No. 14-1085

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest federation of business companies and associations.

It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of national concern to American business.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of the Chamber's intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

This is such a case. The Sixth Circuit's convoluted interpretation of 26 U.S.C. § 6611 defeats taxpayers' reasonable reliance on published IRS guidance, ignores the broader statutory context surrounding § 6611, and contravenes both Congress's intent and this Court's precedents. In doing so, it permits the government to withhold overpayment interest properly owed to petitioner Ford Motor Company ("Ford") and other businesses under the statute. Ford's claim alone is worth nearly half a billion dollars, amply demonstrating the significance of the questions presented in this case for Ford and other U.S. companies. The Chamber's members are frequently due refunds—and interest—on tax overpayments, and the Chamber accordingly has a substantial interest in the issues raised in this case.

SUMMARY OF ARGUMENT

In its prior decision in this case, the Sixth Circuit applied the "strict construction" canon, which applies to waivers of sovereign immunity, to construe § 6611, which creates a substantive right to interest in suits where immunity was *already* waived. App. 39a, 51a-52a. That approach conflicted with this Court's precedents holding that the canon applies only to statutory provisions waiving immunity, not to provisions creating substantive rights. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003).

On remand, the Sixth Circuit professed to interpret § 6611 without applying the strict construction rule. App. 12a-13a. As explained in Ford's petition, however, the court in fact continued to place a

thumb on the scales in the government's favor. Pet. 4, 12, 19; *cf. M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 935 (2015). The Sixth Circuit's decision on remand thus threatens to create all of the same problems as its first decision in this case, sowing confusion about the application of the strict construction canon and the interpretation of substantive provisions governing businesses' and individuals' rights to recover against the government where sovereign immunity has been waived.

The more immediate impact of the Sixth Circuit's decision below is equally troubling. The statute the Sixth Circuit applied in this case, which governs interest on tax overpayments, is exceptionally important to U.S. businesses. Those businesses pay hundreds of billions of dollars in federal income taxes every year. Because corporate tax liability can be very complex, it often takes years for the IRS to determine definitively how much a company owes. Businesses that discover at the end of that process that they have overpaid their taxes are entitled by statute not only to a refund of their overpayment, but also to interest on the funds the federal government has held in the U.S. Treasury but, in the end, has no right to.

The Sixth Circuit misconstrued § 6611, casting aside applicable IRS guidance, ignoring relevant statutory context, and reaching a result that contravenes this Court's precedents and congressional intent. The court's flawed analysis creates an asymmetrical and atextual interest regime in which taxpayers are liable for *under*payment interest whenever they retain money due to the IRS, but the federal government is not always liable for *over*payment in-

terest when it holds taxpayer funds not owed as taxes. Congress, in adopting parallel statutory provisions governing interest on over- and underpayments of tax, did not intend that illogical and unfair result. The two provisions aim to achieve the same purpose—to compensate for the lost time-value of money—regardless of whether it is the government or the taxpayer to whom interest is due. *See, e.g.*, *United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013); *E.W. Scripps Co. v. United States*, 420 F.3d 589, 597 (6th Cir. 2005).

Certiorari should be granted.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO CLARIFY THAT STATUTES CREATING A SUBSTANTIVE RIGHT OF RECOVERY FROM THE GOVERNMENT ARE NOT SUBJECT TO "STRICT CONSTRUCTION"

In its initial decision in this case, the Sixth Circuit held that "both Ford and the United States offered 'plausible' interpretations of the term 'overpayment' in § 6611." App. 8a. To resolve the ambiguity, the court "relied on the canon of strict construction," which "tip[ped] the scales in favor of the government." *Id.* After this Court vacated the decision on other grounds and remanded, *id.* at 32a, the Sixth Circuit professed to change course. The court at last recognized that there is "no basis in the Supreme Court's sovereign-immunity jurisprudence for applying the canon of strict construction to interpret the word 'overpayment' in § 6611," *id.* at 12a-13a, and thus only "the usual tools of statutory interpretation" properly apply in construing § 6611, *id.* at

13a. But as explained in Ford's petition, the Sixth Circuit's (mis)application of those tools shows that that court continued to apply a strict construction canon as a practical matter. Pet. 16-17. Indeed, one member of the panel explicitly suggested that the strict construction canon *does* apply to § 6611. App. 28a-29a.

The panel's disagreement over the role of the strict construction canon, along with the majority's de facto application of it, confirms that the canon remains a subject of confusion warranting review and clarification by this Court. *See* Pet. 15-16; *see also* Pet. for Cert., No. 13-113, at 18-27. As both Ford and the Chamber explained the last time this case was before this Court, the Sixth Circuit was wrong to apply the canon in construing § 6611 because that provision is not a waiver of sovereign immunity, but is instead a separate substantive provision establishing Ford's right to interest. Pet. for Cert., No. 13-113, at 24; Chamber Amicus Br., No. 13-113, at 7-10. It is no less erroneous for the Sixth Circuit now to apply the strict construction rule to § 6611 sub silentio than it was for the court to do so expressly. In *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), this Court rejected a Sixth Circuit contract-interpretation rule that was ostensibly based on "ordinary principles of contract law," where the rule in practice "plac[ed] a thumb on the scale" in favor of one particular outcome. *Id.* at 935. The same is true here. As *M&G Polymers* shows, the Sixth Circuit's insistence that it employed only "the usual tools of statutory interpretation" does not control where the substance of its decision indicates otherwise.

The court's error, moreover, has the potential to reach well beyond § 6611 and the tax context. The persistent confusion about waivers of sovereign immunity and the strict construction canon reflected in the Sixth Circuit's decisions in this case extends to many other contexts involving monetary claims against the government. These include government contracts, torts, copyright and patent infringement, environmental cleanup counterclaims, employment discrimination, and forfeiture. *See* Chamber Amicus Br., No. 13-113, at 4-6. The conflict and confusion in the lower courts identified in Ford's previous petition in this case, *see* Pet. for Cert., No. 13-113, at 18-27, remain, as does the need for clarity in the proper application of the strict construction canon, an "unquestionably important" issue according to the government itself, Br. in Opp., No. 13-113, at 20 (quotation omitted).

II. THE INTERPRETATION OF § 6611 IS EXCEPTIONALLY IMPORTANT TO AMERICAN BUSINESSES

The proper construction of § 6611 is uniquely important for U.S. businesses. The federal government collects hundreds of billions of dollars in business income taxes each year. *See* Internal Revenue Service, 2013 Data Book, at 3. A significant portion of those tax payments are eventually returned as refunds. In 2013, for example, the IRS returned more than $41 billion to companies. *Id.* In 2012, the figure was nearly $44 billion. Internal Revenue Service, 2012 Data Book, at 3. Long before a company receives a refund, however, its payments are deposited directly into the U.S. Treasury—to the federal government's benefit. Naturally, companies often

seek (and, under § 6611, are entitled to) overpayment interest on those funds, as Ford did here.

Corporate tax liability is often very complex, and for a large corporation like Ford, it can sometimes take years for the IRS to assess definitively a given year's tax liability. *See* App. 2a. Substantial amounts of interest can therefore accrue before it is even clear that there has been an overpayment. That is precisely what happened in this case. The IRS (mistakenly) told Ford that Ford had *under*paid its taxes, which prompted Ford to submit additional funds to the IRS. Those funds were deposited directly into the U.S. Treasury when they were received. It was not until years later that the IRS determined that Ford had *over*paid its taxes—by hundreds of millions of dollars—and was therefore due a refund. In the interim, of course, the money Ford had remitted, on the understanding that it had been deficient in paying its taxes, was held by the government and unavailable to Ford for use and investment. Under the Sixth Circuit's decision, however, the government is not required to compensate Ford for anywhere close to the full lost time-value of those funds. Ford's interest claim in this case alone is worth more than $475 million, and billions more could be at stake for other companies in similar situations.

III. THE DECISION BELOW FRUSTRATES TAXPAYER RELIANCE ON PUBLISHED IRS GUIDANCE AND UNFAIRLY DEPRIVES TAXPAYERS OF COMPENSATION FOR THE LOST TIME-VALUE OF FUNDS REMITTED TO THE IRS

In its decision below, the Sixth Circuit held that "the date of the overpayment" under § 6611—the date on which overpayment interest begins to accumulate—is not the date on which Ford remitted its deposit to the IRS and its money was placed in the U.S. Treasury, but the date on which the IRS converted Ford's deposit into an "advance tax payment." App. 18a-19a. In reaching that result, the court disregarded published IRS guidance supporting Ford's view that it is the date of the deposit that controls. The court's holding also cannot be reconciled with the surrounding statutory scheme, this Court's statutory-interpretation precedents, or congressional intent. The Sixth Circuit's interpretation of § 6611 is wrong at nearly every turn.

1. As explained in the petition, Revenue Procedure 84-58—"the only published guidance bearing on the meaning of 'date of the overpayment' in § 6611(b)(1)," App. 46a—contains multiple provisions indicating that a taxpayer's deposit with the IRS will accrue interest from the date of remittance. Pet. 26-27. Yet the Sixth Circuit ignored relevant portions of the Procedure's guidance and permitted the government to renege on representations the IRS has made to taxpayers about how their funds will be treated once remitted to the IRS.

Perhaps most glaringly, the Sixth Circuit rejected Ford's reliance on § 5.05 of Revenue Procedure 84-58. That provision establishes a general rule that overpayment interest is paid on all "[r]emittances treated as payments of tax"—regardless whether they are treated that way upon receipt or later converted from a deposit into an advance tax payment—subject to a single exception (not applicable here) for deposits that are converted under § 4.02. App. 106a; *see id.* at 22a. As the Sixth Circuit conceded, that straightforward understanding of § 5.05 is the only way to "give[] meaning" to the § 4.02 exception, "which would otherwise be meaningless." *Id.* at 24a; *see U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009) ("[W]ell-established principles of statutory interpretation . . . require statutes to be construed in a manner that gives effect to all of their provisions."). By contrast, the court described the government's interpretation of § 5.05 as "illogical." App. 23a. But rather than applying Ford's "superior" reading of § 5.05, *id.* at 50a, the court declared that § 5.05 "simply . . . does not apply to the circumstances of this case," *id.* at 26a—even though § 5.05 applies without qualification to "[r]emittances treated as payments of tax," *id.* at 106a, and Ford's deposits here were indisputably "remittances" that ultimately were "treated as payments of tax."[2]

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[2] The court dismissed § 5.05's second sentence as "irrelevant" to its analysis because this case itself does not involve a deposit converted under § 4.02. App. 24a. But the fact that the § 4.02 exception does not apply in this case does not make the exception irrelevant to *the meaning of § 5.05.* To the contrary, the exception is what proves the rule: it confirms that the first sentence of § 5.05 must apply to all *other* "[r]emittances treated as payments of tax," i.e., remittances not subject to the excep-

The Sixth Circuit rejected Ford's concededly "superior" interpretation of § 5.05 because the court did not want to "adopt a strained reading of § 6611" in order to make sense of the IRS's Revenue Procedure. App. 26a. But there is nothing at all "strained" about the interpretation of § 6611 one must adopt to read it consistently with Revenue Procedure 84-58 § 5.05. Indeed, the Sixth Circuit itself previously described Ford's interpretation of § 6611 as not only "plausible," *id.* at 8a, 43a, 44a, but "strong," *id.* at 43a.[3] Certainly nothing in § 6611 itself is inconsistent with the conclusion that overpayment interest begins to accrue on the date a deposit is remitted to the IRS—§ 6611 says only that interest will run "from the date of the overpayment." 26 U.S.C. § 6611(b)(1), (b)(2). It makes perfect sense to read that language as referring to the date on which the taxpayer deposited funds exceeding its tax liability and the government enjoyed use of those funds.

Unlike that adopted by the Sixth Circuit, Ford's interpretation of § 6611 also has the virtue of being consistent with what the court itself acknowledged was Congress's intent in enacting § 6611 (and the parallel tax underpayment interest provision,

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tion. By trying to read the first sentence of § 5.05 in isolation, the Sixth Circuit distorted the meaning of the provision. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

[3] In its initial decision, the Sixth Circuit found Ford's reading of § 6611 "plausible" even in the face of the dictionary definition of "payment," *see* App. 42a—the same definition on which its interpretation of § 6611 on remand rested, *see id.* at 14a-15a.

§ 6601)—to account for the lost time-value of money. App. 17a-18a; *see, e.g.*, *Perry*, 714 F.3d at 577; *E.W. Scripps*, 420 F.3d at 597; *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993); *see also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is . . . to construe the language so as to give effect to the intent of Congress."). Nothing in that objective suggests that Congress intended that the right to interest on moneys held by the government depend solely on the label affixed to the moneys, i.e., "advance tax payment" versus "deposit." Indeed, as the Sixth Circuit pointed out, the distinction between "deposits in the nature of a cash bond" and "advance tax payments" "was invented by the IRS, not Congress, and the concept . . . did not arise until after Congress enacted § 6611." App. 13a. Whatever the label, the U.S. Treasury has the funds and the taxpayer does not.

2. The Sixth Circuit further erred in refusing to reconcile the IRS's treatment of deposits under § 6611 with its treatment of deposits under § 6601, and in doing so again ignored pertinent guidance in Revenue Procedure 84-58. Sections 6601 and 6611 are "functionally parallel." App. 36a; *see id.* at 19a. The former addresses underpayment interest, and the latter overpayment interest. There is no dispute that the IRS treats deposits like those at issue in this case as "payments" that toll the accrual of *under*payment interest under § 6601 as of the date they are remitted to the IRS. *See id.* at 19a. As Ford argued below, given the similarities between § 6601 and § 6611, if a deposit stops the accrual of underpayment interest under § 6601, it should also start

the accrual of overpayment interest under § 6611. *Id.* at 19a-20a; *see* Pet. 18-19.

The Sixth Circuit recognized the "appeal[]" of this straightforward approach. App. 20a. But the court nonetheless refused to accept it, reasoning that the inconsistency between the IRS's treatment of deposits under § 6601 and § 6611, however troubling, says "nothing about which of the two treatments is correct." *Id.* That is, rather than reading § 6611 to be consistent with the IRS's practice under § 6601, the court went in the opposite direction, suggesting instead that the IRS's long-standing practice under § 6601 was wrong, in order to reconcile that provision with the court's preferred reading of § 6611. *See id.* at 20a-21a.

But there is no basis for questioning the validity of the IRS's practice under § 6601. That practice has long been memorialized by the agency in published guidance, without regulatory or judicial challenge. As the Sixth Circuit recognized, Revenue Procedure 84-58 § 5.01 unequivocally states that the running of interest on an assessed tax liability stops on the date a deposit is remitted, "regardless of when the liability is assessed or the remittance actually applied against the taxpayer's account." App. 105a, *see id.* at 19a. The IRS has expressly invited taxpayer reliance on its published Revenue Procedures. *See* Rev. Proc. 89-14 § 7.01(5), 1989-1 C.B. 814. And perhaps most significant, Congress has specifically ratified the IRS's practice of treating the date of remittance as the "payment" date under § 6601. *See* 26 U.S.C. § 6603(b) ("To the extent that such deposit is used by the Secretary to pay tax, for purposes of section 6601

. . . the tax shall be treated as paid when the deposit is made.").

The Sixth Circuit thought that it "need not concern" itself with Congress's action in § 6603 because that provision was enacted after Ford made the deposit at issue in this case. App. 28a. But again (*see supra* note 2), the point is not whether § 6603 itself applies to this case—it is what § 6603 tells us about the IRS's and Congress's understanding of the meaning and operation of the provisions § 6603 works in conjunction with, including § 6601. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (Congress's actions subsequent to IRS's issuance of challenged revenue ruling "le[ft] no doubt that the IRS reached the correct conclusion"). And what § 6603 tells us is that the IRS correctly treats deposits as "payments" under § 6601, contrary to the Sixth Circuit's suggestion.[4] Once that construction of § 6601 is accepted, as it must be, it follows that deposits should be treated as "payments" under § 6611 as well. *See* App. 20a (noting "common canon of construction [that] compels courts

[4] Section 6603 also grants taxpayers overpayment interest on returned deposits in certain circumstances, with such interest to run from the date the deposit was remitted. 26 U.S.C. § 6603(d). As explained in the petition, the Sixth Circuit's interpretation of § 6611 thus creates an illogical scheme in which taxpayers are entitled to interest on deposits that are returned to them as of the date the deposits were remitted, but are entitled to interest on deposits used to pay taxes only from the date the deposits are converted. Pet. 23.

to interpret statutory terms consistently"); *see also Sorenson v. U.S. Sec'y of Treasury*, 475 U.S. 851, 860 (1986).

3. By refusing to acknowledge the relevance of Revenue Procedure 84-58 §§ 5.01 and 5.05 to the issues in this case, the Sixth Circuit frustrated taxpayers' right to rely on the IRS's published guidance. When the IRS published Revenue Procedure 84-58, it invited taxpayers to rely on that Procedure to decide whether and how to remit money with the IRS. Indeed, the whole point of publishing such Procedures is to engender reliance on them. Ford did exactly as the IRS encouraged and expected by depositing some $875 million after having been informed (incorrectly) by the IRS that it had underpaid its taxes. In making that decision, Ford was entitled to rely on the IRS's guidance that Ford would be able to recover interest on its funds in the event that they exceeded the amount the IRS ultimately determined Ford owed. The IRS's guidance certainly did not give Ford notice that it would be making an interest-free loan to the U.S. government while the IRS sorted out Ford's actual tax liability.

As Ford did in this case, American businesses regularly rely on the IRS's published guidance when making decisions regarding large sums of money. After all, businesses have little other choice. The Sixth Circuit's decision below unfairly permits the government to renege on the IRS's guidance and mulct taxpayers of interest to which the IRS said they would be entitled. The decision also allows the U.S. government to hold taxpayer funds in its coffers without compensating those taxpayers for the lost

time-value of their money—contrary to congressional intent.

The Sixth Circuit's misguided interpretation of § 6611 precluded Ford from recovering more than $475 million in overpayment interest to which Ford is entitled under that provision. This case is thus an especially stark illustration of the importance of properly interpreting § 6611, but the concern is one that affects all taxpayers and claimants to whom the government owes money. This Court should grant certiorari to ensure that § 6611 is interpreted even-handedly, and that taxpayers are fairly compensated when the IRS collects funds that it is not owed.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted.

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