No. 14-1085

In the Supreme Court of the United States

FORD MOTOR COMPANY,
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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RULE 29.6 STATEMENT

Ford Motor Company (Ford) has no parent corporation. State Street Corporation, a publicly traded company whose subsidiary State Street Bank and Trust Company is the trustee for Ford common stock in the Ford defined contribution plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that as of December 31, 2014, it holds 10% or more of Ford's common stock, including 5.9% of Ford's common stock that is beneficially owned by the master trust.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE FIRST QUESTION PRESENTED WARRANTS CERTIORARI 2

II. THE SECOND QUESTION PRESENTED WARRANTS CERTIORARI 8

III. THE COURT'S INTERVENTION IS NEEDED 10

CONCLUSION 12

ADDENDUM

Check from Ford Motor Company to Internal Revenue Service in the amount of $571,000,000.00, dated September 9, 1991 ..... 1a

"Receipt for Payment of Taxes," Receipt Number 224970-41 from Department of Treasury – Internal Revenue Service to Ford Motor Company for $571,000,000.00, dated September 9, 1991 ..... 2a

TABLE OF AUTHORITIES

Page(s)

CASES

Baral v. United States,
528 U.S. 431 (2000) 9

Ford Motor Corp. v. United States,
134 S. Ct. 510 (2013) (per curiam) 1

Lehman v. Nakshian,
453 U.S. 156 (1981) 11

M & G Polymers USA, LLC v. Tackett,
135 S. Ct. 926 (2015) 3

Miller v. Commissioner,
310 F.3d 640 (9th Cir. 2002) 6

National Credit Union Administration v. First National Bank & Trust Co.,
522 U.S. 479 (1998) 5

Rosenman v. United States,
323 U.S. 658 (1945) 4

STATUTES AND REGULATIONS

26 U.S.C. § 6401(c).....6

26 U.S.C. § 6404(e) 6

26 U.S.C. § 6601 4

26 U.S.C. § 6603 6

Page(s)

26 U.S.C. § 6621(d) 4

28 U.S.C. § 1346(a)(1) 10

28 U.S.C. § 1631 10

28 U.S.C. § 2402 11

26 C.F.R. § 301.6404-2 6

26 C.F.R. § 301.6601-1(a) 7

26 C.F.R. § 301.6611-1(b) 7

OTHER AUTHORITIES

I.R.S. Tech. Adv. Mem. 9730005 (Apr. 7, 1997), *available at* 1997 WL 415375 7

Rev. Proc. 84-58 § 2.03, 1984-2 C.B. 501 8

INTRODUCTION

This Court was rightly concerned about the Sixth Circuit's initial decision in this case denying Ford its statutory right to some $475 million in interest on taxes that Ford undeniably overpaid. The decision below should give this Court no comfort that the Sixth Circuit corrected course after *Ford Motor Corp. v. United States*, 134 S. Ct. 510 (2013) (per curiam). And the government's response should only heighten concerns.

The government does not deny the conflict and confusion surrounding the proper application of the strict construction rule for waivers of sovereign immunity. Nor does it deny that other circuits have recognized that taxpayers are entitled to rely on the IRS's revenue procedures. Rather than grappling with that contrary authority, the government simply asserts that the concededly important questions presented are "not implicated" here (Opp. 10, 21), because the Sixth Circuit agreed with the government's interpretation of the statute and Revenue Procedure. In other words, the government's main response is to try to disguise a debate over the fundamental issues presented as merely a dispute over the meaning of a particular statute and revenue procedure. Just as the Court saw through the government's evasive tactics the last time the case was here on certiorari, it should do so again.

The government's treatment of the Sixth Circuit's decision is also telling. The government makes no attempt to explain how the Sixth Circuit could plausibly flip from invoking (in its initial decision) the strict construction canon "to tip the scales in favor of the government" (Pet. App. 8a) to holding (in its decision below) that the government's interpretation somehow prevailed even without the heavy advantage

of that canon. It makes no attempt to explain how nearly identical statutory terms ("date of overpayment" and "date paid") could mean two different things for the same remittance, depending on whether the IRS later determines that the taxpayer underpaid, or overpaid, its taxes. It makes no attempt to defend the Sixth Circuit's remarkable holding that "the duty of harmonization falls on *the IRS*, not this court." *Id.* at 20a (emphasis added). And it makes no attempt to reconcile the Sixth Circuit's prior acknowledgement that Ford's interpretation of Revenue Procedure 84-58 was "superior" (*id.* at 50a) with the court's ruling below that Ford was not entitled to rely on that guidance (*id.* at 26a).

The Sixth Circuit's decision is a blueprint for stacking the deck against taxpayers in litigation against the government—in direct conflict with the decisions of this Court and other circuits. And that, among other reasons, is why this case is exceptionally important to American businesses. Amicus Br. of Chamber of Commerce of U.S. (Chamber Br.) 2-15.

ARGUMENT

I. THE FIRST QUESTION PRESENTED WARRANTS CERTIORARI

1. The government argues that, because the Sixth Circuit *said* that it was applying "'the usual tools of statutory interpretation,'" the question whether it erroneously applied the strict construction canon for waivers of sovereign immunity is not "implicated by the decision below." Opp. 11 (citation omitted). It certainly is implicated as far as Ford is concerned, because it made all the difference in Ford's right to recover half a billion dollars. By the government's

reasoning, a court can insulate any decision from review simply by *purporting* to apply the proper rule—even if it in fact flouts that rule. The Sixth Circuit's decision does just that. Pet. 17-25. And this is not new. In *M & G Polymers USA, LLC v. Tackett*, the Sixth Circuit "purported to apply" the correct canon of construction. 135 S. Ct. 926, 934 (2015). Yet there, as here, the court's analysis actually flouted the canon it purported to invoke—as revealed by the Sixth Circuit's misapplication of "traditional principles" of construction. *Id.* at 936. If anything, this case presents an even starker example of this problem.

While not denying the conflict and confusion over the strict construction canon (Pet. 14-16), or that the panel below disagreed on how to "deal[] with the strict-construction canon" here (Opp. 21), the government addresses the Sixth Circuit's "sub silentio" application of the canon simply by asserting that it "provides no sound basis for further review." *Id.* at 20. That is unpersuasive. It is agreed that the proper application of the strict construction canon is "'unquestionably important.'" No 13-113 U.S. Opp. 20 (citation omitted). Instructing courts that they may not subject taxpayers to a heightened burden in construing substantive provisions on a "sub silentio" basis is just as important as instructing them that they may not do so on a transparent basis. Indeed, condoning the "sub silentio" application of a strict construction regime would only invite more abuse of the canon, particularly because the government habitually presses the canon.

As its position in this case underscores, the government has been undeterred by this Court's precedents holding that the strict construction canon does not apply to separate, substantive provisions.

Pet. 14-15.[1] The decision below will only embolden the IRS to urge courts to disregard traditional canons of construction in construing substantive tax provisions.

2. Although necessary to its argument that the strict construction rule is not implicated here, the government makes no serious attempt to defend the Sixth Circuit's stark departure from ordinary canons of statutory construction—in conflict with the decisions of this Court and other circuits. *Id.* at 17-24.

The underlying statutory question is straightforward. Everyone agrees that the date of remittance is the "date paid" for purposes of 26 U.S.C. § 6601 (underpayment interest) no matter whether the remittance is called a "cash bond" or "advance payment." So how, then, could the "date of overpayment" for the same remittance be any different under § 6611, as the Sixth Circuit held? Indeed, in *Rosenman v. United States*, this Court held that "[i]t will not do to treat the same transaction as payment and not as payment, whichever favors the Government." 323 U.S. 658, 663 (1945). But that is exactly what the Sixth Circuit decision does.

The first time the Sixth Circuit considered this case, it invoked the strict construction canon for waivers of sovereign immunity to achieve that anomalous result—explicitly determining that it was necessary to invoke the canon "to tip the scales in favor

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[1] In one recent example, the government argued that the interest-netting provision in 26 U.S.C. § 6621(d) is subject to the strict construction rule for waivers of sovereign immunity and that the strict construction "rule controls over other rules of construction." Br. for Appellant 53-54 n.19, *Wells Fargo & Co. v. United States*, No. 15-5059 (Fed. Cir. May 13, 2014).

of the government." Pet. App. 8a; *see id.* at 40a-41a, 52a. On remand, the Sixth Circuit purported to remove the canon. Yet the court reached the same result—the statute should still be construed to disrupt the plain symmetry between Sections 6601 and 6611. The court never explained what changed that enabled it to reach that counter-intuitive conclusion—and nothing had changed. Instead, to reach that conclusion—this time purportedly without the heavy advantage of the strict construction canon—the Sixth Circuit disregarded settled principles of statutory construction, in conflict with the decisions of this and other courts. Pet. 17-24.

Neither the Sixth Circuit nor the government has pointed to any textual basis for interpreting near identical statutory triggers to mean different things for the same remittance. And a taxpayer that consulted the sole Revenue Procedure on point—as Ford did—would reasonably conclude that the remittance would be treated the same way, in both situations, just as the statute says. *Id.* at 26-28. Only by contorting settled principles of construction and still tipping the balance in favor of the government did the Sixth Circuit find a way to adopt the government's position again.

Notably, the Sixth Circuit, like the government now, all but ignored the duty to harmonize statutory provisions when possible. *Id.* at 17. That duty is at its apex when, as here, the statutory provisions at issue employ "similar language." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). Yet, instead of honoring that duty, the Sixth Circuit farmed it out, stating: "the duty of harmonization falls on *the IRS*, not this court." Pet. App. 20a (emphasis added). The government does not defend that reasoning—the crux of the decision below.

The government now suggests that its "longstanding administrative practice" (Opp. 4) of treating the date of remittance as the "date paid" for purposes of § 6601 is just a matter of administrative beneficence (*id.* at 13-14). But the IRS lacks the authority to abate underpayment interest unless the statutory trigger ("date paid") is actually met. 26 U.S.C. § 6404(e); 26 C.F.R. § 301.6404-2; *cf. Miller v. Commissioner*, 310 F.3d 640, 644 (9th Cir. 2002). So the IRS's settled practice of tolling underpayment interest as of the date of remittance necessarily establishes that the date of remittance is the "date paid." Congress ratified that longstanding interpretation in 26 U.S.C. § 6603. Pet. 23.

The government argues that the remittances were "not 'payments' as that term is ordinarily understood" because "they were not 'made for the purpose of discharging [petitioner's] estimated tax obligations.'" Opp. 12 (alteration in original) (citation omitted). But that is exactly why Ford wrote a check to the IRS for hundreds of millions of dollars after being told by the IRS that it had underpaid its taxes. Moreover, to the extent the government is suggesting that there could be no "payment" before a final "tax obligation" was calculated and assessed, Congress has expressly rejected that interpretation. 26 U.S.C. § 6401(c).

The government says "[t]here is nothing anomalous . . . about a legal regime in which a cash bond stops the accrual of underpayment interest but does not earn overpayment interest." Opp. 14-15. But the statute uses the *same* trigger (date of payment) for *both*

situations.[2] Sections 6601 and 6611 also both effectuate the time-value-of-money principle. Remarkably, the government says that principle has "no application here." Opp. 16. Yet the IRS has repeatedly recognized that this principle underlies Sections 6601 and 6611, and that, "under § 6611, the government pays the taxpayer interest on an overpayment for the time the government has *use* of the taxpayer's money." I.R.S. Tech. Adv. Mem. 9730005 (Apr. 7, 1997), *available at* 1997 WL 415375 (emphasis added); *see* Pet. 20-21. Here, the IRS indisputably had *use* of Ford's money from the date of remittance. Pet. 7-8.

The government's response is a "date of conversion" theory that not only is contradicted by the statute and longstanding practice, but makes no economic sense. The remittances at issue were checks made payable to the IRS; when the IRS received the checks, it cashed them and deposited the funds in the U.S. treasury; and the IRS used the funds to satisfy Ford's assessed tax liability (before the IRS determined Ford was entitled to a refund). *Id.*[3]

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[2] The statutory symmetry is reinforced by the IRS's own regulations, which use the same "date of payment" trigger for calculating both underpayment and overpayment interest. *Compare* 26 C.F.R. § 301.6601-1(a), *with* 26 C.F.R. § 301.6611-1(b).

[3] To illustrate how this process worked, Ford has appended a copy of one of the remittance checks it submitted for the funds at issue, along with the "Receipt for Payment of Taxes" that Ford received from the IRS in return. Add. 1a-2a. Both documents were produced by Ford during discovery and are Bates numbered.

II. THE SECOND QUESTION PRESENTED WARRANTS CERTIORARI

1. The government does not even try to grapple with the precedent of other circuits stressing the taxpayer's right to rely on the IRS's published materials. Pet. 25-26. Instead, the government paradoxically claims that a taxpayer's right to rely on IRS guidance "is not implicated" here because the Sixth Circuit dismissed Ford's construction of Revenue Procedure 84-58. Opp. 21. Once again, the government's attempt to evade the question fails.

Ford reasonably relied on the Revenue Procedure's clear guidance that, except in one situation that is not implicated here, remittances would be treated the same way for purposes of calculating both underpayment and overpayment interest. Pet. 26-28. The taxpayer's right to rely on published IRS guidance is meaningless if Ford was not entitled to rely on Revenue Procedure 84-58 when it wrote checks for hundreds of millions of dollars to the IRS, after being erroneously told that it had underpaid its taxes. Instead of giving effect to the plain terms of Revenue Procedure 84-58, the Sixth Circuit again just tilted the balance in favor of the IRS, this time implausibly declaring that the Revenue Procedure "does not apply" to the common scenario at issue. Pet. App. 26a.

The government's response is again revealing. The government twice quotes Revenue Procedure 84-58 for the proposition that a deposit in the nature of a cash bond is "'not a payment of tax.'" Opp. 14 n.3, 19 (quoting Rev. Proc. 84-58 § 2.03, 1984-2 C.B. 501). But both times, the government omits an ellipsis for the language that follows in the same sentence—"and, *if returned to the taxpayer*, does not bear interest." Pet.

App. 99a (emphasis added). The government ignores that the Revenue Procedure draws a line between deposits, like Ford's, that are actually used as payments and deposits that are returned. Pet. 6-7.

The government's assertion that Ford's position is at odds with "IRS practice" fares no better. Opp. 19. The only evidence of the IRS's prior practice in this case is that the IRS initially *agreed* that Ford was entitled to the overpayment interest at issue. Ford Motor Co.'s Br. in Opp. to Def.'s Mot. for J. on the Pleadings, Ex. 2, Beattie Mem. at 3, *Ford Motor Co. v. United States*, No. 08-cv-12960 (E.D. Mich. filed Dec. 9, 2009); *see id.* Ex. 3, 1985 TIGTA calculation. Moreover, when Ford asked the government for evidence of its past practice in calculating overpayment interest, the IRS refused to provide such information on the ground that the "consistency" of the IRS's practice "in other tax years for other taxpayers" was not "relevant" to interpreting Section 6611. U.S. First Suppl. Resp. to Pl.'s First Set of Interrogs. & First Req. for Produc. of Docs. to Def. 20, *Ford Motor Co. v. United States*, No. 08-cv-12960 (E.D. Mich. dated June 10, 2009). The government should hardly be heard now to contend that its undisclosed practice supports its position.[4]

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[4] *Rosenman* is not to the contrary. *Cf.* Opp. 19. As this Court has recognized, the deposit system at issue in *Rosenman* was overhauled by Congress and the IRS's own revenue procedures. *Baral v. United States*, 528 U.S. 431, 437-39 & nn.1-2 (2000); s*ee* U.S. Br. 20, *Baral v. United States*, No. 98-1667 (Dec. 13, 1999) (acknowledging "significant changes" in deposit scheme since *Rosenman*).

III. THE COURT'S INTERVENTION IS NEEDED

This Court's prior involvement in this case and the magnitude of the overpayment interest at issue (nearly a half billion dollars) alone make this case stand out. But as the Chamber of Commerce has explained, this case is by no means a one-off situation. "The proper construction of § 6611 is uniquely important for U.S. businesses," from which the IRS collects hundreds of billions of dollars each year. Chamber Br. 6. And the importance of this case extends beyond Section 6611 and even the tax context. *Id.* at 6-14. The Sixth Circuit's ruling conflicts with the decisions of this Court and other circuits and warrants further review.

The government's position on jurisdiction only bolsters the need for this Court's intervention. In 2013, the Solicitor General claimed, for the first time in this case, that the Sixth Circuit lacked jurisdiction under 28 U.S.C. § 1346(a)(1). No 13-113 U.S. Opp. 3 n.3. Now the government tries to downplay jurisdiction. But the Solicitor General's position is still that the Sixth Circuit lacked jurisdiction to order a judgment depriving Ford of the nearly $500 million in overpayment interest it is due. Opp. 5, 22. That position is tantamount to a confession of error. As the government has recognized, if the Solicitor General is right that the court lacked jurisdiction, then the decision below must be vacated and the case remanded to the Court of Federal Claims. 28 U.S.C. § 1631; *see* U.S. Suppl. C.A. Br. 4.

Moreover, the Solicitor General's position creates two different jurisdictional regimes for taxpayers seeking the return of tax overpayments. "[T]axpayers in the Sixth Circuit" may bring suit in a local Article III, district court, where a jury may be requested to

resolve any factual disputes (28 U.S.C. § 2402); *or* in the Article I, Court of Federal Claims in Washington, D.C., where no jury would be available (*Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)). Opp. 22. By contrast, "[t]axpayers living outside of the Sixth Circuit" may—according to the United States—*only* bring such suits in the Court of Federal Claims. *Id.* at 22-23. Congress plainly did not intend for there to be one regime for taxpayers in the Sixth Circuit and another for taxpayers in the rest of the country.

Accordingly, the Solicitor General's position on jurisdiction ultimately just provides another reason to grant review. If the government chooses to challenge jurisdiction, there would of course be no impediment to this Court deciding that important issue too.

* * * * *

All Ford seeks in this action is disgorgement of the interest that the IRS undeniably earned as of the date that the IRS had use of Ford's money, as required by § 6611. The Sixth Circuit's decision barring that recovery (again) not only conflicts with the decisions of this Court and other circuits, but raises far-reaching and recurring questions about the proper mode of interpreting tax statutes and the taxpayer's right to rely on the IRS's own published materials. Chamber Br. 2-15. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 2015

Counsel for Petitioner

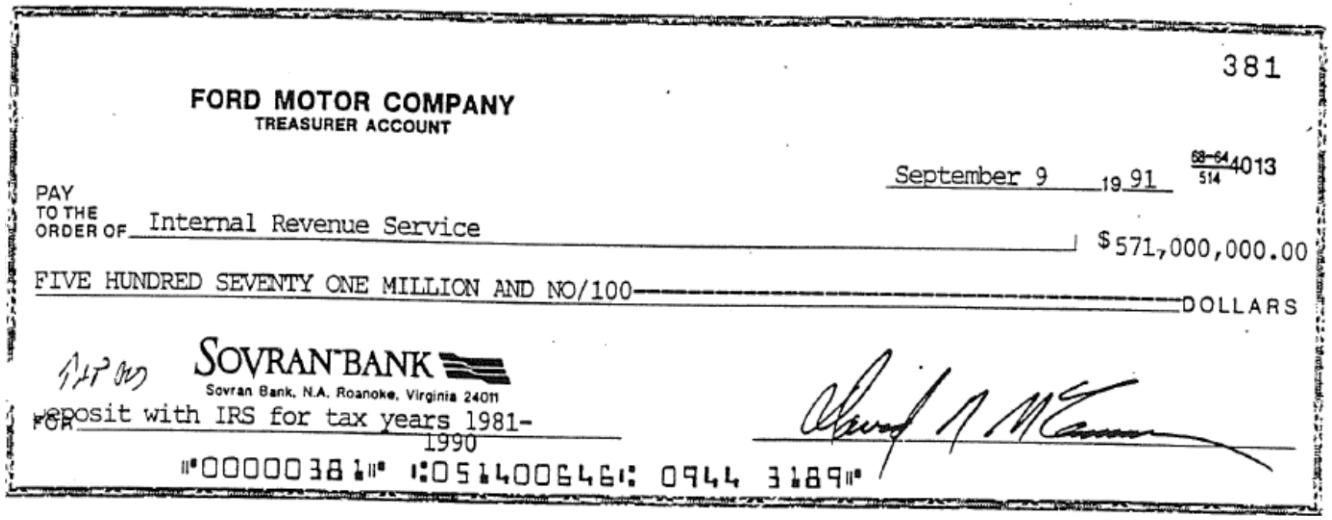
ADDENDUM

ADDENDUM TABLE OF CONTENTS

Page

Check from Ford Motor Company to Internal Revenue Service in the amount of $571,000,000.00, dated September 9, 1991 .....1a

"Receipt for Payment of Taxes," Receipt Number 224970-41 from Department of Treasury – Internal Revenue Service to Ford Motor Company for $571,000,000.00, dated September 9, 1991 .....2a



381

FORD MOTOR COMPANY
TREASURER ACCOUNT

September 9 19 91 68-64/514 4013

PAY TO THE ORDER OF Internal Revenue Service $571,000,000.00

FIVE HUNDRED SEVENTY ONE MILLION AND NO/100 DOLLARS

SOVRAN BANK
Sovran Bank, N.A. Roanoke, Virginia 24011

FOR Deposit with IRS for tax years 1981-1990

⑈00000381⑈ ⑆051400646⑆ 0944 3189⑈

1a

FDTX0011437

Form **809**
(Rev. March 1991)

Department of the Treasury — Internal Revenue Service

2 Receipt for Payment of Taxes

Receipt Number
224970-41

Identifying number and file source	Check digit or name control	MFT	Category *(check one)*	Des Pmt Ind 01 02 03 04 05 06 07 08 09 10 11 99
38-054170	FORD	02	TDA ☐ Notice ☐ Other ☑	

Tax form number	Period covered	Issue DTR	Type of payment	
1120	8112		Cash ☐ Check ☑ Money Order ☐	

Payment received from *(Name and address)*

D. L. HICKMOTT for
FORD MOTOR COMPANY
THE AMERICAN ROAD
DEARBORN, MI 48121

Assessed amount			
Accrued penalty			
Accrued interest			
Fees TC 360			
Other TC 640	571,000,000.00		
Total amt. received	571,000,000.00		

Signature of IRS employee	Date	Employee ID number
[signature]	090791	384011409

Part 2 — Receipt for Federal taxes listed above

Form 809 (Rev. 3-91)

2a

FDTX0011438