No. 10-794

# 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

## REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–cont'd

Page(s)

**Administrative Material**



**Article**

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## REPLY BRIEF FOR PETITIONER

The government's brief in opposition does not dispute that the question presented is recurring, nationally important, and squarely at issue in this case. Rather, the government devotes its attention primarily to a preemptive defense of the merits of a 50/50 rule and (eventually) to asserting that the dissenting judge below, commentators, and various lower courts are all mistaken in acknowledging the deep and entrenched conflict on this issue. But saying so does not make it so.

As explained below, the circuits (not to mention district and bankruptcy courts) are in square and persistent disagreement over whether § 7403 requires district courts to value spousal entireties interests by a strict 50/50 rule. The government's contrary claim rests on a series of flawed premises—*e.g.*, that *Craft* simultaneously changed nothing and yet changed everything and that § 7403 permits deviation from the normal actuarial valuation of assets such as a joint life estate or a survivorship interest by relying on a 50/50 rule when those assets are part of an entireties estate.

The government is also wrong in claiming that the 50/50 rule is the correct method of valuation. The government simply ignores the majority of petitioner's arguments, offering instead the bizarre contention that the imprecision inevitable in any estimation of life expectancy warrants making no attempt to estimate whatsoever. And, tellingly, the government offers no explanation for sharply reversing the position it previously took before this

Court and at least two lower courts. Indeed, the enduring conflict in the lower courts is in part the government's own making. This Court's review is needed to resolve it.

## I. The Conflict Is Real And Widespread

As the petition explained, Pet. 10-14—and as Chief Judge Batchelder expressly noted below without disagreement from the panel majority—the lower courts are deeply divided about how to value an innocent spouse's component interests in a tenancy by the entirety for purposes of 26 U.S.C. § 7403. Accord Kimberly A. Butlak, *When Is a Tenancy by the Entirety Interest in Common Law Jurisdictions an Asset of One Spouse? Craft-ing a Solution for the Tax Code's § 108 Insolvency Exclusion*, 34 U. Balt. L. Rev. 287, 303 (2005) ("[C]ourts are split regarding whether the value of one spouse's interest in tenancy by the entirety property should be adjusted further to account for each spouse's separate survivorship interest in cases concerning a debtor's federal tax obligation."). The government offers three arguments claiming that there is no conflict warranting this Court's review. None has merit.

A. The government notes that the four circuit-level cases adopting petitioner's position pre-date this Court's decision in *United States* v. *Craft*, 535 U.S. 274 (2002). Br. in Opp. 11. That is true but irrelevant. As the government elsewhere acknowledges, *Craft* identified but *"express[ed] no view"* on the very question at issue in this case—*i.e.* "the proper *valuation* of" a delinquent taxpayer's interest in property held in tenancy by the entirety. *Id.* at 6 (quoting 535 U.S. at 289) (emphasis added). In addition, neither of the post-*Craft* circuit-level

decisions that adopted the government's current position perceived *Craft* as controlling on the issue. To the contrary, those decisions recognized that *Craft* "*left open* the question of how to value the respective tenants' interests in entireties property in these circumstances." *Popky* v. *United States*, 419 F.3d 242, 244-245 (3d Cir. 2005) (emphasis added); accord Pet. App. 5a-13a.

B. The government notes that the Second, Fifth, and Tenth Circuit decisions cited in the petition did not involve entireties property. Br. in Opp. 12-13. That is likewise true—petitioner expressly acknowledged as much in the petition, see, *e.g.*, Pet. 10 (describing conflict as over valuation of "component interests" contained in entireties property); *id.* at 13 (describing the majority of "circuits [as having] approved the use of actuarial calculations to value *the individual interests that make up a tenancy by the entirety*") (emphasis added)—but equally irrelevant. As this Court explained in *Craft*, the discrete rights granted by a tenancy by the entirety can be analogized to a "bundle of sticks," 535 U.S. at 278, including a joint-life estate and a survivorship interest, *id.* at 282. Accordingly, one cannot assign a value to a spouse's total interest in an entireties property without assigning a value to those constituent parts. Accord Transcript of Oral Argument at 15, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (counsel for the United States observing that a court should value a taxpayer's interest in an entireties estate by treating each spouse "as if they have a life estate plus a right of survivorship"). If joint-life estates and survivorship interests must ordinarily be valued actuarially—and the government does not dispute

that three circuits have so held—it follows that the valuation rule for these same interests in an entireties property cannot be 50/50. That is why the government points to no case in any of those circuits suggesting that a 50/50 rule for entireties property (or for other property including a joint-life estate and survivorship interest) would be permissible. And district courts certainly understand that these circuits would not follow the 50/50 rule in valuing component entireties interests. See, *e.g.*, *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 799 (E.D. Mich. 2010).

C. The government acknowledges that *Pletz* v. *United States*, 221 F.3d 1114 (9th Cir. 2000), *did* involve a proper method of valuing "a taxpayer-debtor's interest in property owned by the entirety" and that the Ninth Circuit there adopted an actuarial valuation, *not* the 50/50 approach endorsed by the Sixth Circuit in this case. Br. in Opp. 11-12. No matter, says the government, because "the Ninth Circuit in *Pletz* was [not] asked to decide whether a 50-50 division of entireties property was appropriate." *Id.* at 12. That is true but only because *the government itself* argued in favor of actuarial valuation in *Pletz*. As the government explained in that case, "a joint-life actuarial table appropriately and properly values the tenants by the entirety interest in real property," Gov't C.A. Br. at 19, *Pletz* v. *United States*, 221 F.3d 1114 (9th Cir. 2000) (No. 99-35248), and, thus, "[t]he bankruptcy court properly used the joint-life actuarial tables to value the respective interests of the debtor and his nondebtor wife," *id.* at 21; see also *id.* at 5 (noting that the IRS had "presented evidence in the form of an actuarial determination" based on the ages of the

debtor and his wife and that its calculation of the value of the debtor's interest "was based on joint-life actuarial tables to account for the interests of both of the spouses").[1] Yet again, the government does not point to a case within the Ninth Circuit suggesting that the actuarial rule adopted in *Pletz* is anything less than the definitive word on the subject.

## II. The Government Offers No Explanation For Its Reversal Of Position, Which Is Wrong On The Merits

The government devotes most of its efforts to defending the virtues of a 50/50 rule, but it largely fails to confront petitioner's arguments. And the government makes no effort to explain its sharp reversal of the position it took before this Court less than a decade ago (and, as noted above, pp. 4-5 & n.1, *supra*, in *Pletz* and *Harris*). See Pet. 27-28 (explaining that the government argued for an actuarial method of valuing an entireties property in both its briefing and oral argument in *Craft*).[2]

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[1] The government has made the same argument elsewhere. See Gov't C.A. Br. at 12-13, *Harris* v. *United States*, 764 F.2d 1126 (5th Cir. 1985) (No. 84-1703) (arguing for actuarial valuation of a right of survivorship and offering Treasury Department tables for that purpose). In fact, in *Popky*, the Third Circuit case first adopting the 50/50 rule, the government itself originally "urged [in the alternative that] the district court * * * value the spouses' interests in property based on their relative life expectancies." Gov't C.A. Br. at 6, *United States* v. *Popky*, 419 F.3d 242 (3d Cir. 2005) (No. 04-2798), available at 2004 WL 5040670.

[2] The only glimmer of an explanation is the government's brief mention of a 2003 IRS notice stating that "[a]s a general rule, the value of the taxpayer's interest in entireties property will be

A. The government first argues that the court of appeals' 50/50 rule is "consistent with this Court's precedents" because *Craft* described entireties owners as having the same "interest" in the entireties property. Br. in Opp. 6. As explained in the petition, however, that argument confuses the *definition* of an entireties interest with the *value* of such an interest. See Pet. 18-19. Just because the definition of each spouse's interests in entireties property is the same does not mean that those identical interests will have identical cash values. Some components of the entireties interest, such as the right of survivorship, will almost always *not* have equal value to both spouses because their value to each spouse necessarily turns on the probability that that spouse will outlive the other. Pet. 19. The government offers no response to this point.

B. The government also suggests that the 50/50 rule is superior to actuarial valuation because actuarial tables are "intended to estimate life expectancies among groups of individuals [and] are of limited value when applied to a particular individual." Br. in Opp. 9. Of course, actuarial tables are not *perfect* predictors of a specific person's life expectancy because they rely on group characteristics

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deemed to be one-half." Br. in Opp. 6-7 (quoting I.R.S. Notice 2003-60, 2003-2 C.B. 643). The government offers no explanation of how the IRS reached this conclusion, however. And it rightly does not claim that the notice is entitled to any sort of deference. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); *United States* v. *Barczyk*, 697 F. Supp. 2d 789, 797 n.2 (E.D. Mich. 2010). Neither of the courts of appeals that have agreed with the government's position—the Third Circuit in *Popky* and the Sixth Circuit in this case—relied on, or even cited, the 2003 notice.

as the basis for their prediction. But in the context of valuing property rights, actuarial tables are frequently used—and sometimes required to be used—to predict how long *individuals* will live. That, in fact, is why the Treasury Department makes them available for use in those circumstances. See *United States* v. *Rodgers*, 461 U.S. 677, 704 (1983) (noting that "any calculation of the cash value of a homestead interest must of necessity be based on actuarial statistics" even though this method "will unavoidably undercompensate persons who end up living longer than the average"); *Harris*, 764 F.2d at 1130-1131 (finding "no reason here to depart from the use of the Treasury tables in determining the value of" the nondebtor's interest notwithstanding her argument "that a question of fact exists as to which actuarial table appropriately measures her life expectancy"); *id.* at 1131 (holding that use of actuarial tables "in determining the present value of future interests in property has long been recognized and approved by the Supreme Court") (citing *Simpson* v. *United States*, 252 U.S. 547, 550 (1920)).

Despite any shortcomings, actuarial tables are vastly better predictors of a lifespan than a presumption that any two married owners of entireties property will live precisely the same length of time regardless of their respective ages and sexes. By criticizing the imperfections of an actuarial approach without acknowledging the far greater ones inherent in a rigid 50/50 split, the government would have this Court make the perfect the enemy of the obviously better. Put another way, the government does not dispute that § 7403 directs courts to award the innocent spouse the actual cash value of that spouse's interest in the marital home. But it would

be beyond strange to read that command as requiring a blind guess as to the correct value of that interest rather than a thoroughly educated one.[3]

C. Although the government parrots the Third Circuit's observation that the 50/50 approach is "far simpler" to administer, Br. in Opp. 8 (quoting *Popky*, 419 F.3d at 245), it does not argue that actuarial valuation would be unduly complex or burdensome for the lower courts. Such an argument would fail in any event. As the government explained in its briefing to this Court in *Craft*,

> [t]he necessity of resolving these issues is simply one of the "practical consequences" of the failure of one of the joint owners to pay taxes as they come due. These "practical consequences" have not prevented the prompt and efficient application and enforcement of the federal tax lien to every *other* type of jointly-owned property.

U.S. Reply Br. at 18, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (quoting *United States* v. *Rodgers*, 461 U.S. 677, 698 (1983)). Besides, courts

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[3] The government errs in suggesting that the 50/50 rule adopted by the Third and Sixth Circuits is simply a "presumption" that can be discarded if it proves sufficiently inaccurate or unjust in a particular case. Br. in Opp. 10-11. Neither court described its holding in this way. See *Popky*, 419 F.3d at 245 (Third Circuit "reject[s]" the "approach" of looking to actuarial tables); Pet. App. 7a-8a. In particular, when read with the slightest attention to context, the Sixth Circuit's reference to "the presumption of equal spousal life expectancy implicit in Michigan law," Pet. App. 8a, refers not to a *particular* spouse's ability to persuade a court that an actuarial approach is warranted in a specific case but to petitioner's failure to persuade the court that an actuarial approach is *ever* appropriate in valuing property held in a tenancy by the entireties.

routinely value property rights far more complicated than this.

D. The government offers no response to petitioner's remaining arguments. In particular, the government does not deny that a 50/50 approach can dramatically undervalue an innocent spouse's interests in entireties property by (1) misallocating value between the joint-life estate and the remainder; (2) incorrectly valuing the remainder interest for the longer-living spouse; and (3) ignoring the value to that spouse of the right to prevent unilateral alienation. See Pet. 22-23. The government does not dispute that federal tax law *requires* that several of the component interests that make up an entireties property be valued actuarially. See *id.* at 23-24; see also *Simpson* v. *United States*, 252 U.S. 547, 550-551 (1920) (approving an actuarial approach for "determining the present value of future contingent interests in property" under the tax code and stating that "[i]t is much too late to successfully assail a method so generally applied"). The government likewise does not deny that the *IRS itself* often requires that spouses actuarially value their separate interests in entireties property when paying gift taxes. See Pet. 28. Nor does it take issue with petitioner's explanation of why the court of appeals' failure to accord *any* value to Mrs. Barr's ability to prevent Mr. Barr from selling the home in which she is entitled to live for the rest of her life is inconsistent with Treasury Department regulations that govern the same issue in the gift tax context. See *id.* at 29-30.

## III. The Government Does Not Deny That This Issue Is Recurring And Important Or That This Case Is An Ideal Vehicle For Resolving It

A. The government does not dispute that the issue presented in this case is of great importance to the 67.5 million married Americans who live in States that recognize tenancy by the entirety, see Pet. 30, and to the 52.7 million married Americans who live in States that recognize other forms of joint ownership, see *id.* at 31-32. Nor does the government deny that the method for valuing entireties interests "has become one of the most frequently litigated federal tax questions," see *id.* at 30, or that current economic conditions make the need for this Court's review even more pressing, see *id.* at 34. Finally, the government does not deny that "[t]he severely strained financial resources of many delinquent taxpayers and their spouses make it impractical for many to seek full judicial review," *id.* at 33, meaning that this case "presents an uncommon opportunity for this Court to resolve" an important and recurring question, *id.* at 16.

B. The government identifies no vehicle defect and none exists. The case presents a clear issue of pure law, whether 26 U.S.C. § 7403 permits a 50/50 rule or requires an actuarial valuation. There are no threshold issues. The issue is squarely presented, and its resolution will directly impact the outcome of this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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