRS has once more adopted a miserly approach to interest netting, contrary to the will of Congress.

Finally, the district court's interpretation—requiring the taxpayer to be the "same" during the year(s) to which the underpayments and overpayments relate—cannot be squared with the realities of corporate tax compliance. Although tax returns are generally due the year

following the relevant tax year, a company's ultimate tax liability often changes due to events that happen *years later*. Those subsequent events include refund claims, tax credits, foreign tax redeterminations, retroactive regulations, and IRS audits. Further, mergers are extremely common, meaning that the district court's approach would likely deny interest netting to the intended beneficiaries of Section 6621(d) in many cases.

This Court should reverse the district court's ruling and restore a reading of Section 6621(d) that is faithful to its text and purpose.

ARGUMENT

I. The District Court's Interpretation Rewrites Section 6621(d) and Cannot Be Squared with Other Provisions of the Internal Revenue Code.

The text of Section 6621(d) provides that whenever "the same taxpayer" has "equivalent underpayments and overpayments" "for any period," that taxpayer owes "zero" interest. 26 U.S.C. § 6621(d). The district court's contrary interpretation grafts on a temporal limitation that exists nowhere in the text. That approach violates basic principles of statutory construction, and it is inconsistent with how other Code provisions have been applied and interpreted.

A. By Disregarding the Plain Language of Section 6621(d), the District Court Carved Out an Arbitrary Exception to Interest Netting that Is Absent from the Text.

For interest netting to be available, the relevant over- and underpayments must be "by the same taxpayer." 26 U.S.C. § 6621(d). The district court held that the taxpayer with the overpayment and the taxpayer with the underpayment must be "the same taxpayer" at the time that the payments are "made." Summ. J. Order 4, 6–7, *Bank of Am. v. United States*, No. 3:17-cv-00546-RJC-DSC (Feb. 14, 2023), ECF No. 83. The word "made" does not actually appear in Section 6621(d). In fact, Section 6621(d) contains no temporal requirement at all. Thus, the district court re-wrote the statute in a manner that imposes a new and atextual limit on the applicability of interest netting, creating an exception to the relief provided by that provision.

According to the district court, "[t]he presence of the verb 'made' is understood; it was left out merely by means of a grammatical ellipsis." *Id.* at 7. Contrary to the district court's reasoning, however, inserting the word "made" is not the most obvious or "natural" way to read the statute. One could just as easily substitute the word "paid" where the district court inserted the word "made," for example, which would change the

point in time the taxpayer must be the "same" and would achieve a fairer result.

Further demonstrating that the district court's interpretation of Section 6621(d) is not the most obvious one is the IRS's own prior position. Previously, the IRS appeared to agree—as evidenced by its internal guidance memoranda—that *no* temporal limitation applied and interest netting for pre-merger under- and overpayments was available post-merger. *See* IRS Field Serv. Advice Mem. 200212028, 2002 WL 442928 (Jan. 16, 2002) (Situation 5) ("Accordingly, because B is both entitled to A's Year 1 overpayment, and is liable for its Year 3 underpayment, B would be entitled to file a claim for interest netting."); IRS Chief Counsel Advice Mem. 200407015, 2004 WL 276550 (Feb. 13, 2004) (same); IRS Field Serv. Advice Mem. 200017003, 2000 WL 1873995 (Oct. 19, 1999) ("In retroactively applying section 6621(d) . . . , the Service should construe the terms 'underpayments and overpayments by the same taxpayer' to mean the person liable for both taxes."). Such a

reading better aligns with the legislative history and realities of tax compliance, as discussed below.[2]

The inclusion of the word "made" where it does not exist also leads to the illogical and unfair result that a post-merger entity would owe the federal government interest payments even where it has no actual tax liability. This leads to a windfall to the government and unfairly harms the post-merger taxpayer. Courts should not read words into a statute that are not supported by the plain text, especially where doing so would create illogical and inequitable results. *See Lamie v. U.S. Trustee,* 540 U.S. 526, 538 (2004) (refusing to "read an absent word into the statute" when the statute had "a plain, nonabsurd meaning").

Even if the Court were to accept the district court's addition of the word "made," this case offers another reason why interest netting is permitted. Under merger law, Bank of America and Merrill Lynch are the "same taxpayer"—prospectively *and* retroactively. *See Wells Fargo I*, 119 Fed. Cl. at 35 ("Because the surviving corporation steps into the

[2] The Court of Federal Claims has also correctly interpreted the statute in this manner. *See Wells Fargo & Co. v. United States* ("*Wells Fargo I*"), 119 Fed. Cl. 27 (2014), *aff'd in part & rev'd in part*, 827 F.3d 1026 (Fed. Cir. 2016).

shoes of the acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made.”). Therefore, the two entities are the same taxpayer at the time when the under- and overpayments were made. The temporal limitation is ultimately irrelevant in this case because of the operation of merger law, which provides an independent basis for overturning the district court. Even if the word “made” were inserted into the statute, the result would be the same.

B. Section 6621(d) Should Be Interpreted Consistently with Other Provisions of the Internal Revenue Code.

The district court misread Section 6621(d) on its own terms. But the flaws in the district court’s approach become even more obvious when Section 6621(d) is considered alongside other provisions of the Code. *See Comm’r v. Engle*, 464 U.S. 206, 223 (1984) (“[T]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections . . . .” (quoting *Helvering v. Morgan’s Inc.*, 293 U.S. 121, 126 (1934))).

1. *Overpayments and Underpayments Are Netted Under the Internal Revenue Code.*

The district court's interpretation of Section 6621(d) is inconsistent with Section 6402(a) of the Internal Revenue Code. Under Section 6402(a), the IRS has the authority to credit any "overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to [certain limitations], refund any balance to such person." 26 U.S.C. § 6402(a). Thus, a taxpayer's overpayments and underpayments can be credited against each other, offsetting a tax liability.

Merged entities are treated as the same "person" under 26 U.S.C. § 6402(a). *See Wells Fargo I*, 119 Fed. Cl. at 39 ("Noting that Congress intended for § 6402 to be broadly construed, the [IRS guidance] states that the acquired group's overpayment could be credited against the surviving group's liabilities."). Indeed, the IRS treated Bank of America and Merrill Lynch as the same "person" in this very case, crediting the "overpayment, including [the] interest allowed thereon" for Merrill's 2005 tax year "against [the] liability in respect" of Bank of America's 2005 underpayment. Stip. ¶¶ 65–67, 88–89.

The government is therefore treating Bank of America and Merrill Lynch as the same "person" for purposes of offsetting tax liabilities under Section 6402(a), but *not* the same "taxpayer" under Section 6621(d) for the purpose of interest netting. This position is legally unsupportable and defies common sense. In the Internal Revenue Code, the "[t]he term 'taxpayer' means any *person* subject to any internal revenue tax."[3] 26 U.S.C. § 7701(a)(14) (emphasis added). As the government has already conceded that Bank of America and Merrill Lynch are the same "person," they are necessarily also the same "taxpayer."

Moreover, having one set of rules for offsetting *payments* and another set of rules for offsetting *interest* on those payments inserts incongruity into the interpretation of two similar Code provisions in a manner that unfairly benefits the government and harms taxpayers.

Finally, Section 6402(a)—unlike Section 6621(d)—uses the word "made," showing both that Congress knew how to include the word "made" if it wanted to, and that even the *explicit* inclusion of "made" does

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[3] The word "person" in turns "shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1).

not necessarily create the temporal limitation that the district court read into Section 6621(d).

2. *The Internal Revenue Code Recognizes that a Post-Merger Entity Succeeds to all Pre-Merger Assets and Liabilities.*

The government's interpretation of Section 6621(d) is also inconsistent with Section 368(a) of the Internal Revenue Code. Section 368(a) defines a set of tax-free transactions known as "reorganizations," which includes mergers such as the Bank of America-Merrill Lynch merger.

"[F]ederal tax law recognizes statutory mergers under [26 U.S.C.] § 368(a)(1)(A) as a form of corporate reorganization where the pre-merger entities' assets and liabilities automatically become the assets and liabilities of the post-merger surviving corporation." *Wells Fargo & Co. v. United States* ("*Wells Fargo II*"), 827 F.3d 1026, 1040 (Fed. Cir. 2016). Specifically, in the case of a statutory merger, two events happen "simultaneously at the effective time of the transaction." 26 C.F.R. § 1.368-2(b)(ii)(A). First, all the assets and liabilities of each pre-merger entity become the assets and liabilities of the post-merger entity. 26

C.F.R. § 1.368-2(b)(ii)(A). Second, the pre-merger entities cease their "separate legal existence for all purposes." 26 C.F.R. § 1.368-2(b)(ii)(B).

The Treasury regulations under Section 368 are consistent with basic principles of merger law, under which "mergers automatically effect the joining or absorption of the acquired entity into the survivor." *Wells Fargo II*, 827 F.3d at 1038-39 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 n.3 (1964)).

As the company that has stepped into the shoes of the pre-merger entities and is the legal owner of those entities' assets and liabilities, the post-merger entity automatically becomes liable for all pre-merger underpayments and is entitled to make a refund claim for all pre-merger overpayments. To hold a post-merger company liable for all outstanding tax liabilities no matter which entity owed the government or when the underpayment occurred—but then deny the company the benefit of interest netting—is fundamentally unfair.

3. *Congress Has Imposed Temporal Limits Throughout the Internal Revenue Code.*

The district court's reading of a temporal limit into Section 6621(d) where none exists is also flawed because Congress knows how to impose such a limitation in the Internal Revenue Code when it wants to. The

Code has numerous temporal limitations.[4] Congress has even imposed temporal requirements in the context of mergers. *See, e.g.*, 26 U.S.C. § 381(c)(2) ("[A] deficit in earnings and profits of the distributor, transferor, or acquiring corporation [that arose before the acquisition] shall be used only to offset earnings and profits accumulated after the date of transfer.").

Section 6621(d) has no such temporal limitation. To the contrary, the statute's language permits interest netting "for *any* period." 26 U.S.C. § 6621(d) (emphasis added). Given the absence of such a limitation despite numerous instances demonstrating that Congress is fully capable of enacting temporal requirements when it chooses to, including in the merger space, the district court's artificial imposition of such a limitation is arbitrary and untenable. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular

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[4] For example, there are statutes that govern when the IRS may open an audit, send certain notices, assess additional tax or penalties, and collect amounts owing. *See, e.g.*, 26 U.S.C. §§ 6501, 6502, 6751(b). There are statutes that govern when a taxpayer may challenge an IRS determination in court or file for a tax refund. *See* 26 U.S.C. §§ 6213, 6511. There are myriad statutes that require taxpayers to act within a set time period to obtain certain tax benefits. *See, e.g.*, 26 U.S.C. §§ 1031(a)(3) (like-kind exchanges), 1033(a)(2)(B) (involuntary conversions), 30D(h) (clean vehicle credit), 168(k) (bonus depreciation).

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

II. The District Court's Approach Would Undermine the Purpose of Section 6621(d), Which Conferred Broad Interest-Netting Authority to Address a Basic Inequity in the Internal Revenue Code.

As discussed, it is obvious from Section 6621(d)'s text—particularly when read alongside other provisions of the Internal Revenue Code—that interest netting should be available to post-merger entities under the circumstances presented here. But if there were any ambiguity, it would be resolved by the statute's purpose and history. Section 6621(d) was enacted for the express purpose of ensuring that entities owing zero tax also owe zero interest. And it came in the wake of the IRS's repeated failures to carry out broad interest-netting measures. This Court should not permit the IRS's efforts to frustrate Congress's intent yet again.

A. Section 6621(d) Was Designed to Address a Fundamental Inequity in the Internal Revenue Code.

"Examination of purpose is a staple of statutory interpretation . . . ." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844,

861 (2005). The purpose of Section 6621(d) is clear: Congress sought "to provide fairness for taxpayers," *Wells Fargo I*, 119 Fed. Cl. at 33, by ensuring that taxpayers would not owe interest when they did not owe net taxes.

Congress enacted Section 6621(d) because it recognized that differential interest rates could have inequitable consequences in specific circumstances. Because a corporate taxpayer pays interest at a "higher underpayment rate" and receives interest at a "lower overpayment rate," the taxpayer is unfairly "assessed a net interest charge, even if the amounts of the overpayment and underpayment are the same." H.R. Rep. No. 105-364, pt. 1, at 63; *see also* S. Rep. No. 105-174, at 61 (1998). In other words, in that scenario, the taxpayer is charged interest on taxes that the taxpayer does not owe.

Section 6621(d) addresses that fundamental unfairness. According to Congress, "different interest rates provided for overpayments and underpayments were [not] ever intended to result in the charging of the differential on periods of mutual indebtedness." H.R. Rep. No. 105-364, pt. 1, at 64; *see also* S. Rep. No. 105-174, at 62. Rather, "taxpayers should be charged interest only on the amount they actually owe, taking into

account overpayments and underpayments from *all open years*." H.R. Rep. No. 105-364, pt. 1, at 63–64 (emphasis added); *see also* S. Rep. No. 105-174, at 61. Section 6621(d) thus "establishe[d] a net interest rate of zero on equivalent amounts of overpayment and underpayment that exist *for any period*." H.R. Rep. No. 105-364, pt. 1, at 64 (emphasis added); *see also* S. Rep. No. 105-174, at 62. In this way, Section 6621(d) "remedied an unintended consequence caused by unequal interest rates by ensuring that a taxpayer with equal underpayments and overpayments would owe no interest on those payments." *Wells Fargo II*, 827 F.3d at 1036.

The government's approach here would frustrate this purpose. Indeed, it would accomplish exactly what Section 6621(d) aimed to prevent: Taxpayers like Bank of America would be "assessed a net interest charge, even if the amounts of the overpayment and underpayment are the same." H.R. Rep. No. 105-364, pt. 1, at 63; *see also* S. Rep. No. 105-174, at 61. This Court should reject an interpretation of Section 6621(d) that would promote the very unfairness that the statute was designed to address.

B. Section 6621(d) Was Enacted in Response to the IRS's Pattern of Improperly Declining to Net Interest.

The IRS's reading of Section 6621(d) would be unlawful even if it were the first time the agency had construed its interest-netting obligations too narrowly. But it is far from the first time: For decades, the IRS has been foiling the will of Congress by adopting a cramped view of the agency's interest-netting authority. This Court should not permit the IRS to override Congress yet again by applying a counter-textual reading of Section 6621(d) and declining to net interest under the circumstances presented here.

"Ever since Congress set interest at different rates on tax overpayments and underpayments, Congress has repeatedly attempted to enact broad interest-netting provisions." *Wells Fargo II*, 827 F.3d at 1036 (citation omitted). In each of those instances, Congress has directed the IRS "to implement comprehensive interest netting procedures." H.R. Rep. No. 104-506, at 50 (1996). For example, when it first implemented an interest rate differential under the Tax Reform Act of 1986, Congress directed the IRS to "implement[] the most comprehensive netting procedures that are consistent with sound administrative practices." Conf. Rep. No. 99-841, pt. 2, at 785 (1986). Congress gave similar

instructions when it enacted other legislation modifying the interest rates for various types of underpayments and overpayments. *See, e.g.*, Conf. Rep. No. 101-964, at 1101 (1990) (The IRS "should implement the most comprehensive crediting procedures . . . that are consistent with sound administrative practice."); H.R. Rep. No. 103-826, pt. 1, at 178 (1994) (The IRS "should implement the most comprehensive crediting procedures . . . that are consistent with sound administrative practice, and should do so as rapidly as is practicable."). Indeed, "Congress has never adopted differential interest rates, or increased the amount of such differential, without at the same time also encouraging the IRS to implement comprehensive interest netting procedures." H.R. Rep. No. 104-506, at 50.

Despite Congress's repeated directives, the IRS has often adopted a miserly approach to interest netting. *See Magma Power Co. v. United States*, 101 Fed. Cl. 562, 563–64 (2011) (explaining that "Congressional efforts to persuade the Treasury Department to implement broad [interest-netting] reforms were met with inaction on the part of the Service"). In 1996, after expressing its "concern[] that the IRS has failed to implement comprehensive interest netting procedures," Congress

directed the Treasury Department to prepare a report addressing the reasons for that failure. H.R. Rep. No. 104-506, at 50. In its report, the IRS expressed skepticism for its authority under existing law and "recommend[ed] legislation providing for interest equalization when taxpayers and the IRS have overlapping periods and amounts of mutual indebtedness (taxes and refunds due)." *See* Office of Tax Policy, Dep't of the Treasury, *Report to the Congress on Netting of Interest on Tax Overpayments and Underpayments* 1–2 (1997).[5]

By enacting Section 6621(d), Congress gave the IRS exactly what it requested. That statute further "expand[ed] on the IRS's pre-existing authority to implement interest netting." *Wells Fargo II*, 827 F.3d at 1038. Indeed, Section 6621(d) allows "the taxpayer . . . to *retroactively* zero out its interest for equivalent overpayments and underpayments *during any period*." *Magma Power*, 101 Fed. Cl. at 564 (emphases added). Congress made clear when enacting Section 6621(d) that it expected the IRS would apply interest netting broadly to effectuate "past Congressional statements urging the [IRS] to eliminate interest rate

[5] https://home.treasury.gov/system/files/131/Report-Netting-Interest-1997.pdf.

differentials" where a taxpayer has equal overpayment and underpayment amounts. H.R. Rep. No. 105-364, pt. 1, at 65. Congress "continue[d] to expect" that the IRS would "implement the most comprehensive crediting procedures that are consistent with sound administrative practice." *Id.*

Yet once more, the agency is claiming that it lacks the authority to apply interest netting—even when doing so is necessary to ensure that taxpayers who owe zero net taxes also owe zero net interest. This Court should not greenlight the agency's continued efforts to frustrate the will of Congress.

III. The District Court's Approach Ignores the Realities of Tax Compliance.

The district court's insistence on reading into Section 6621(d) a temporal limitation for when taxpayers must be the "same" also fails to take into account the realities of tax compliance for corporations.

Although tax returns generally are due the year following the tax year, there are many events that can impact the ultimate tax liability that do not occur until after the return is filed—sometimes many years after. For example, a taxpayer generally may file a refund claim up to three years after a return is filed, *see* 26 U.S.C. § 6511(a); certain credits

earned in one year may be eligible to be carried back to a previous year, *see, e.g.*, 26 U.S.C. § 39 (prescribing the carryback time for certain business credits); a foreign tax redetermination in one year may increase or decrease the foreign tax credit that a taxpayer was entitled to claim in a previous year, *see* 26 C.F.R. § 1.905-3(a); or regulations with retroactive effect may alter a taxpayer's liability upward or downward for a year that has already ended, *see* 26 U.S.C. § 7805(b).

Further, it often requires years to determine a taxpayer's final tax liability for a given year. For example, the IRS generally has three years to audit a taxpayer's return after it has been filed, not including any statutory extensions. *See* 26 U.S.C. § 6501(a). Nor is it unusual for corporations to have ongoing audits for multiple tax years. Indeed, the administrative and judicial processes that are often necessary to finally determine a taxpayer's liability for a particular year can take years and even decades to play out. *See, e.g.*, *Estate of Bartell v. Comm'r*, 147 T.C. 140 (2016) (deciding in 2016 a tax dispute regarding the taxpayer's 2001-2003 tax years).

For all these reasons, although an underpayment may as a technical matter arise when the return is due, the existence of an under-

or overpayment is usually not known for years afterward. At the time of a merger, the merging entities are unlikely to be aware of every potential over- and underpayment for all pre-merger tax years. It is therefore not practical—nor legally required—for entities anticipating a merger to "settle up" with the IRS for all pre-merger years. Once a tax liability is finally determined for a particular pre-merger year, whenever that may be, the post-merger entity is the one responsible for paying any underpayment or receiving a refund for any overpayment. In the case of overlapping under- and overpayments, the post-merger entity is entitled to an offset. To nonetheless deny interest netting to the post-merger entity in this setting artificially separates tax liability from interest and is inconsistent with the realities of tax compliance.

In light of these practicalities, it also would not be feasible for merging corporations to "game" the timing of the final determination of a tax liability for a particular year in an attempt to receive the benefit of interest netting post-merger. Taxpayers have little control over when the IRS's examination function will open or complete an audit, when the IRS Independent Office of Appeals will schedule an administrative hearing and come to a decision, or when a court will issue an opinion. And, in any

event, mergers are complicated, expensive, business-driven decisions that are very unlikely to occur simply in an attempt to procure the benefit of interest netting under Section 6621(d). Rather than preventing corporate gamesmanship, the government's position unfairly benefits itself at the expense of taxpayers that have no control over the tax compliance system.

IV. The Fundamental Unfairness in the District Court's Interpretation Would Harm a Broad Range of Businesses.

The district court's flawed interpretation of Section 6621(d) would have far-reaching consequences outside of the context of this particular case and beyond the banking industry. Because Section 6621(d) broadly applies to any corporation with overlapping over- and underpayments, any company undergoing a merger could be unfairly harmed by the district court's holding.

Corporations frequently undergo mergers, acquisitions, and other transactions that change the makeup of the corporation. *See, e.g.*, *Magma Power*, 101 Fed. Cl. at 571 (explaining that corporations "undergo regular changes from year to year and often during the same tax year"). On average, there have been over 18,000 U.S. merger and acquisition deals every year for the last 10 years. *See* Inst. for Mergers, Acquisitions,

and Alliances, *United States - M&A Statistics*.[6] Each of these post-merger entities, spanning from the smallest family-held corporations to the largest publicly held companies, and across every industry, may be subject to paying interest to the IRS when there is no net tax liability.

Given the frequency of mergers, adopting the government's approach here could deny interest netting to the intended beneficiaries of Section 6621(d) in a large number of cases. And contrary to the district court's reasoning below, nothing in the plain language of the statute requires such an inequitable outcome. Rather, the text, structure, and purpose of Section 6621(d) as well as common sense all point in the opposite direction. A post-merger entity should not be forced to pay the federal government interest on a *zero* tax balance simply because the offsetting tax balances arose in the context of a merger. Such a result reintroduces the very inequity Congress sought to address.

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[6] https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/ (last visited May 23, 2024).

CONCLUSION

For the reasons discussed above, the district court's order should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 5,463 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word for Microsoft 365 MSO Version 2308 in 14-point Century Schoolbook font.

The electronic version of this brief has been scanned for viruses and is virus-free.

Dated: May 28, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024, a true and correct copy of the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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