No. [illegible]

In the Supreme Court of the United States

CAROLYN C. BARR,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 26 U.S.C. § 7403, a district court may order the sale of a delinquent taxpayer's property to satisfy a federal tax lien, even if the property is co-owned with another individual who does not owe taxes. Sale proceeds are to be divided "according to the findings of the court in respect to the interests of the parties and of the United States." *United States* v. *Craft*, 535 U.S. 274 (2002), held that federal tax liens attach to the delinquent spouse's interest in a tenancy by the entirety, but expressly left open the question presented here:

> When a court allocates the proceeds from a § 7403 sale "according * * * to the interests of the parties and of the United States," must the court take into account the additional value of the survivorship right of the spouse with the longer life expectancy and any other asymmetrical rights—as held by the Second, Fifth, Ninth, and Tenth Circuits—or must it allocate the proceeds equally to each party in every situation—as held by the Third and Sixth Circuits?

TABLE OF CONTENTS

TABLE OF CONTENTS–cont'd

TABLE OF CONTENTS–cont'd

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–cont'd

Page(s)

TABLE OF AUTHORITIES–cont'd

TABLE OF AUTHORITIES–cont'd

TABLE OF AUTHORITIES–cont'd

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Sixth Circuit, App., *infra*, 1a-21a, is available at 617 F.3d 370. The district court's opinion, App., *infra*, 24a-32a, is available at 2008 WL 4104507.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. Petitioner timely filed a petition for rehearing en banc, which was denied on September 14, 2010. App., *infra*, 33a-34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7403 of Title 26 of the United States Code provides, in pertinent part:

> (a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax

or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

STATEMENT

This case concerns how a federal district court must value an innocent spouse's interest in entireties property when a court orders its sale under 26 U.S.C. § 7403 to enforce a federal tax lien against her delinquent taxpayer husband. This Court has twice addressed the enforceability of tax liens against marital property and both times left unresolved the question of valuing a spouse's interest in such

property under § 7403. *United States* v. *Craft*, 535 U.S. 274, 289 (2002) ("We express no view as to the proper valuation of [the] interest of the entireties property."); *United States* v. *Rodgers*, 461 U.S. 677, 698 (1983) ("The exact method for the distribution required by § 7403 is not before us at this time."). This petition presents that issue, which has divided the courts of appeals.

The decision below, over a vigorous dissent, held that valuing the "interest" of a spouse in the proceeds from the sale of entireties property requires a simple 50/50 split between the innocent spouse and the United States. App., *infra*, 3a. More particularly, the Sixth Circuit determined that an innocent spouse is entitled to no greater portion of the proceeds than her delinquent taxpayer husband, even though her husband has the shorter life expectancy and the wife therefore has the greater likelihood of inheriting the entire property upon his death. That decision conflicts with decisions by four other Circuits and flies in the face of this Court's guidance regarding the correct valuation analysis under § 7403.

Statutory Background

Section 7403 authorizes federal district courts to order the sale of property in which a delinquent taxpayer holds an interest for payment of tax liabilities—notwithstanding the concurrent interest owned by an innocent third party. The statute requires that all parties having an interest in the property be made parties to the action, allows the court to decree a sale of the property, and instructs that the court distribute the sale proceeds "according

to the findings of the court in respect to the interests of the parties and of the United States." 26 U.S.C. § 7403(c). This language aims to satisfy the Takings Clause by requiring fair compensation for innocent third parties. *Rodgers*, 461 U.S. at 697-698.

In *Rodgers*, this Court examined § 7403 as it applied to two situations: a family home in which an innocent spouse held an interest along with the delinquent taxpayer, her husband (the Ingram case), and a family home held by an innocent spouse and the estate of her deceased husband (the Rodgers case). Under Texas law, each spouse had a "homestead interest" in the property, a right that this Court analogized to an undivided life estate.[1] *Rodgers*, 461 U.S. at 685-686. Acknowledging the State's robust protection of property owners against creditors, this Court emphasized that, "although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." *Id.* at 683.

The Court then concluded that § 7403 empowers district courts to sell the entire property, not just the delinquent taxpayer's interest. *Rodgers*, 461 U.S. at 691-694. An innocent third party's interest in the property, the Court explained, will not block a court's ability to force sale under § 7403. This Court expressly acknowledged, however, that the spouse was entitled "to so much of the proceeds as represents complete compensation for the loss of the homestead estate." *Id.* at 680.

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[1] A life estate is an estate whose duration is measured by a designated person's life. William B. Stoebuck & Dale A. Whitman, The Law of Property § 2.11, at 58 (3d ed. 2000).

Recognizing that its holding would present lower courts with questions regarding how to value spouses' respective concurrent interests, the Court provided a guiding example for resolving the compensation issue. *Rodgers*, 461 U.S. at 698-699. Assuming that the homestead estate was the equivalent of a life estate, and using a standard actuarial table with an eight percent discount rate, the Court calculated that three innocent surviving spouses, aged 30, 50, and 70 years, would be entitled to 97%, 89%, and 64% of the proceeds, respectively. If those three spouses also had a protected half-interest in the underlying ownership right of the property, their portion of the proceeds would total 99%, 95%, and 82%, respectively. *Ibid.*

In *United States* v. *Craft*, 535 U.S. 274 (2002), the Court held that tax liens attach to property held in a tenancy by the entirety. Such property, the Court held, is likewise subject to sale under § 7403. *Id.* at 288. This form of ownership, it explained, rests on the law's notion that the husband and wife are a single person for purposes of ownership. *Id.* at 281. A spouse's interest could be alienated upon severance of the entireties tenancy, but that would require either a divorce or the consent of both spouses. *Ibid.* The Court then identified the principal interests held by tenants by the entirety, including a joint-life estate, the right of survivorship, and the right to prevent sale. *Id.* at 282.

Craft did not resolve how to value the separate interests of a spouse in entireties property. Indeed, it specifically left that question open, "express[ing] no view as to the proper valuation of respondent's

husband's interest in the entirety property." 535 U.S. at 289. Notably, in response to a passage in the taxpayer's brief raising the valuation issue, Craft Br. at 33, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831), the government asserted that the actuarial illustration set forth in *Rodgers* offered the most appropriate solution, U.S. Reply Br. at 17 n.17, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) ("The answer to the valuation issue has factual variations but the 'rough idea' is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698.").

District Court Proceedings

Charles Barr had tax liabilities in excess of $300,000 owing to unpaid taxes, interest, and other statutory accruals. Consequently, the government attached a federal tax lien to the home owned in a tenancy by the entirety by Mr. Barr and petitioner Carolyn Barr, his wife. The government then sought to reduce these liabilities to judgment and filed a civil action against Mr. Barr, against whom a default judgment was subsequently entered. In that proceeding, the government sought to foreclose on the marital home under § 7403 and filed a motion for summary judgment to that effect. No evidence was provided by the government as to the compensable value of a spousal entireties interest.

The district court granted the government's motion, holding that *Rodgers* and *Craft* permitted foreclosure under § 7403 on a federal tax lien on property held in a tenancy by the entirety. The district court then concluded that foreclosure was

appropriate in this case. App., *infra*, 32a. The district court held that each spouse held an interest "that may be fairly divided between them." *Ibid.* In the order of foreclosure that followed, the district court ruled that Mrs. Barr's compensation for her interest was 50% of whatever equity in the property was left after all other creditors were paid. (R. 41). The other 50% went to the government.

Court of Appeals Proceedings

A divided Sixth Circuit affirmed. App., *infra.*, 13a. The majority held that the proper way to value spouses' interests in a tenancy by the entirety under § 7403 was to split the value down the middle, observing that Michigan laws provided for equal distribution of proceeds upon consensual sale or divorce. The court quoted with approval *Popky* v. *United States*, 419 F.3d 242 (3d Cir. 2005), which justified 50/50 distribution on the grounds that such a "valuation is far simpler and less speculative" than an actuarial approach. App., *infra*, 6a (quoting *Popky*, 419 F.3d at 245).

The panel majority cast aside this Court's statement in *Rodgers* that "any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics." 461 U.S. at 704. Such valuation was necessary in *Rodgers*, the majority posited, only because of the need to decide the value of a life estate, implying without explanation that no actuarial calculation is required for a survivorship interest. The majority likewise disposed of Mrs. Barr's right to prevent sale, asserting that it had no value because it was

perfectly offset by her reciprocal inability to sell without Mr. Barr's consent. App., *infra*, 8a.

Chief Judge Batchelder issued an opinion concurring in part but dissenting on the question of valuation. While she agreed that foreclosure was permissible under § 7403, she argued that the panel majority's 50/50 solution was "simplistic" and "flawed." App., *infra*, 18a (Batchelder, C.J., concurring in part and dissenting in part). Stressing this Court's holding in *Rodgers* that innocent spouses must receive complete compensation, she urged that "district courts must take care to assure that innocent third parties receive compensation for *each* property interest they possess" to avoid potential Takings violations. *Id.* at 17a-18a n.3 (emphasis original). The panel majority's approach, she concluded, failed to follow this Court's valuation instructions. *Id.* at 21a.

The dissent further criticized the panel majority for looking to how Michigan courts deciding different state law cases involving entireties property might approach valuation because it was undisputed that valuing property interests under § 7403 is a matter of federal law. App., *infra*, 18a-19a (Batchelder, C.J., dissenting in part and concurring in part). The "weight of federal law," she explained, "argues strongly against" the 50/50 approach. *Id.* at 19a (citing *Pletz* v. *United States*, 221 F.3d 1114, 1117 (9th Cir. 2000); *United States* v. *Gibbons*, 71 F.3d 1496, 1500 (10th Cir. 1995); *Harris* v. *United States*, 764 F.2d 1126, 1131-1132 (5th Cir. 1985)). She sharply disagreed with *Popky*, upon which the panel majority relied. In her view, "[t]here is simply no

legal justification for ignoring the vested property rights of litigants in order to avoid complexity and uncertainty." *Id.* at 19a n.4.

Chief Judge Batchelder also questioned the majority's comparison of Mrs. Barr's situation to distributions of property pursuant to consensual sale or divorce. These events, she explained, are fundamentally different from a forced sale because of their timing. App., *infra*, 20a-21a (Batchelder, C.J., dissenting in part and concurring in part). In a divorce, the tenancy by the entirety is first severed by divorce decree and converted into a tenancy in common, after which the property is sold. In a consensual sale, both spouses have reached agreement that the timing and terms of the disposition are advantageous enough to warrant surrendering their rights of survivorship and to prevent sale. Both situations naturally result in presumptive equal distribution of proceeds although the spouses themselves—or a family court in a divorce proceeding—could allocate their shares differently. *Ibid.* In a § 7403 forced sale, by contrast, "the value of the non-delinquent spouse's interests must be determined prior to the § 7403 order, by which the court will extinguish those rights." *Id.* at 21a. She posited that valuing Mrs. Barr's property interests as if she had already surrendered them "would raise the unsightly specter of a taking without just compensation." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Deepens A Split Among The Circuits Over How To Value An Innocent Spouse's Component Interests In A Tenancy By The Entirety Under 26 U.S.C. § 7403

In *Craft*, this Court expressly left open the question of how to value an innocent spouse's interest in an entireties property in a § 7403 foreclosure. 535 U.S. at 289 ("We express no view as to the proper valuation of respondent's husband's interest in the entireties property.") Ignoring the "far greater weight of the cases," the Sixth Circuit here joined the Third Circuit in holding that the value of an innocent spouse's component interests in an entireties estate is fifty percent in every situation where a court is asked to order a sale of entireties property under § 7403. App., *infra.*, 19a (Batchelder, C.J., dissenting in part and concurring in part). In contrast, four circuits have held that an innocent owner's component interests should be valued actuarially. This split of authority is stark, well-established, and likely to persist. Review by this Court is therefore warranted.

A. Two Circuits Have Held That The Value Of An Innocent Spouse's Component Interests In Entireties Property Is Always Fifty Percent, Regardless Of The Spouses' Respective Life Expectancies

The Third and Sixth Circuits have adopted a universal rule that all spouses have equal survivorship interests regardless of their relative life expectancies App., *infra.*, 3a; *Popky* v. *United States*,

419 F.3d 242, 245 (3d Cir. 2005). In *Popky*, the Third Circuit adopted the equal shares approach for three reasons. First, it assumed that because spouses have the same *interests* in an entireties estate, those interests necessarily must have the same *value*. *Ibid.* It reasoned that "[v]aluing the interests of tenants by the entireties equally accords with longstanding Pennsylvania common law *definitions* of tenancies by the entirety," thus tying the economic value of each spouse's interests to the formal, definitional identity of those interests. *Ibid.* (emphasis added) (citing two cases holding that spouses hold identical interests in entireties property). Second, it concluded that because the proceeds of an entireties property are distributed equally *after* "an entireties estate is severed because of a sale with consent of both tenants, divorce, or other reasons," each spouse's interests in that property must have the same value *prior to* a court-ordered severance under § 7403. *Ibid.* Finally, it declared that a 50/50 approach is "[s]ound policy" because it "is far simpler and less speculative" than an actuarial valuation. *Ibid.*

The Sixth Circuit hewed closely to the Third Circuit's three-part reasoning. First, it concluded that because the Barrs have "equal interests in their home," those interests must be valued equally. App., *infra.*, 5a ("division according to their [equal] interests results in an equal distribution of the proceeds of the sale of that home"). Second, it assumed that because the proceeds from the sale of the Barrs' property would presumptively be divided equally *after* a divorce or consensual sale severed their tenancy, their respective interests should be valued equally *prior to* severance by a forced sale

under § 7403. *Id.* at 7a. Finally, quoting *Popky*'s policy analysis, the Sixth Circuit praised the 50/50 approach as an "intuitive conclusion," *id.* at 6a, despite the dissent's admonition that "ignoring the vested property rights" of an innocent spouse for the sake of administrative convenience is unjustifiable, *id.* at 19a n.4 (Batchelder, C.J., dissenting in part and concurring in part).

The Sixth Circuit then expanded upon the Third Circuit's analysis. While the Sixth Circuit correctly identified the components of an entireties property as an implicit joint-life estate, a survivorship interest and a right to prevent sale, App., *infra.*, 6a, it simply reapplied a form of the Third Circuit's reasoning to each of them. The court held that the Barrs' survivorship rights should be valued equally because "differences in life expectancies do not result in different survivorship interests." *Id.* at 7a. If differences in life expectancies did matter, the Sixth Circuit reasoned, "Michigan law [would not] provide[] for equal division of property upon divorce or consensual sale." *Ibid.* It expressly rejected the Court's admonition in *Rodgers* to value spousal interests actuarially because "Mrs. Barr presents no compelling reason why this court should not apply the presumption of equal spousal life expectancy implicit in Michigan law." *Id.* at 8a. The Sixth Circuit then held that the Barrs' rights to prevent unilateral sale or encumbrance by the other spouse were worth the same—exactly zero—because they were "precisely reciprocal between spouses." *Ibid.*

B. Four Circuits Have Held That A Court Should Consider Life Expectancy In Valuing The Component Interests Of A Tenancy By The Entirety

Four circuits have approved the use of actuarial calculations to value the individual interests that make up a tenancy by the entirety. *Pletz* v. *United States*, 221 F.3d 1114, 1117-1118 (9th Cir. 2000); *United States* v. *Gibbons*, 71 F.3d 1496, 1501-1502 (10th Cir. 1995); *United States* v. *Baran*, 996 F.2d 25, 28 (2d Cir. 1993); *Harris* v. *United States*, 764 F.2d 1126, 1129-1132, 1132 n.3 (5th Cir. 1985); *United States* v. *Molina*, 764 F.2d 1132, 1133 (5th Cir. 1985). As this Court noted in *Craft*, the component interests that make up a tenancy by the entirety can be readily disaggregated. 535 U.S. at 281-282. For each spouse, these interests include a joint-life estate, a survivorship interest, and a right to prevent unilateral sale or encumbrance of the property by the other spouse. *Id.* at 282; see also App., *infra.*, 6a. Of course, how a court values any component interest necessarily affects the total value of a spouse's overall interests in a tenancy by the entirety.

The Fifth Circuit has held that the respective life expectancies of the spouses should be considered in valuing the "economic equivalent of a [joint] life estate," one of the central components of a tenancy by the entirety. *Harris*, 764 F.2d at 1130. Noting this Court's assertion in *Rodgers* that the use of actuarial tables is "appropriate in calculating the value of the homestead estate," the Fifth Circuit saw "no reason * * * to depart from the use of * * * Treasury tables." *Ibid.*; see also *Molina*, 764 F.2d at 1133 (requiring

use of joint-life actuarial tables to value an innocent spouse's homestead interest). Much of its discussion, in fact, concerned exactly which type of actuarial approach—using single-life or joint-life tables—was more faithful to this Court's teaching in *Rodgers*. 764 F.2d at 1130-1131 & n.2. Likewise citing this Court's decision in *Rodgers*, the Second Circuit has approved the use of actuarial tables in valuing a life estate under § 7403. *Baran*, 996 F.2d at 28.

Similarly, the Tenth Circuit has held that an innocent spouse holding a life estate and a survivorship interest is entitled to more than fifty percent of the proceeds of a § 7403 forced sale. *Gibbons*, 71 F.3d at 1501-1502. Accepting the view that the innocent spouse's interests in a life estate should be valued actuarially, the Tenth Circuit remanded the case to the district court solely to determine the effect of a possible outstanding mortgage on this calculation. *Id.* at 1502. In other words, it remanded for the district court to consider the impact of probabilistic events *in addition to* different life expectancies in valuing the innocent spouse's interests, *i.e.*, an even more complex actuarial calculation.

More recently, the Ninth Circuit followed the Fifth Circuit's decisions in *Harris* and *Molina* to hold that joint-life actuarial tables should be used to value the interests in a tenancy by the entirety when a court orders a sale under § 7403. *Pletz*, 221 F.3d at 1117-1118. In particular, it approved the district courts' and bankruptcy courts' employing "the joint-life method[] and correcting for the difference in anticipated lifespan" between the spouses to allocate

more than 50 percent of the value of the entireties property to the innocent spouse. *Id.* at 1116.

C. This Split Of Authority Is Widely Recognized And Certain To Persist

Other courts have acknowledged this conflict over how to value an innocent spouse's component interests in an entireties estate under § 7403. See, *e.g.*, *United States* v. *Goddard*, No. 1:09-CR-20, 2010 U.S. Dist. LEXIS 76336, at *8-*15 (E.D. Tenn. July 28, 2010) (discussing the "two methods which have been adopted by other courts" for valuing interests in entireties property); *Barczyk*, 697 F. Supp. 2d at 799-800 (discussing cases); *id.* at 799 (discerning "no consensus on how to value spousal interests in joint tenancies"). District and bankruptcy courts have also reached different conclusions in grappling with this issue. Compare *United States* v. *Ryan*, No. 04-0531-CV-W-GAF, 2005 WL 6153137, at *3 (W.D. Mo. July 19, 2005) (adopting the equal shares approach for reasons of "judicial economy"), with *In re Murray*, 318 B.R. 211, 214 (Bankr. M.D. Fla. 2004) (using actuarial method "[d]espite its administrative inconvenience").

Of course, this Court does not ordinarily grant review in order to settle disagreement and confusion among the district and bankruptcy courts. In this context, however, such disagreement and confusion heighten the significance of the circuit conflict because this issue will, by its nature, seldom rise to the attention of the circuit courts. Given that many disputes involving § 7403 begin in bankruptcy court, circuit court adjudication will often be the second

level of review for property owners. Only the most determined and affluent litigants are likely to pursue their claims through two appeals. Even for disputes commencing in district court, the cost of litigation is likely to rule out appellate review for a family whose last asset, a home, is about to be taken from them. Although significant over the run of cases, the economic difference between the two methods may under many circumstances not be great enough in any one case to justify the cost of an appeal. See pp. 33-34, *infra*; see *e.g.*, *United States* v. *Burtsfield*, 553 F. Supp. 2d 1194, 1200 n.5, 1202 (D. Mont. 2008) (difference between the approaches when applied to particular entireties property amounted to $8,565.90). Given the high cost of legal representation, an innocent spouse whose life expectancy exceeds that of her delinquent counterpart will often conclude that an appeal of a decision awarding equal shares is uneconomical. The financial hardship inherently accompanying most forced sales compounds this difficulty. The several cases litigated up to the circuit level within the last quarter-century have offered appellate courts only a few occasions to clarify an area of the law of fundamental importance in the bankruptcy and district courts. This case therefore presents an uncommon opportunity for this Court to resolve this important question.

II. Always Valuing The Innocent Spouse's Interest In Entireties Property At Exactly Fifty Percent Undercompensates Many, Overcompensates Others, And Conflicts With How The Government Values Life Estates And Remainder Interests In Related Contexts

Splitting the value of an entireties property 50/50 between a delinquent and an innocent spouse in a § 7403 foreclosure compensates the innocent spouse haphazardly. This "method" undervalues the entireties interests of an innocent spouse who can expect to live longer than the delinquent one while overvaluing the interest of an innocent spouse who has a shorter life expectancy. It disadvantages women, who generally live longer than men, cf. *Craft*, 535 U.S. at 289-290 ("[Entireties] ownership [is] of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property.") (Scalia, J., dissenting), especially when they are younger than their delinquent husbands. A simple 50/50 split is also inconsistent with the actuarial techniques the government itself uses to value life estates and remainder interests in related contexts.

Section 7403 allows the government to file an action to enforce a lien against any property in which a delinquent taxpayer has an interest. When others also hold interests in the property, § 7403 permits the government to foreclose on the whole property but requires that it fully compensate others for the value of their interests. *United States* v. *Rodgers*, 461 U.S. 677 (1983). Only in this way can the government

avoid taking innocent owners' property without just compensation.

By arbitrarily splitting the proceeds of § 7403 foreclosure sales 50/50 between spouses, the Third and Sixth Circuits sacrifice accuracy and just compensation to expediency and judicial convenience. Splitting the sale proceeds this way almost never values the spouses' interests correctly and often undercompensates the innocent spouse. This Court should grant review because judicial convenience cannot justify denying an innocent spouse just compensation for his or her interest in entireties property—as the statute indisputably demands.

The Sixth and Third Circuits asserted three different reasons for splitting the proceeds of a § 7403 sale 50/50. Each is mistaken. First, they assumed that because the spouses have identical *interests* in an entireties property those interests must have equal *values*. App., *infra.*, 5a; *Popky*, 419 F.3d at 245. The initial premise is correct. Under Michigan law, the spouses' interests are exactly identical:

> [E]ach tenant by the entirety possesses the right of survivorship. Each spouse * * * may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. Neither spouse may unilaterally alienate or encumber the property although this may be accomplished with mutual consent.

Craft, 535 U.S. at 282. The Third and Sixth Circuits' conclusion, however, does not follow. Although some

of these identical interests have equal values, some do not. During the period of time that both spouses live and occupy the property—the joint-life estate—their use and enjoyment of the property have equal value to each spouse. For each, this interest carries the same rights–to possess, to exclude third parties, and to enjoy the property's income—until the death of the first spouse. Since these rights guarantee to each spouse the same use of the property for exactly the same amount of time, they have the same value to each spouse.

The right of survivorship, by contrast, does not. Whichever spouse outlives the other gains the whole remainder interest and the value during their joint-lifetimes should reflect the probability of each outliving the other. Thus, if one spouse is 80 percent likely to outlive the other, the value of the right of survivorship to that spouse should be 80 percent of the present value of the remainder. Just because each spouse has identical survivorship *interests*, in short, does not mean that those survivorship interests have identical *values*.

Second, the Third and Sixth Circuits concluded that because the proceeds of an entireties property are distributed equally *after* "an entireties estate is severed because of a sale with consent of both tenants, divorce, or other reasons," each spouse's interest in that property must have the same value *prior to* a court-ordered severance under § 7403. *Popky*, 419 F.3d at 245; App., *infra.*, 7a. Again, the premise is correct. After formal severance of an entireties tenancy, each spouse is entitled to receive 50 percent of the value unless they agree otherwise

or, in the case of divorce, the final decree apportioning the couple's total property specifies otherwise. *Craft*, 535 U.S. at 282. But the Third and Sixth Circuits' conclusion does not follow. Prior to a formal severance of the entireties tenancy, each spouse possesses equal formal interests, some of which, particularly the right of survivorship, usually have different expected economic values, See, p. 19, *supra*. It is axiomatic, moreover, that the government must compensate a property holder for the economic value of his interest in the property at the time it is taken, not *afterwards*. *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 387 n.17 (1980); *Danforth* v. *United States*, 308 U.S. 271, 283 (1939) ("Just compensation is value at the time of the taking"). Yet, the Third and Sixth Circuits' 50/50 rule does exactly the opposite. It compensates the innocent spouse for the value of her interests *after* the § 7403 foreclosure has severed the entireties tenancy against her wishes.

Chief Judge Batchelder noted the illogic of this position:

> Even ignoring the linguistic inconsistency of asserting that a *forced* sale and a *consensual* sale should be treated the same, treating a § 7403 forced sale as equivalent to a consensual sale or sale subsequent to a divorce also ignores a fundamental question of timing. When a divorce occurs, and the property is sold, the tenancy by the entirety is severed by the divorce decree first, and only then is the property sold. The divorce decree transforms the tenancy in the entireties into a tenancy in common, so a 50/50 split from a

> subsequent sale is the natural result. Similarly, when a consensual sale occurs, both parties consent to the sale, effectively surrendering their survivor interests and their right to prevent sale. Only then is the sale effectuated, and a 50/50 split is, again, the natural result. With a sale pursuant to § 7403, however, the value of the non-delinquent spouse's interests must be determined *prior* to the § 7403 order, by which the court will extinguish those rights. Valuation of property interests under § 7403 cannot occur *as if* the non-delinquent spouse had already surrendered her interests. To do so would raise the unsightly specter of a taking without just compensation. *See Rodgers*, 461 U.S. at 697 (holding that § 7403 requires compensation for every property interest that is "taken" in the process).

App., *infra.*, 20a-21a (Batchelder, C. J., concurring in part and dissenting in part). That the entireties property gives the innocent spouse the specific right to prevent severance (except through the compulsion of divorce) compounds the error of the 50/50 rule's logic.

Third, the Third and Sixth Circuits defended the 50/50 split as "sound policy" *Popky*, 419 F.3d. at 245; App., *infra.*, 6a (quoting *Popky*, 419 F.3d. at 245), and as an "intuitive conclusion," *ibid.* As the dissent below noted, however, this policy intuition rests completely on the fact that a simple "50/50 split [is] far simpler and less speculative" than an actuarial valuation. App., *infra.*, 19a (Batchelder, C. J., concurring in part and dissenting in part) (quoting *Popky*, 419 F.3d at 245). The ease of simply splitting

the value in half is undeniable but irrelevant, particularly given the Fifth Amendment's protection against unjustly compensated takings. As the dissent further noted, "[t]here is simply no legal justification for ignoring the vested property rights of litigants in order to avoid complexity and uncertainty." App., *infra.*, 19a n.4 (Batchelder, C.J., dissenting in part and concurring in part). And judicial expedience and convenience also prove too much. A simple "equal shares" approach is an easier way to divide the value of *any* jointly-owned property. Yet, courts routinely try to determine the value of each property-holder's interest in any condemnation proceeding. See generally 1 Lewis Orgel, Valuation Under The Law Of Eminent Domain §§ 113-127 (2d ed. 1953).

In the case of complex marital property interests, this Court has instructed the lower courts to divide the property into its more familiar constituent components. *United States* v. *Rodgers*, 461 U.S. 677, 685-686 (1983). As this Court recognized in *Craft*, a Michigan tenancy by the entirety is composed of, among other interests, (1) a joint-life estate, (2) a remainder interest inherited by the surviving spouse upon the death of the first spouse, and (3) the right of each spouse to prevent the unilateral sale or encumbrance of the property by the other. *See Craft*, 535 U.S. at 282. Although each spouse has the same formal interests in the property, the economic value of those interests depends, in large part, on the relative life expectancies of the spouses.

Simply splitting the value of an entireties property 50/50 between the spouses undervalues in at least three different ways the interests of the spouse

who is expected to live longer: (1) it misallocates the value of the overall entireties property as between the joint-life estate and the remainder; (2) it then undervalues the expected value of the remainder to the spouse with the longer life expectance; and (3) it ignores completely the value to that spouse of the right to prevent unilateral alienation. First, an equal division of the proceeds from the property fails to allocate properly the property's value between the joint-life estate and the remainder. Because the joint-life estate terminates when the first spouse dies, the allocation of the property's value between the joint-life estate and the remainder depends upon the length of time that both spouses are expected to live. This initial allocation of value between the joint-life estate and the remainder interest is critical because, while the value of each spouse's interest in the joint-life estate may be identical, the expected value of their remainder interest is not. The 50/50 rule, in other words, correctly allocates at most the value of the joint-life estate. To determine how much of the overall entireties tenancy the joint-life estate represents and how to allocate the value of the remainder between the spouses requires an actuarial undertaking.

The federal tax code recognizes, in fact, that many property interests depending on life expectancy should be valued actuarially and mandates the use of actuarial techniques in many contexts similar to this one. Section 7520 of the Internal Revenue Code requires, for example, that "[f]or purposes of [The Internal Revenue Code], the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be

determined * * * under tables presented by the Secretary * * * using an interest rate * * * equal to 120 percent of the Federal midterm rate." 26 U.S.C. § 7520(a); see 26 C.F.R. § 20.2031-7T (containing current table). So far as they apply, these tables must be used in valuing all life estates and remainders under the Internal Revenue Code unless another provision of the code, see, e.g., 26 U.S.C. § 7520(b) ("This section shall not apply for purposes of part I of subchapter D of Chapter 1,"), or a regulation, *ibid.* ("This section shall not apply for purposes of * * * any other provision specified in regulations."), specifies otherwise. None does in the situation here. See 26 C.F.R. §§ 1.7520-3(a), 20.2031-7T(d), 20.7520-3(a), 25.7520-3(a).

A hypothetical based on the recent case of *Marshall* v. *Marshall*, 547 U.S. 293 (2006), underscores how haphazardly the Third and Sixth Circuits' 50/50 rule compensates spouses. *Marshall* involved a married couple with widely disparate ages. At the time of their marriage, the husband was 89 years old and the wife 26. Suppose they held property as tenants by the entirety, the husband had failed to pay his taxes, and the wife was an innocent spouse. Using the Internal Revenue Code's valuation tables and the interest rate applicable in September 2010, 89.6% of the present value of the property would be captured in the remainder interest, while only 10.4% would be captured in the joint-life estate.[2] Much

[2] 26 U.S.C. § 7520 says that an interest rate equal to 120% of the applicable federal midterm rate (computed annually) for the month in which the valuation falls is to be used in splitting the property into a life estate and remainder interest. For the month of September 2010, when these calculations were

more of the value of the property is contained in the remainder interest because the time that both spouses are expected to remain alive is relatively short.

The next step divides the value of each of these two distinct interests appropriately between the spouses. Assuming each spouse has a half claim to the joint-life estate, the 10.4% value attributed to the joint-life estate should be split 50/50: 5.2% goes to each spouse. Each spouse, however, has a quite different expectation of the remainder. The 26 year-old wife can expect to live for another 55.16 years; the 89 year-old husband only another 4.14. See Social Security Administration Period Life Tables, http://www.ssa.gov/OACT/STATS/table4c6.html (last visited Sept. 30, 2010).

Using these tables, the wife has a 99.7% chance of outliving the husband and thus a 99.7% chance that

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performed, that rate was 2.4%. See www.irs.gov/businesses/small/article/0,,id=112482,00.html (last visited Sept. 30, 2010). IRS Publication 1457 provides instructions for using the double- and single-life tables to compute the portion of the value captured in the remainder interest. According to example 6 in that publication, the portion of the property value captured in the remainder interest is equal to the Single Life Remainder Factor for Spouse 1 from Table S (interest rate 2.4%) plus the Single Life Remainder Factor for Spouse 2 from Table S (interest rate 2.4%) minus the Joint and Survivor Remainder Factor for Spouses 1 and 2 from Table R-2 (interest rate 2.4%). For a couple ages 26 and 89, those factors equal 0.30861 + 0.8958 – 0.30825 = 0.89616. See www.irs.gov/retirement/article/0,,id=206601,00.html (last visited Sept. 30, 2010) for IRS Publication 1457 and associated tables. Therefore, 89.6% of the value is captured in the remainder interest and 10.4% is captured in the life estate.

she will eventually come to possess the remainder and own the property in fee simple.[3] Therefore, her expected value of the remainder equals 99.7% of the 89.6% of the property that the remainder represents. Together, her interest in these two components of the property is half of the 10.4% the joint-life estate represents and 99.7% of the 89.5% the remainder does for a total of 94.6% of the portion of the overall property these two interests represent together. The Third and Sixth Circuit's 50/50 rule, however, would award her only 50%—slightly over half of what she is entitled to. If, by contrast, the husband were the innocent spouse, the 50/50 rule would *over*compensate him by the same amount. Under the above analysis, a 50/50 split would compensate the innocent spouse correctly only if both spouses happened to have identical life-expectancies.

One might hope that the rule would at least have the virtue of compensating innocent spouses appropriately *on average*, but even that hope would

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[3] Since the Secretary of the Treasury has not developed tables that can be used for this purpose, the Social Security Administration Life Tables were used to compute the probability that one spouse will outlive the other. This computation was done by first determining the odds that, given a spouse's current age, he or she will die at each future age. For a 26 year-old female, the probabilities that she will die at age 26, at age 27, at age 28, and so forth was computed. For an 89 year-old male, the odds that he will die at age 89, at age 90, at age 91, and so forth was also computed. Using these probabilities, the probability that the husband will die in a given year while the wife remains alive was computed by multiplying the odds that he will die in the current year by the odds that she will die in a future year. That probability was computed for 2010, 2011, 2012, and so forth. These probabilities were then added together to compute the total probability that the wife will outlive the husband.

be mistaken. Unless innocent and delinquent spouses have identical life expectancies *on average*, it would not. The Third and Sixth Circuits certainly offered no support for this quite specific and peculiar actuarial assumption and commonsense offers no ground for it either. Even if it were true, however, it would offer no defense for the 50/50 rule. The government cannot justify undercompensating in one taking because it has overcompensated in a different one. An error that cuts both ways is doubly error.

In *Craft*, moreover, the government twice conceded that the value of jointly-owned property should be allocated actuarially—once in its reply brief, U.S. Reply Br. at 17 n.17, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) ("The answer to the valuation issue has factual variations but the 'rough idea' is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698."), and once in oral argument. In response to the Court's question about how to value a spousal interest in entireties property—"[i]n your view, you always value the [delinquent] taxpayer's interest at 50 percent"—the government responded:

> No. I think in the Rodgers – well, if the property's been sold, yes. If the property hasn't been sold, and we're talking about in a foreclosure context, I believe the Rodgers court goes through the example of the varying life expectancies of the two tenants, and which one – and I believe what the Court in Rodgers said was that each of them should be treated as if they have a life estate plus a right of survivorship, and the Court explains how that could well – I think in the facts of

> Rodgers resulted in only 10 percent of the proceeds being applied to the husband's interest and 90 percent being retained on behalf of the spouse.

Transcript of Oral Argument at 15, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831). Like the dissent below, the government argued that a 50/50 split was appropriate *only if* the property had already been sold—and the tenancy thus severed—by the husband and wife together.

The government itself, moreover, has recognized the appropriateness of actuarially valuing spouses' interests in entireties property when collecting gift taxes. Before 1981, the Internal Revenue Code allowed spouses to elect to pay gift taxes on the creation of a entireties interest (as opposed to paying a gift on sale of the property) 26 C.F.R. § 25.2515-1(b). If they made that election, Treasury regulations required an actuarial valuation of the size of the gift as between the spouses. See *id.* §§ 25.2515-2(b)(2)&(c) (requiring actuarial valuation); see also *id.* §§ 25.2512-5 & 25.2512-5T (elaborating particular actuarial method). Furthermore, if such election is made, when the tenancy terminates, Treasury regulations require that any difference between the value actually received by each spouse and the actuarial value of each spouse's interest in the tenancy to be treated as a gift. *Id.* § 25.2515-4(b)[4].

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[4] § 2515 under which the regulations were promulgated, was repealed in 1981 when unlimited nontaxable gifts were allowed between spouses, but its regulations are still given effect for gifts to non-citizen spouses under 26 U.S.C. 2523(i). Gifts to non-citizen spouses are taxable under the old rules.

As these regulations show, the government itself recognizes that the values of spouses' interests in entireties property are not always the same and depend upon their life expectancies. Actuarial calculations of a spousal interest have been a standard in revenue collection for many years.

Finally, tenancy by the entirety entails an additional right not included in the valuation above—the right to prevent sale or encumbrance. Under this form of joint ownership, either spouse may prevent the unilateral sale or encumbrance of the property by the other. This entitlement protects each spouse's interest in marital property in two important ways: it ensures that a spouse (i) can use the entireties asset for that spouse's entire lifetime, which is particularly important in the case of a home, and (ii) receive the remainder if the other spouse predeceases them. This right is especially valuable in three situations: when creditors come knocking, when one spouse would seek to defeat the interest of the other by sale or encumbrance, and when one spouse wants to sell but the other does not because the proceeds from the sale of the home would not allow the couple to purchase a comparable home or the hesitant spouse believes the market for the home is depressed but likely to eventually rebound.

In this case, the difference in life expectancies means that Mrs. Barr's ability to prevent Mr. Barr from selling the house in which she is entitled to remain for the rest of her life is more valuable than his ability to prevent her from selling the same house. The courts below, however, gave no value to this right, let alone an actuarial one. Such treatment

ignores the value of an important stick in the spousal bundle and conflicts with Treasury regulations, which recognize some special value in this right in the related gift tax context. When, "under the law of the jurisdiction governing the rights of the spouses each is entitled to share in the income or other enjoyment of the property but *neither, acting alone, may defeat the right of a survivor of them to the whole of the property*," the property is subject to actuarial valuation that imputes greater value to the spouse with the longer life expectancy. 26 C.F.R. § 2515-2(b)(2) (emphasis added).

III. This Issue Is Important And Recurring

The question presented here is of great practical importance to millions of ordinary Americans. The issue could potentially arise in literally thousands of tax disputes each year, and recent data show that it has become one of the most frequently litigated federal tax questions. Thus, even if the dollar amount at issue in any particular case is limited, proper valuation of property sold under § 7403 is of significant magnitude in the aggregate and extremely important to the affected individuals—particularly innocent spouses.

Taxpayers commonly hold property in a tenancy by the entirety. Twenty-six States and the District of Columbia permit married individuals to hold entireties property. DENIS CLIFFORD, PLAN YOUR ESTATE 168 (10th ed. 2010). These jurisdictions are home to approximately 67.5 million married persons. See U.S. Census Bureau, *Census 2000 Demographic Profiles*, http://censtats.census.gov/pub/Profiles.shtml

(collecting demographic data on U.S. jurisdictions). Accordingly, it is no exaggeration to say that the issue of how to value entireties property cuts across a broad swath of American taxpayers.

What is more, the valuation of an innocent spouse's property interests is not limited to the marital home. A federal tax lien attaches to *all* of a taxpayer's real and personal property, the rights to such property, and any property acquired by the taxpayer after the assessment date. 26 U.S.C. § 6321; see IRM § 5.17.2.5 (Dec. 14, 2007) ("This is a very broad concept and includes not only items which are typically thought of as property, e.g., tangible items and 'things,' but also intangible items and 'rights' which a taxpayer may have, but are not necessarily marketable.") Thus, for over 100 million married Americans, the proper valuation of ownership interests apparently applies not only to their homes, but also to their vehicles, their financial accounts, and all manner of personal property.

Moreover, as this Court recognized in *Rodgers*, similar issues of valuation arise with other forms of joint ownership. 461 U.S. 677, 698-699 (1983) (holding that an innocent spouse sharing a "homestead" interest with a delinquent taxpayer had similar property rights requiring proper valuation). In particular, many of these same issues arise in valuing individual interests in joint tenancies, which, like entireties tenancies, grant a joint-life estate and a right of survivorship to each tenant but, unlike entireties tenancies, grant no right to prevent unilateral severance by other tenants. William B. Stoebuck & Dale A. Whitman, The Law of Property

§ 5.3 (3d ed. 2000). Many married persons, including many in entireties states, hold property as joint tenants and that property includes many different types. "It is common for real estate to be owned in joint tenancy, but any type of property can be owned in this manner and avoid probate. Bank accounts, automobiles, boats, and mobile homes are all routinely held in joint tenancy * * *." Denis Clifford, Plan Your Estate 165 (10th ed. 2010). The valuation principles at stake in this case thus potentially affect even the 52.7 million married individuals living in the twenty-four states that do *not* allow couples to hold proper as tenants by the entirety. See U.S. Census Bureau, *Census 2000 Demographic Profiles*, http://censtats.census.gov/ pub/Profiles.shtml.

Nor are these principles of potential concern to only the 120.2 million married individuals in the United States. Unmarried individuals may also hold property as joint tenants, benefitting from the same life estate and remainder interest at issue here. Forty-nine states and the District of Columbia permit unmarried individuals to hold property in a joint tenancy with right of survivorship, Denis Clifford, Plan Your Estate 166 (10th ed. 2010). The issue of how properly to value individual interests in jointly-owned property is thus potentially important to nearly everyone who holds joint-owned property in this country.

Perhaps due to their expansive reach, federal tax liens are an increasingly common collection mechanism. Over the past decade, the IRS has dramatically increased its use of federal tax liens, filing 965,618 in Fiscal Year 2009, an increase of

84.6% over the last five years and an astounding 474.7% increase over the past decade. IRS, DATA BOOK, 1999-2009, Tables 16a & 16b (1999-2009), available at http://www.irs.gov/taxstats/article/0,,id=207457,00.html (last updated May 26, 2010) (follow "1994-2001" and "2002-2009" hyperlinks)

The IRS frequently enforces these liens under § 7403. Federal tax liens are often contentious; the Taxpayer Advocate Service, an independent organization within the IRS, reported assisting taxpayers with federal lien issues 4,650 times during Fiscal Year 2009, 1 IRS, NATIONAL TAXPAYER ADVOCATE 2009 REP. TO CONGRESS 527, which is more than the number of times it assisted taxpayers with issues concerning a failure to file or failure to pay a penalty, *ibid.* Further, the enforcement of federal tax liens under § 7403 was one of the 10 most litigated tax issue in federal courts in the latter half of 2008 and early half of 2009, *id.* at 403, with some 61 cases culminating in a judicial opinion, *id.* at 465. These cases have been litigated in both the courts of appeals, see, *e.g.*, *United States* v. *Gomes*, 292 Fed. Appx. 570 (9th Cir. 2008), and the district courts, see, *e.g.*, *United States* v. *Zurn*, Case No. CV 07-07766 GW (FMOx), 2009 U.S. Dist. LEXIS 27920 (C.D. Cal. Jan. 29, 2009).

Those fully litigated cases are just the tip of the iceberg. The severely strained financial resources of many delinquent taxpayers and their spouses make it impractical for many to seek full judicial review. Simply put, ordinary Americans cannot often afford to litigate against the IRS. See generally Tom

Herman, *How to Fight the IRS*, WALL ST. J. April 12, 2010, at R1 (describing the IRS as "one of the most powerful government bureaucracies on the planet" and noting that "[s]eemingly routine struggles can drag on for years").

This Court routinely accepts cases of significant magnitude, recognizing their importance even when an individual case is limited in scope. See, *e.g.*, *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1268 (2009) (deciding whether federal courts have subject matter jurisdiction to compel arbitration in the context of a $10,610.74 credit card debt dispute); *Locke* v. *Karass*, 129 S. Ct. 798, 802 (2009) (deciding whether non-union employees' First Amendment rights were violated by a $9.70 per month union service fee).

Particularly in difficult economic conditions, the rate of tax delinquencies tends to increase. "The government's need to sustain the current level of revenue and collect delinquent tax liability during a recession may increase the number of these actions in the future." See 1 IRS, NATIONAL TAXPAYER ADVOCATE 2009 REP. TO CONGRESS 470. For the innocent spouses who *do* litigate the IRS's artificial valuation of property interests during the enforcement of federal tax liens, the modest dollar amount at issue may well represent the last of their financial reserves. The proper valuation of property interests is and will remain an important and recurring issue that deserves the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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