No. 23-571

IN THE
Supreme Court of the United States

MADELEINE PICKENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The decision below creates a split regarding the interpretation of an important tax statute that is ripe for abuse. It also deepens a split regarding judicial estoppel, and creates another split over the venerable canon that ambiguous tax statutes should be "construed most strongly against the government, and in favor of the citizen." *Gould* v. *Gould*, 245 U.S. 151, 153 (1917). The Government does not meaningfully dispute that the lower courts are in disagreement, and its contention that the decision below does not implicate these splits does not withstand scrutiny.

On the merits, the Government also does not dispute the "dire hardship" its interpretation of Section 6324(a)(2) produces. *Higley* v. *Comm'r*, 69 F.2d 160, 163 (8th Cir. 1934). Instead, the Government's defense of the decision below hinges on one thing—a comma. Because Congress placed a comma after the word "receives," the Government maintains that Section 6324(a)(2) unambiguously permits it to recover from trust beneficiaries like Ms. Pickens who receive estate property long after the decedent's death.

The comma cannot bear that weight. Punctuation is important but "fallible" evidence of congressional intent. *Ewing's Lessee* v. *Burnet*, 36 U.S. 41, 54 (1837). Here, other evidence overwhelmingly refutes the Government's interpretation—including judicial precedent dating back nearly a century; formal IRS acquiescence to that precedent; congressional ratification of that precedent; statutory context; the fact that the Government's reading would lead to absurd results; and the fact that these results would place "hardship

on beneficiaries who would often be hopelessly unable to bear it." *Higley*, 69 F.2d at 163. In asking the Court to ignore this evidence, the Government advances a sorry facsimile of textualism that elevates one especially fallible measure of congressional intent to the exclusion of all other evidence.

Lurking beneath this technical tax dispute are important questions about the proper methodology for interpreting tax statutes and about the notice our Government owes members of the public before subjecting them to ruinous liability. *See* Amicus Brief of National Taxpayers Union Foundation 3. The question presented is exceptionally important and this case is a good vehicle. The Court should grant the petition.

I. THE DECISION BELOW IS INDEFENSIBLE.

Section 6324(a)(2) provides that if estate taxes are not paid when due, an individual falling within six statutory categories "who receives, or has on the date of the decedent's death, property included in the gross estate," shall be personally liable for estate taxes. As Judge Ikuta explained, both the verbs *receive* and *has* apply to individuals who have or receive estate property immediately on the date of the decedent's death, Pet. App. 64a-65a (Ikuta, J., dissenting), and can thus "delay or defeat collection" of estate taxes, *Higley*, 69 F.2d at 163.

The Government here invokes a new power, never before recognized, to collect taxes from trust beneficiaries who receive property long after the decedent's death. The Government does not dispute that its interpretation would be erroneous were it not for the

comma after "receives." Because of the comma, however, the Government maintains (at 10) that "the grammar of Section 6324(a)(2) unambiguously answers the question presented in the Government's favor."

The comma cannot support the Government's claim. "Punctuation is a most fallible standard by which to interpret a writing." *Ewing's Lessee*, 36 U.S. at 54. A court must consider it as evidence of congressional intent, "but the court will first take the instrument by its four corners," and if its meaning is apparent, "the punctuation will not be suffered to change it." *Id.*; *see Stephens* v. *Cherokee Nation*, 174 U.S. 445, 480 (1899). Overwhelming evidence confirms that Congress did not intend to impose personal liability on trust beneficiaries who receive property many years after the decedent's death.

First, the statutory history renders the Government's interpretation inconceivable. The Government does not dispute that the original predecessor to Section 6324(a)(2) did not impose liability on trust beneficiaries who receive property after the decedent's death. That statute provided that if taxes were not paid on property transferred in anticipation of or upon death, including "insurance" policies to "specific beneficiar[ies]," "then the transferee, trustee, or beneficiary shall be personally liable for such tax." *Higley*, 69 F.2d at 162 (quoting Revenue Act of 1926, 44 Stat. 9, 80). The Eighth Circuit deemed it "obvious" that "the word 'beneficiary' in this section applies only to insurance policy beneficiaries" who receive their interest immediately upon the decedent's death, not trust beneficiaries. *Id.* This Court then favorably cited the

Eighth Circuit's holding "that the personal liability of transferees did not extend to the beneficiaries under a trust." *Allen* v. *Trust Co. of Ga.*, 326 U.S. 630, 636 n.5 (1946).

Congress in 1942 revised the Internal Revenue Code by adopting the same language now codified in Section 6324(a)(2), which makes six categories of individuals—including "beneficiar[ies]—liable if the individual "receives, or has on the date of the decedent's death" property in the gross estate. *See* Revenue Act of 1942, ch. 619, 56 Stat. 798, 950. Given the settled interpretation in *Higley*, no court ever deemed this language to impose liability on trust beneficiaries who receive property after the decedent's death. In 1959, the Tax Court unequivocally rejected the contention that "Congress intended to broaden the scope of the term 'beneficiary' so as to make a beneficiary of a trust personally liable for the tax." *Englert* v. *Comm'r*, 32 T.C. 1008, 1015 (1959). As the Government does not dispute, this conclusion was particularly obvious because Congress described the six categories of persons liable by cross-referencing "six specific subsections" of the Revenue Code—and these six subsections included only persons who receive an interest in estate property immediately upon the decedent's death. *Id.* at 1016. *Englert*'s interpretation has applied ever since.

Second, both the Executive Branch and Congress promptly endorsed *Englert*. The IRS formally acquiesced in 1960. *IRS Announcement Relating to: Englert*, 1960 WL 62561 (IRS ACQ Dec. 31, 1960). The Government attempts to wriggle out of its acquiescence (at 16), noting that the acquiescence "offers no

reasoning," and is not formally binding on the Executive Branch. But the point of IRS acquiescence is to convey "that the rule of that decision will be followed and applied by the IRS in future cases." *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666, 672 n.10 (D.C. Cir. 1981). The Government does not explain what good acquiescence would do if no one could rely on it.

Congress then reenacted the *exact same language* without change in 1966, which gives rise to a strong presumption that Congress "adopted the earlier judicial construction of that phrase." *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019). The Government disputes (at 15) that ratification occurred here because *Englert* was "a single opinion"—but this disregards the Eighth Circuit's decision in *Higley*, this Court's endorsement of *Higley*, and the complete absence of contrary authority. More important, this ignores the IRS's own acquiescence to *Englert*. And while the Government claims (at 15) the 1966 amendments were "tangential" to the meaning of Section 6324(a)(2) because they "were directed to the statute's lien provisions," that is manifestly erroneous. Congress's comprehensive amendments to the lien system in 1966, while leaving the language at issue here intact, provide powerful evidence of ratification.

In the half century since, no court until the Ninth Circuit below ever held that beneficiaries who receive property after the decedent's death can be liable. Whenever the Government's theory has arisen it has been rejected. *Garrett* v. *Comm'r*, 67 T.C.M. (CCH) 2214, *14 (T.C. 1994); *United States* v. *Johnson*, No. 2:11-cv-87, 2013 WL 3924087, at *5 (D. Utah July 29,

2013); *United States* v. *Detroit Bank & Tr. Co.*, No. 20937, 1962 LEXIS 5184, at *5 (E.D. Mich. Feb. 28, 1962). No trust beneficiary has, in nearly a century, been subject to liability under the Government's theory. While the Government contends (at 13) that Ms. Pickens "grossly overstate[s] the weight of authority" rejecting its interpretation, it is the Government that grossly understates the consensus predating the decision below.

Third, as Judge Ikuta explained, the Government's interpretation yields "illogical" results that "Congress could not have intended." Pet. App. 69a (Ikuta, J., dissenting).

The Government's interpretation permits the IRS to impose "personal liability for unpaid estate taxes on trust asset recipients in excess of the value of the assets received." Pet. App. 68a-69a. The panel avoided that result by "rely[ing] on the government's avowals in its briefing and at oral argument that estate tax liability cannot exceed the value of the property received." Pet. App. 38a (majority op.). The Government does not defend that conclusion, no doubt because estoppel plainly could not bind the Government in these circumstances. The Government instead predicts (at 17) that a beneficiary is unlikely to be liable for more than the value of property received. But there is no support for this "approach of interpreting statutes based on predictions regarding future events." Pet. App. 71a (Ikuta, J., dissenting). While the Government suggests that the absurdity canon could not apply here, Judge Ikuta correctly noted that the "canon against absurdity applies only when a court departs from the plain meaning of a statute." Pet. App. 69a.

Ms. Pickens does "not ask the court to disregard the text of § 6324(a)(2)" but instead "offer[s] an interpretation of its text that is superior to the government's." *Id.*

The Government offers no response to an additional bizarre result its interpretation creates. *See* Pet. 22. Section 6324 applies exclusively to *non-probate* property, such as property in trust, and not *probate* property transferred via will. Under the Government's approach, a trust beneficiary may face unexpected personal liability based on a third party's misconduct, when a similar recipient of a bequest would not. This result makes no sense. The Government's silence speaks volumes.

Fourth, statutory context further refutes the Government's interpretation. As Judge Ikuta explained, the IRS has other tools for protecting its interests, such as by holding the actual wrongdoer liable, or by using a "surety bond" or "special lien." Pet. App. 63a (Ikuta, J., dissenting). The Government simply failed to use those tools here. That makes the Government's interpretation of Section 6324(a)(2) completely unnecessary.

The Government declares (at 18) that "the existence of other collection tools" "cannot displace Section 6324(a)(2)'s plain text." But the existence of these tools is strong contextual evidence that Congress did not intend to confer the extraordinary power the Government now claims. And the Government does not dispute that its interpretation would place a "real hardship on beneficiaries"—in many cases, the most

vulnerable individuals—"who would often be hopelessly unable to bear it." *Higley*, 69 F.2d at 163. The Government disparages this (at 14) as "nakedly purposivist," but statutory construction appropriately considers "text, structure, history, *and purpose*," *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013) (emphasis added).

The Government points to contextual clues to support its interpretation, but its arguments are makeweight. The Government notes (at 11-12) that some of the cross-referenced provisions in Section 6324(a)(2) encompass property that is *receivable* upon the decedent's death but not actually *received* until later, and claims that rejecting its interpretation "would drain those cross-references of meaning." Judge Ikuta easily rejected the same argument. Each cross-referenced provision conveys an *interest* in property that is immediately received upon the decedent's death, even if the property itself is not received until later. Pet. App. 70a-71a (Ikuta, J., dissenting). Ms. Pickens, by contrast, received no interest in estate property until it was distributed to her three years after her husband's death by the trustee responsible for paying estate taxes.

The Government claims (at 12) that a contrary interpretation would make the verbs "receives" and "has" redundant. But, as Judge Ikuta noted, *receives* and *has* in this context "refer to two different situations." Pet. App. 64a-65a. *Has* "refers to a person who holds property transferred within three years before the decedent's death, which is considered part of the decedent's gross estate." Pet. App. 65a (citing 26

U.S.C. § 2035(c)(1)). *Receives* refers to property obtained "solely because of decedent's death such as insurance proceeds." *Englert*, 32 T.C. at 1016. There is no redundancy.

Finally, even if these interpretive tools did not squarely refute the Government's interpretation, they would make Section 6324(a)(2) ambiguous. The Government does not dispute the "traditional canon that construes revenue-raising laws against their drafter" in cases of ambiguity, and has therefore forfeited any such dispute. *United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring). The Government instead claims (at 18) that there is "no role for the canon to play" because "the text of Section 6324(a)(2) unambiguously forecloses petitioners' position." In support of that contention, the Government returns to the only support it can muster—the comma.

The Government does not address this Court's precedent making clear that commas cannot unambiguously override clear contrary evidence of congressional intent. *See Simpson* v. *United States*, 435 U.S. 6, 11-12 n.6 (1978) (disregarding comma because the statutory phrase "must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision"); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 344-445 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute," and cannot "defeat the evident legislative intent."); *Barrett* v. *Van Pelt*, 268 U.S. 85, 91 (1925) ("The comma after the word 'unloaded' is not entitled to have any weight as evidence of the legislative intention."); *Stephens*, 174 U.S. at 480 (The "rule

is well settled that, for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required."); *Hammock* v. *Farmers' Loan & Tr. Co.*, 105 U.S. 77, 84 (1881) (similar). Overwhelming evidence here refutes the Government's interpretation, but at the very least gives rise to an ambiguity that must be resolved in taxpayers' favor.

II. THIS CASE PRESENTS THREE CIRCUIT SPLITS.

The Ninth Circuit split from every court to have considered the question whether the Government may impose personal liability on trust beneficiaries who receive estate property after the decedent's death. The Government downplays (at 19) this split, noting that the Eighth Circuit's decision in *Higley* interpreted a statutory predecessor to Section 6324. But *Higley* held that Congress did not impose the "dire hardship" of liability on trust beneficiaries, *Higley*, 69 F.2d at 163, and Congress retained that interpretation in enacting the language now in Section 6324(a)(2). The Ninth Circuit's decision squarely conflicts with *Higley*. After Congress enacted Section 6324(a)(2)'s text, the Tax Court unequivocally rejected the Government's interpretation of that text in *Englert*. While the Government notes (at 19) that "Tax Court decisions are subject to review in the courts of appeals," the Government immediately acquiesced to *Englert* and Congress ratified it—a "significant factor" of the kind the Government acknowledges (at 19) makes *Englert* especially important for purposes of this Court's review.

The decision below also deepens a split over judicial estoppel. The Government does not dispute the 5-

to-4 circuit split, but erroneously claims (at 19) that the Ninth Circuit's reliance on judicial estoppel was "dicta." To the contrary, the panel "*rel[ied] on* the government's avowals in its briefing and at oral argument that estate tax liability cannot exceed the value of the property received." Pet. App. 38a (emphasis added). The Government cites this passage (at 8) but omits the emphasized language making the panel's application of estoppel clear. Judge Ikuta's dissent likewise understood the majority's holding to turn on judicial estoppel. *See id.* at 75a-76a (Ikuta, J., dissenting). And while the Government claims that the panel "did not address the distinction between questions of fact and questions of law," the panel clearly held that "judicial estoppel may be applied to prevent the government from asserting inconsistent legal arguments." Pet. App. 40a n.29 (majority op.).

Finally, the Government (at 21) does not dispute that the Ninth Circuit's understanding of the revenue-raising canon conflicts with the approach of other federal Courts of Appeals. Instead, the Government relies on the Ninth Circuit's suggestion, Pet. App. 46a, that the canon is inapplicable because Section 6324 is unambiguous. But the Ninth Circuit deemed the statute unambiguous only by applying judicial estoppel to avoid the natural results of its interpretation. If the Court rejects estoppel, the statute will either be unambiguous *in Ms. Pickens' favor*, or this Court will need to determine whether to construe an ambiguous statute against the IRS.

III. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT.

This case raises exceptionally important questions about the meaning of a significant tax statute and the notice the Government owes taxpayers before imposing ruinous liability.

As Judge Ikuta noted, the Government here seeks to use an interpretation of Section 6324(a)(2) it disclaimed 60 years ago to impose millions of dollars of retroactive liability on Ms. Pickens—all to "compensate for its failures to use the available statutory options to collect estate taxes" from the person responsible for paying them. Pet. App. 66a (Ikuta, J., dissenting). Ms. Pickens had no conceivable basis to predict the IRS would fail to protect itself, fail to hold the wrongdoer accountable, then pursue her via a theory of Section 6324 no court had ever accepted. This Court should restore the settled meaning of Section 6324(a)(2) and make clear that the Government's conduct cannot stand. *See* Amicus Brief of National Taxpayers Union Foundation 11.

But the stakes radiate beyond this case. The Ninth Circuit has gifted the IRS a radically expanded tax-enforcement statute ripe for abuse. And the Ninth Circuit's extraordinary application of judicial estoppel raises deep constitutional concerns in its own right.

The Government urges (at 21) the Court to await the District Court's calculation of the final tax bill on remand. There is no need to prolong these proceedings. The legal issue—whether Section 6324(a)(2) permits any liability—is squarely presented and completely dispositive. Nothing will change on remand.

Further proceedings will only impose more unnecessary costs on Ms. Pickens, an innocent third-party forced to litigate against the IRS for years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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