No. 23A_____

IN THE

Supreme Court of the United States

MADELEINE PICKENS,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 5, 2023

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Madeleine Pickens respectfully requests a 30-day extension of time, to and including November 22, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. The Ninth Circuit entered judgment on May 17, 2023. *See United States* v. *Paulson*, 68 F.4th 528 (9th Cir. 2023); App. 1a-73a. The court denied Pickens's petition for rehearing en banc on July 25, 2023. *See* App. 136a-138a. Unless extended, the time to file a petition for a writ of certiorari will expire on October 23, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. The Applicant is Madeleine Pickens. In 2000, Pickens's husband Allen Paulson passed away. During his lifetime, Allen transferred nearly all his assets to a living trust. The trust terms required the trustee to pay estate taxes. Allen's son from a previous marriage—John Michael Paulson—was appointed trustee. Because Allen's estate contained a closely-held business, the estate was statutorily eligible to enter into a 15-year payment plan. 26 U.S.C. § 6166(a)(1). In 2001, John Michael Paulson elected to pay estate taxes through a payment plan. But the government

neither required John Michael Paulson to post a surety bond, nor imposed a special lien, all of which it could do to protect its interest. Because of extraordinary misconduct by John Michael Paulson—for which Pickens is not responsible—the estate later failed to pay the taxes. *See* App. 9a-10a, 114a-115a.

3. In 2003, nearly three years after her husband's death, Pickens received property from the trust. Pickens then had no further engagement with the trust. In 2009, the trust defaulted under the payment plan. At that time, the trust had enough money to pay the taxes. The government assessed the trust's outstanding tax liability at $9.6 million and valued the estate's assets at $13.7 million. In 2010, the IRS terminated the trust's payment plan. Meanwhile, a state probate court dismissed John Michael Paulson from his position as trustee for misconduct. When the dust settled, two other heirs had become co-trustees. In 2013, the new trustees claimed the trust had been completely depleted. *See* App. 11a-12a, 115a-117a.

4. In 2015, the government filed this action seeking to hold Pickens personally liable under 26 U.S.C. § 6324(a)(2) for the estate's outstanding taxes, an amount in excess of $10 million. Every court to consider Section 6324 since it was enacted in 1954 has read the statute to prohibit such personal liability, because Section 6324 imposes liability only on individuals who held or received estate property "immediately upon the date of decedent's death." App. 129a. Applying that settled understanding, the District Court concluded that someone like Pickens who received estate property after the decedent's death cannot be held personally liable for estate taxes. Instead, the District Court held that a person like Pickens can be

held personally liable only if she "received property immediately upon the date of decedent's death." *Id.*

5. Over Judge Ikuta's dissent, a divided panel of the Ninth Circuit reversed. The majority—the first court to ever do so—held that "§ 6324(a)(2) imposes personal liability for unpaid estate taxes" on persons who receive estate property "either on the date of the decedent's death *or at anytime thereafter*." App. 16a (emphasis added). To reach this result, the majority relied on the last-antecedent canon, the interpretive principle that a limiting clause ordinarily modifies "only the noun or phrase that it immediately follows." App. 18a (citation omitted). According to the majority, because of the placement of a comma in Section 6324, "the limiting phrase 'on the date of the decedent's death' modifies only the immediately preceding antecedent 'has,' and not the more remote antecedent 'receives.' " *Id.*

6. The majority recognized that its interpretation allows for a bizarre result: The government may impose estate tax liability on a third party that "exceed[s] the value of the property received" from an estate. App. 31a-32a & n.20. This is because Section 6324 imposes personal liability on a third party "to the extent of the value, at the time of the decedent's death, of" property received by the third party. 26 U.S.C. § 6324(a)(2). But property can decline in value after someone dies. Thus, when a third party receives property, that third party is personally liable to the extent of the property's value *at the time of death*—which value could be much higher than the property's value at the time of receipt.

7. The majority resolved this concern, however, based on the government's "avowals in its briefing and at oral argument" not to abuse its newfound authority. App. 36a. According to the majority, the government's commitment to limit collections under Section 6324 to only the value of the property at the time of receipt would bar "the government from later arguing, in this case or a future case that it can recover more than the value of the property that the taxpayer received." App. 37a.

8. Judge Ikuta dissented. She explained that the majority's "hypertechnical reading" of Section 6324 was divorced from the statute's "most logical meaning," and rested entirely on a single comma. App. 58a (Ikuta, J., dissenting) (quotation marks omitted). Judge Ikuta added that the majority's efforts to avoid a bizarre result—a third party facing personal liability in excess of the value of property received—was fundamentally flawed. The majority relied on judicial estoppel to bind the government to its representations in this case, but judicial estoppel does not apply here. "It is well settled that the government may not be estopped on the same terms as any other litigant because public policy considerations allow the government to change its positions in ways private parties cannot." App. 71a (cleaned up). Indeed, "the government is free to make changes in response to changed factual circumstances, or a change in administrations." *Id.* (quotation marks omitted). "Accordingly, principles of judicial estoppel would not avoid the illogical results caused by the government's (and majority's) interpretation of the statute." *Id.*

9. The Ninth Circuit's interpretation of Section 6324 breaks from a half-century of precedent regarding that statute. In addition, the Ninth Circuit's application of judicial estoppel against the government creates circuit split that places great stress on the separation of powers. This Court's review is warranted.

10. The decision below is wrong. For decades, courts, Congress, and even the IRS itself read Section 6324 narrowly. In 1959, the Tax Court had addressed the very issue in this case, and concluded that an individual who received property after the decedent's death could not be personally liable under Section 6324's substantially similar predecessor. *Englert* v. *Comm'r*, 32 T.C. 1008, 1016 (1959). A year later, the IRS formally acquiesced to that holding. *IRS Announcement Relating to: Englert*, 1960 WL 62561 (Dec. 31, 1960). Shortly thereafter, in 1966, "Congress amended" Section 6324, but "did not change the syntax" at issue here. App. 61a (Ikuta, J., dissenting). As Judge Ikuta explained, that should have made short work of this case: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Id.* (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). The fact that Congress modified other parts of Section 6324 without displacing the Tax Court's 1959 decision "indicates that Congress intended to keep the then-current judicial interpretation." *Id.*

11. But instead of affording Section 6324 its longstanding meaning, the Ninth Circuit broke with precedent, and disrupted a settled consensus across all three branches of government. As Judge Ikuta stressed, the Ninth Circuit's hyper-

technical reading of Section 6324 leads to bizarre results: It permits the government to pursue a third-party for more than the value of the property received from an estate.

12. The Ninth Circuit majority attempted to limit the sweeping nature of its decision by concluding, based on the government's representations in this case, that the IRS is estopped from abusing this expansive interpretation of Section 6324. But as Judge Ikuta persuasively explained, the longstanding rule is that the government cannot be estopped on par with a private litigant.

13. The rule has deep constitutional roots, which the Ninth Circuit's contrary approach threatens. If "a court refuses to enforce the law on the basis of a previous representation from a government official, it renders the current executive unable to enforce the law and thus discharge its responsibilities under the Take Care Clause." *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1348 (5th Cir. 1996); *see* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4477.5 (3d ed. 2023 update) ("[T]he United States—and presumably any other government—may enjoy special respect for changes of position based on changed approaches to public policy."). And the Ninth Circuit's decision now enables the executive branch to rewrite the text of the U.S. Code by making purportedly binding representations to courts, usurping Congress's lawmaking authority in the process. This in turn further robs regulated parties of the ability to rely on the plain text of a statute, which the government can simply

displace with a promise in an appellate brief. That result is profoundly wrong: The law should not change based on what the government says in a court filing.

14. The Ninth Circuit's approach to estoppel has created a circuit split that merits this Court's review. Multiple courts of appeals have held that judicial estoppel is never appropriate even against private parties, in an "unrelated * * * proceeding," much less against the government. *Moses* v. *Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010); *see Little Rock Cardiology Clinic PA* v. *Baptist Health*, 591 F.3d 591, 601 n.7 (8th Cir. 2009); *accord Nichols* v. *Scott*, 69 F.3d 1255, 1272 n.33 (5th Cir. 1995) ("There is considerable authority that judicial estoppel does not apply in favor of one who was not a party to the prior proceeding in which the inconsistent position was taken."). Meanwhile, courts of appeals have declined to judicially estop the government based on conflicting representations in unrelated cases. *See, e.g.*, *United States* v. *Campa*, 459 F.3d 1121, 1152 (11th Cir. 2006) (en banc). The Ninth Circuit's approach in this case conflicts with that precedent.

15. Neal Katyal of Hogan Lovells US LLP, Washington, D.C., was retained to file a petition for certiorari in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and argument in a variety of matters, including a petition for certiorari due October 7, 2023 in *Boresky* v. *Graber*, No. 23A94, a petition for rehearing en banc due October 10, 2023 in *E. Ohman J:Or Fonder AB* v. *NVIDIA Corp.*, No. 21-15604 (9th Cir.), a cross-reply brief due October 20, 2023 in *Wye Oak Technology* v. *Republic of Iraq*, No. 23-7009 (D.C. Cir.); a brief in opposition due October 26, 2023 before the Special Master in *Delaware* v. *Pennsylvania*, Nos.

22O145, 22O146 (U.S.); a reply brief due November 24, 2023 in *Wolford* v. *Lopez*, No. 23-16164 (9th Cir.); and oral argument on December 7, 2023 in *Lynwood Investments CY Limited* v. *Konovalov*, Case No. 22-16399 (9th Cir.).

16. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including November 22, 2023.

Respectfully Submitted,

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