No. 00-1831

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOAN I. OPPENHEIMER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the federal tax lien that arises by operation of law in "all property and rights to property" of a delinquent taxpayer (26 U.S.C. 6321) attaches to the rights of that taxpayer in property held in a tenancy by the entirety.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-41a, 44a-69a) are reported at 140 F.3d 638 and 233 F.3d 358. The opinions of the district court (Pet. App. 70a-93a, 95a-104a) are reported at 74 A.F.T.R.2d (RIA) 6362, 76 A.F.T.R.2d (RIA) 7447, and 65 F. Supp. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. Pet. App. 42a. The petition for rehearing was denied on March 16, 2001. Pet. App. 43a. The petition for a writ of certiorari was filed on June 8, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. a. Although Don Craft earned substantial income from his law practice during the years 1979 through 1986, he failed to file federal income tax returns for each of those years. Pet. App. 45a, 72a. In 1988, the Internal Revenue Service assessed $482,446 in unpaid income tax liabilities owed by him for those years and demanded payment. *Id.* at 45a. When Mr. Craft failed to pay these taxes on demand, the federal tax lien attached by operation of law to "all property and rights to property" in which he owned any interest. 26 U.S.C. 6321. Notice of the federal tax lien was filed on March 30, 1989, in the county of his residence. Pet. App. 45a.

b. Sandra L. Craft was the wife of Don Craft and is the respondent in this case. In 1972, Don and Sandra Craft purchased real property in Grand Rapids, Michigan, as tenants by the entirety. Pet. App. 45a. On August 28, 1989, after the notice of tax lien had been filed for the taxes owed by Don Craft, the Crafts jointly executed a quitclaim deed that purported to transfer this property solely to Sandra Craft for one dollar. *Id.* at 45a. When she thereafter attempted to sell the

property in 1992, a title search revealed the government's lien. The Internal Revenue Service agreed to release the tax lien from this property so that the sale could be made, with the stipulation that half of the net proceeds—amounting to $59,944.10—were to be held in escrow pending a final determination of the rights of the parties.[1]

2. Sandra Craft then brought this action to quiet title to the escrowed proceeds. The government asserted in its answer (i) that the federal tax lien attached to Don Craft's interest in the property when it was held by the Crafts as tenants by the entirety, (ii) that when the property was conveyed to respondent it remained subject to the government's lien and (iii) that the government is therefore entitled to one-half of the sale proceeds. The government further asserted that Don and Sandra Craft's purported conveyance of the property to Sandra Craft was invalid as a fraud on creditors. Pet. App. 46a-47a.

The district court granted the government's motion for summary judgment. The court held (i) that the conveyance of the property to respondent terminated the tenancy by the entirety, (ii) that, at that moment, each spouse took an equal one-half interest in the estate and (iii) that the government's lien attached to Don Craft's one-half interest in the estate at that time and remained attached to the property throughout any subsequent transfers. Pet. App. 104a. The court con-

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[1] Under the escrow agreement, the funds representing Don Craft's 50% share of the sale proceeds are held "in an interest-bearing account * * * until such time as a resolution of the tax lien dispute is reached and an agreement is signed by both the Internal Revenue Service and representatives of Don Craft or until ordered to release those funds by an appropriate court order." J.A. 30.

cluded, however, that the tax lien attached only to the value of Don Craft's interest as of the date of the Crafts' conveyance of the property to respondent and not to any appreciation of that property's value that occurred subsequent to that date. *Id.* at 46a-48a, 104a.

3. a. Both parties appealed. Pet. App. 44a. On respondent's appeal, the Sixth Circuit reversed the determination of the district court that the tax lien attached to the property.[2] Relying on that circuit's earlier decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (1971), the panel majority held that Don Craft never had an attachable interest in the property held in a tenancy by the entirety—either prior to, or at the transitory moment of, the conveyance to respondent. Pet. App. 54a-56a. In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either of the spouses but is instead owned by the "marital unit." The court concluded that the husband (who owed the taxes) had no separate interest in entirety property to which the tax lien could attach. *Ibid.* Since Michigan law exempts property held in a tenancy by the entirety from seizure by creditors for the debts of only one spouse, the majority concluded that this property was exempt from the federal tax lien for the separate tax debt of one spouse. *Id.* at 57a-58a.

According to the panel majority, the decisions of this Court in *United States* v. *Irvine*, 511 U.S. 224 (1994), and *United States* v. *Rodgers*, 461 U.S. 677 (1983), have no effect "on the government's ability to attach a lien to

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[2] As a result of that ruling, the court of appeals did not consider the government's appeal of the district court's determination that the tax liens did not attach to any appreciation occurring after the Crafts' conveyance of the property to respondent.

an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place." Pet. App. 55a. The court remanded the case for consideration of the fraudulent conveyance issue that had not been addressed by the district court. *Id.* at 58a.

b. Judge Ryan concurred in the remand but dissented from the majority's conclusion that a spouse's interest in entirety property is not "property or rights to property" to which the federal tax lien may attach. Pet. App. 69a. He concluded that each spouse has valuable, legally-protected rights in property held in a tenancy by the entirety to which the tax lien attaches as a matter of federal law: in particular, each spouse has the right to share in the proceeds of any sale or lease of the property and the right to the entire property if the other spouse predeceases him. *Id.* at 61a. Judge Ryan added that this Court's decisions in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Irvine*, *supra*, make it clear that the state legal fiction that the husband and wife are a single entity—and the associated fiction that neither has any separate interest in entirety property—cannot be interposed to preclude the operation of the federal lien (Pet. App. 63a-64a):

> As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account.
> * * *

> Although the majority disagrees, I am satisfied that *United States* v. *Irvine*, 511 U.S. 224 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities.

Judge Ryan noted, moreover, that the majority opinion "not only contravenes established precedent," it also "provides an avenue for easy avoidance of federal income-tax laws." *Id.* at 69a.[3]

4. On remand, the district court concluded that when, as here, property is made exempt from the claims of creditors under state law, a conveyance of that property cannot be a fraudulent transfer under state law. Pet. App. 79a-85a. The court stated, however, that this rule is inapplicable when the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by using them to enhance exempt property. *Id.* at 85a-86a. Since Don Craft had enhanced the value of the property by making mortgage payments while he was insolvent, the court held that the government is entitled to a lien on his share of the sale proceeds to the extent of the enhanced value—which the court concluded was $6693. *Id.* at 86a, 92a.[4]

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[3] Judge Ryan was of the view that the federal tax lien would not follow the property after its transfer to respondent unless that transfer was set aside as fraudulent. See Pet. App. 69a. He concurred in the remand solely for the purpose of determining whether Don and Sandra Craft's transfer of the property for $1 to Sandra Craft as sole owner constituted a fraud on creditors. *Id.* at 68a-69a.

[4] This figure included only the portion of the mortgage payments that had been applied to reduce the principal balance of the loan. The district court rejected the government's additional claim to recover the far greater interest payments, as well as local ad

5. Both parties again appealed. Pet. App. 1a-2a. The government also petitioned the court of appeals for hearing *en banc* on the ground that the decision in *Craft I* conflicted with the relevant decisions of this Court. The court of appeals denied that petition in December 1999. Pet. App. 6a.

a. The panel to which the appeal was assigned concluded that it was bound by the prior decision in *Craft I* and dismissed the government's appeal.[5] Pet. App. 2a. The panel stated that it was bound by *Craft I* because the relevant Supreme Court decisions do not "directly h[o]ld otherwise" (*id.* at 11a) and because the recent decision of this Court in *Drye* v. *United States*, 528 U.S. 49 (1999), which was issued after *Craft I* was decided, "has not so fundamentally changed the legal landscape as to overrule *Craft I*." Pet. App. 18a.

b. In a concurring opinion, Judge Gilman agreed that the panel was bound by *Craft I* but concluded "that the result reached in *Craft I* and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed." Pet. App. 35a. Judge Gilman therefore recommended "that this case be revisited en banc." *Ibid.*

Judge Gilman stated that the decision in *Craft I* was inconsistent with the decisions of this Court that make clear that the federal tax laws are "not struck blind" by state-law legal fictions. Pet. App. 36a (quoting *United*

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valorem property tax payments, that Don Craft made over the years with the untaxed income that generated the tax liability in the first place. Pet. App. 92a-93a.

[5] On respondent's appeal, the panel affirmed the district court's ruling that the government is entitled to a lien on the property to the extent of taxpayer's payments of the principal of the outstanding mortgage loan made after the taxes began to accrue. Pet. App. 20a-23a.

States v. *Irvine*, 511 U.S. at 240). Judge Gilman stated that (Pet. App. 38a):

> [i]n contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

Judge Gilman noted that each spouse has several valuable, legally-protected rights in entirety property to which the federal tax lien may attach: (i) the right to enter and enjoy the property and to exclude all others; (ii) the right to half of any rental or sale proceeds; (iii) a contingent right of survivorship; and (iv) in the event of divorce, the right to bring an action for partition and sale. Pet. App. 37a-38a. Because these valuable rights are protected under state law, "*Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety." *Id.* at 38a. Although Judge Gilman believed the panel was bound by *Craft I*, he recommended that the case be reheard en banc because "*Craft I* contravenes recent Supreme Court decisions." *Id.* at 41a.

c. Following the entry of the panel decision, the government filed a petition for rehearing *en banc*. That petition was denied when "less than a majority of the judges" of that circuit voted to grant it. Pet. App. 43a.

SUMMARY OF ARGUMENT

1. Under Section 6321 of the Internal Revenue Code, the federal tax lien attaches by operation of law to "all property and rights to property" of a delinquent taxpayer. 26 U.S.C. 6321. This statutory lien is broad in scope and "reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). As this Court recently concluded, this expansive federal tax lien "reach[es] every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999).

The interest of a married taxpayer in property held in a tenancy by the entirety is a valuable, legally protected "species of right or interest" that is encompassed within the federal tax lien. Each spouse has the right to use the property, to receive half the proceeds of the sale of the property, or to receive the property in fee simple absolute on the death of the other spouse. Because these legally-protected rights have "undeniable value" (Pet. App. 38a (Gilman, J.)), they constitute "property" or "rights to property" within the broad scope of the federal tax lien. *Drye* v. *United States*, 528 U.S. at 56.

2. a. The court of appeals erred in concluding that "state law governs the issue of whether any property interests exist in the first place" (Pet. App. 55a). It is federal law, not state law, that "determine[s] whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. "Once it has been determined that state law creates sufficient interests in the taxpayer to satisfy

the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722 (1985).

b. Under the established federal standard, the valuable, legally-protected rights of each spouse in entirety property constitutes an interest in "property" or "rights to property" to which the federal lien attaches. The fact that state law may, in some circumstances, preclude other creditors from seizing or foreclosing on property held in a tenancy by the entirety does not prevent the attachment and enforcement of the federal tax lien. As this Court emphasized in *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983), "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal tax lien. It is "irrelevant" to the enforcement of the federal tax lien that state law prohibits other creditors from foreclosing on property held in a tenancy by the entirety. *United States* v. *National Bank of Commerce*, 472 U.S. at 727.

c. The court of appeals erred in relying on the legal fiction employed in Michigan that entirety property is owned by the marital unit rather than by the individual spouses acting collectively. Federal tax statutes are not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). In particular, in applying federal tax statutes affecting tenancies by the entirety, courts are to look to the "actual" substantive rights of the spouses rather than to the "amiable fiction" of state law that such property is owned by the "marital unit" rather than by the spouses collectively. *Tyler* v. *United States*, 281 U.S. 497, 503 (1930).

3. The contrary holding of the court of appeals would cause an irrationally disparate treatment of similarly situated taxpayers. A tenancy by the entirety is the *only* form of joint property ownership that has been treated as exempt from the federal tax lien for the debts of one spouse. Other types of joint ownership—such as homestead property, community property, and jointly-owned property—have consistently been held subject to the federal tax lien. The decision of the court of appeals would create an unwarranted preference for taxpayers who own property in a tenancy by the entirety over taxpayers who jointly own property in the many States that do not recognize, or have abolished, that form of ownership.

The decision of the court of appeals also fails the test of common sense, for it "provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a (Ryan, J.). Under the court's reasoning, both spouses may earn income, refuse to file returns or file only separate returns, and avoid paying taxes simply by shielding their residence—and, in many States, even their bank accounts and other financial assets—in a tenancy by the entirety. It is implausible to conclude that, in crafting the broad text of the federal tax lien statute for the very purpose of "assur[ing] the collection of taxes" (*Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945)), Congress intended to authorize such an obvious and facile method for evading and obstructing tax collection.

ARGUMENT

THE FEDERAL TAX LIEN ATTACHES TO THE RIGHTS OF A TAXPAYER IN PROPERTY HELD IN A TENANCY BY THE ENTIRETY

A. A Spouse's Interest In A Tenancy By The Entirety Is A Valuable, Legally Protected Interest That Is Subject To The Federal Tax Lien

1. When a taxpayer fails to pay taxes after a demand for payment has been made, a lien arises by operation of law "in favor of the United States upon all property and rights to property" of that taxpayer. 26 U.S.C. 6321. "[T]he purpose of the federal tax lien [is] to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950). To achieve that goal, Congress employed the broadest terminology "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). Indeed, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). Recognizing the sweeping text and purpose of Section 6321, this Court has recently held that this broad federal tax lien "reach[es] every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999). See also *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982) (quoting S. Rep. No. 665, 72d Cong., 1st Sess. Pt. 1, at 39 (1932); H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

The term "property" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisi-

ble, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right or interest * * *." *Black's Law Dictionary* 1382 (rev. 4th ed. 1968). The "property" or "rights to property" to which the federal tax lien attaches thus includes interests as diverse as "unliquidated choses in action, contingent remainders, options, alimony, the taxpayer's interest in jointly owned property, business licenses, the cash surrender value of life insurance, and property exempt under state law." 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.6.4, at 111-158 (1989). See also *Drye* v. *United States*, 528 U.S. at 61 (an heir's right to inherit is "property" under Section 6321); *United States* v. *National Bank of Commerce*, 472 U.S. at 723-727 (a depositor's right to withdraw the entire contents of a joint bank account qualifies as "property" under Section 6321); *United States* v. *Bess*, 357 U.S. at 56-57 (an insured's right under a life insurance policy to compel his insurer to pay him the cash surrender value is "property" subject to the tax lien).

2. No less than an heir's right to inherit, the interest of a married taxpayer in a tenancy by the entirety is a valuable, legally protected "species of right or interest" (*Drye* v. *United States*, 528 U.S. at 56) and is therefore encompassed within the federal tax lien. During the period of a tenancy by the entirety, each spouse has separate rights in the present use of the property and in its disposition upon the termination of the tenancy by sale, death or divorce. For example, in Michigan, "joint property"—a category that includes a tenancy by the entirety in real or personal property —"consist[s] of a present interest and a future interest." Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified at *id.* § 700.2901(g), (i) (West Supp. 2001).

The "present interest" entitles each spouse to reside on the property, to exclude third parties from the property, to share in the profits of the property, to join or refuse to join in the mortgage, lease, or sale of the property and, upon the sale, individually to receive half the proceeds. *Id.* § 557.71 (West 1988); see *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (1984); *Farmers' & Merchants' Nat'l Bank & Trust Co.* v. *Globe Indem. Co.*, 264 Mich. 395, 399, 249 N.W. 882, 883 (1933); *Eadus* v. *Hunter*, 249 Mich. 190, 193-196, 228 N.W. 782, 783-784 (1930). In addition, if a married couple divorces, each spouse becomes a tenant in common of realty formerly owned by the entirety, unless the divorce decree provides otherwise. Mich. Comp. Laws Ann. § 552.102 (West 1998 & Supp. 2001). The "future interest" in a tenancy by the entirety "is the right of survivorship," which is the right to receive the property in fee simple absolute upon the death of the other spouse. *Id.* § 554.872(g) (West Supp. 1997), recodified at *id.* § 700.2901(g) (West Supp. 2001). These valuable interests are expressly described as "property" rights under state law (*id.* § 700.2901(i)), and the Michigan Supreme Court has held that each spouse holding an interest in a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 456 (Mich. 1976).

These valuable rights of each spouse in a tenancy by the entirety qualify as "property" or "rights to property" under the broad text of the tax lien statute.[6] The

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[6] The imposition of a federal tax lien on entirety property does not, by itself, divest the "marital estate" from possession. The primary effect of a lien is to ensure that such property remains

right of each spouse "to exclude others" from property held in a tenancy by the entirety is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan* v. *Tigard*, 512 U.S. 374, 384 (1994). Similarly, each spouse's right to "possess, use and dispose" of the property, in concert with the other, is a characteristic attribute of a "property" right. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). And, each spouse has the right to receive half of the proceeds of a sale or to receive the fee simple absolute upon the death of the other. These legally-protected rights have undeniable value and therefore constitute "property or rights to property within the broad scope of the federal tax lien. *Drye* v. *United States*, 528 U.S. at 56.[7]

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potentially available for payment of delinquent taxes and cannot be transferred free of the government's claim in the interim. Moreover, as this Court emphasized in *United States* v. *Rodgers*, 461 U.S. at 696, the government's lien reaches only the taxpayer's interest in property. If the government seeks to sell the property to enforce its lien under 26 U.S.C. 7403, the court may deny foreclosure in "the exercise of reasoned discretion." 461 U.S. at 706. And, if a sale is authorized, the non-liable spouse must be compensated for her interest "according to the findings of the court in respect to the interests of the parties and of the United States." *Id.* at 697-698 (quoting 26 U.S.C. 7403(c)).

[7] The valuable, legally-protected rights of a taxpayer in entirety property are at least as extensive as the right of an heir-at-law to inherit under Arkansas law—a right to which the federal tax lien attached under this Court's decision in *Drye* v. *United States*, 528 U.S. at 59-60.

B. The Court Of Appeals Erred In Concluding That State Law Governs In Determining Whether A Spouse's Interest In A Tenancy By The Entirety Is Subject To The Federal Tax Lien

The court of appeals erred by relying (Pet. App. 51a-53a) on its decision in in *Cole* v. *Cardoza*, 441 F.2d 1337 (1971), and in failing to follow the recent, clear guidance of this Court in *Drye* v. *United States*, *supra*.

1. The rationale of *Cole* v. *Cardoza*, 441 F.2d at 1343, is that state law "governs the property rights of the taxpayers" and that courts must therefore "look to the law of" the State in determining whether "the federal tax lien attach[es] to the * * * property." The court concluded that, since "tenants by the entirety hold under a single title" under Michigan law, the federal tax lien cannot attach to the property for the debts of one spouse only. *Ibid.* In the present case, the court of appeals repeated the reasoning of *Cole* by relying on what it described as "the basic tenet that state law governs the issue * * * whether any property interests exist in the first place." Pet. App. 55a.

That reasoning is demonstrably incorrect, however, for this Court has made it clear that "[i]t is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Drye* v. *United States*, 528 U.S. at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). This Court has instead explained that, while state law determines the nature of a taxpayer's interest in property, federal law determines whether that interest is sufficient to constitute "property" or "rights to property" under 26 U.S.C. 6321. As the Court stated in *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (internal quotations omitted):

> [o]nce it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law.

Courts are therefore to "look * * * to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. See also *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Morgan* v. *Commissioner*, 309 U.S. 78, 80 (1940). And, applying this federal standard, this Court has clearly and concisely held that the tax lien attaches to "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56. The valuable, legally protected rights possessed by each spouse in a tenancy by the entirety constitute "property or rights to property" to which the lien applies under this expansive federal standard. See pages 13-15, *supra*.

2. The court of appeals ultimately appeared to acknowledge in the present case that each spouse possesses valuable rights in a tenancy by the entirety that are protected under state law. The court reasoned, however, that the federal tax lien does not attach to those interests in property—such as the right of survivorship—because the rights of each spouse are not treated as "separate" or "severable" under state law. Pet. App. 57a-58a.

That reasoning conflicts with the plain text of the tax lien statute and with the clear holdings of this Court. The federal tax lien attaches to "*all* property and rights to property" (26 U.S.C. 6321 (emphasis added)), not

merely to property that is immediately transferable by the owner of the interest to a third party. For example, *United States* v. *Rodgers*, 461 U.S. 677, 684-685 (1983), concerned a married taxpayer who held an interest in homestead property that could not be mortgaged, sold or abandoned without the consent of the other spouse under state law. The Court expressly held that the inability of the taxpayer in *Rogers* to exercise his rights separately from the rights of his spouse was not a basis for denying foreclosure of the federal tax lien. *Id.* at 702. The Court concluded that the federal tax lien reaches the taxpayer's interest in "the entire property" and that, in the event that a judicial foreclosure of that lien occurs, the separate rights of the non-liable spouse "are adequately discharged by the payment of compensation." *Id.* at 701, 702. See note 6, *supra*. Courts have therefore consistently held that the federal tax lien on "all property and rights to property" of a delinquent taxpayer attaches not only to presently transferable rights but also to those valuable and legally-protected interests that the taxpayer would not, acting by himself, be able immediately to transfer or sell. See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996) (federal tax lien attaches to the interest of the beneficiary of a spendthrift trust) (cited in *Drye* v. *United States*, 528 U.S. at 58 n.5 & 60 n.7); *United States* v. *Rye*, 550 F.2d 682, 684-685 (1st Cir. 1977) (federal tax lien attaches to taxpayer's nonassignable right to receive support payments). The court of appeals thus erred in concluding in this case that the federal tax lien cannot attach to "property" or "rights to property" until those rights are "severable" from the rights of others in the same property.

3. The court of appeals improperly ignored the precedents of this Court in relying on the fact that

Michigan does not authorize the seizure of tenancy by the entirety property for the debts of only one spouse. Pet. App. 52a (citing *Cole* v. *Cardoza*, 441 F.2d at 1343). This Court has frequently held that state-law restrictions on seizure and exemptions from foreclosure do not prevent the attachment and enforcement of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 59 (quoting *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) ("exempt status under state law does not bind the federal collector")); Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1498 (1964) (stripped of its fiction that husband and wife are a legal unit, the entirety theory "serves much the same function as an exemption created by state law" and thus should not "defeat the federal lien"). As this Court explained in detail in *United States* v. *National Bank of Commerce*, 472 U.S. at 727 (citation omitted):

> The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law. * * * [T]he facts that under [state] law [the taxpayer's] creditors * * * could not [seize or attach the property] are irrelevant. The federal statute relates to the taxpayer's rights to property and not to his creditors' rights. The Court of Appeals would remit the IRS to the rights only an ordinary creditor would have under state law. That result "compare[s] the government to a class of creditors to which it is superior."

See also *United States* v. *Bess*, 357 U.S. at 57 ("[o]nce it has been determined that state law creates sufficient interests in the insured to satisfy requirements of [the statute], state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States").

For example, in *United States* v. *Rodgers*, 461 U.S. at 701, this Court expressly held that "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal lien. The tax lien involved in *Rodgers*, like the lien involved here, arose from the tax liability of only one spouse and attached to that spouse's interest in the jointly-owned family residence. The government sought to foreclose on its lien in *Rodgers* by obtaining a judicial sale of the property and compensating the non-liable spouse for her separate interest. Although Texas law protected homestead property from forced sale for the payment of debts (461 U.S. at 684), this Court held that the federal tax lien could be foreclosed on the homestead for the unpaid taxes of one spouse. See note 6, *supra*. The Court reasoned that the Supremacy Clause of the Constitution "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions" (*id.* at 701) and "allows the federal tax collector to convert a non-delinquent spouse's homestead estate into its fair cash value." *Id.* at 703-704.

As this Court pointed out in *Drye* v. *United States*, 528 U.S. at 56-57, the fact that state-law exemptions of property from seizure by creditors are ineffective against the federal tax lien is corroborated by Section 6334(a) of the Code, 26 U.S. 6334(a). That statute lists thirteen specific categories of property that are exempt from administrative levy—such as wearing apparel, tools of a trade, employment benefits, and workmen's compensation. *Ibid.*[8] The categories of property listed

[8] The categories of property that are exempt from levy under 26 U.S.C. 6334(a) are not exempt from judicial sale under 26 U.S.C. 7403 and have been held not to be exempt from the federal tax lien. See *American Trust* v. *American Community Mutual Ins. Co.*,

as exempt from federal levy in Section 6334(a) are exclusive, for the statute specifies that, "[n]otwithstanding any other law of the United States * * *, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." 26 U.S.C. 6334(c). Property held in tenancy by the entirety is *not* among the types of property that are listed as exemptions in this federal statute.[9] See 26 U.S.C. 6334(a). As this Court emphasized in *Drye*, "[t]he fact that * * * Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of [federal tax] liens * * * ." 528 U.S. at 56 (quoting *United States* v. *Bess*, 357 U.S. at 57). "Th[e] language [of Section 6334] is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) (quoted at *Drye* v. *United States*, 528 U.S. at 56-57); W. Plumb, *supra*, at 20.

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142 F.3d 920, 925 (6th Cir. 1998); *In re Sills*, 82 F.3d 111, 113 (5th Cir. 1996); *In re Voelker*, 42 F.3d 1050, 1052 (7th Cir. 1994); *United States* v. *Barbier*, 896 F.2d 377, 389 (9th Cir. 1990). The lien on such property could thus be enforced through a judicial foreclosure or upon a voluntary sale.

[9] Even though property held in a tenancy by the entirety or any other form of joint ownership is subject to the federal tax lien, the government cannot administratively levy upon any principal residence—regardless of the form of ownership—without the prior approval of a federal district court judge or magistrate. 26 U.S.C. 6334(a)(13) & (e). Moreover, unlike a judicial foreclosure (see note 6, *supra*), the government can administratively seize and sell only the taxpayer's interest in jointly held property. See *United States* v. *Rodgers*, 461 U.S. at 695-696.

4. The court of appeals also erred in relying on the legal fiction employed in Michigan that property held in a tenancy by the entirety is owned by the marital unit, rather than by the individual spouses acting collectively. Pet. App. 51a-53a. The court reasoned that the consequence of this legal fiction is that neither spouse has an interest in "property" or a "right to property" to which the federal tax lien could attach. *Ibid.*

This Court has repeatedly emphasized that federal tax law is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). In *Drye*, the Court applied that principle in holding that the federal tax lien attached to the interest of an heir who disclaimed his rights in an intestate estate even though state law deemed any such disclaimer to have occurred *before* the death of the decedent so that creditors would be unable to attach the disclaimant's interest in the estate. The Court held that application of the federal tax lien statute is not controlled by the legal fictions of state law and that the right of the heir to inherit is "a valuable, transferable, legally protected right" to which the federal tax lien attached before the disclaimer was made. 528 U.S. at 59, 60.

In *United States* v. *Irvine*, 511 U.S. at 239-240, this Court likewise refused to be "struck blind" by the "legal fiction" created by state law that a valid state-law disclaimer of an interest in a trust had the effect of canceling the transfer of that interest to the disclaimant *ab initio*. The Court explained that "Congress had not meant to incorporate state-law fictions as touchstones of taxability" and that the fictional construct of state law did not destroy the reality that the disclaimant possessed—even if only transitorily—a "property" in-

terest in the trust for purposes of federal tax law. *Id.* at 240.[10]

Indeed, in *Tyler* v. *United States*, 281 U.S. 497 (1930), this Court specifically rejected the proposition that federal tax law is governed by the state law fiction that entirety property is owned by the "marital unit" rather than by the spouses acting collectively. That case concerned the constitutionality of the Revenue Act of 1916, ch. 463, § 202(c), 39 Stat. 778, which taxed the total value of entirety property—both the share attributable to the decedent and to the surviving spouse—in the estate of the first spouse to die.[11] The estate administrators contended that the entirety property was owned by the marital unit under state law and that, on the death of the first spouse, the survivor merely retained what she already had. They argued that a transfer of property therefore did not occur on the date of death and that the estate tax, as applied to this situation, constituted an unconstitutional direct tax without apportionment. 281 U.S. at 500. The Court rejected this argument and explained in detail why the "amiable fiction of the common law [that] husband and wife are but one person" is not binding for purposes of federal tax legislation (*id.* at 503):

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[10] In *Irvine*, the Court emphasized that "the general and longstanding rule in federal tax cases [is] that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." 511 U.S. at 238. Because federal law controls the determination of what state-created interests constitute "property" within the meaning of federal tax statutes, "state property transfer rules do not translate into federal taxation rules." *Id.* at 239.

[11] Section 2040(b) of the Internal Revenue Code currently includes only one-half of the value of such property in the decedent's gross estate. 26 U.S.C. 2040(b).

> According to the amiable fiction of the common law, * * * husband and wife are but one person. * * * This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights, and powers of tenants by the entirety at common law.

Federal tax law thus looks to "the actual results" rather than merely to "the artificial rules" of state law in determining the nature and taxability of the rights possessed by tenants by the entirety. 281 U.S. at 503. In *Tyler*, because the death of the first spouse resulted in an expansion of the survivor's "actual" property rights, the Court upheld the constitutionality of the estate tax on the entire value of the entirety property. *Id.* at 504.[12]

Although the precise question at issue here was not presented in *United States* v. *Rodgers*, 461 U.S. at 703 n.31, the Court there stated that it was not convinced of the correctness of appellate decisions that, prior to that date, had concluded that the federal tax lien would not attach to a taxpayer's interest in a tenancy by the

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[12] In explaining the reasoning of *Tyler* in *United States* v. *Jacobs*, 306 U.S. 363 (1939), the Court emphasized that "[t]he constitutionality of an exercise of the taxing power of Congress is not to be determined by such * * * ancient fictions" as the ownership of entirety property by the marital unit. *Id.* at 369.

entirety.[13] Noting that these older cases had rested on "the peculiar legal fiction governing tenancies by the entirety in some States," the Court emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* (emphasis in original). As one commentator has observed, the reasoning of the older cases that relied on the state legal fiction of the "marital unit" "was dubious before" and "[n]ow, after *Drye*, its incorrectness is glaringly clear." S. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 Ind. L.J. 1163, 1189-1190 (2000).[14]

C. The Holding Of The Court Of Appeals Would Create Irrationally Disparate Treatment Of Similarly Situated Taxpayers And Would Facilitate Fraud On The Revenue

1. This Court has emphasized the importance in a national tax system of avoiding "inequalities in the

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[13] The cases cited by the Court in *Rodgers* are *United States* v. *National Bank*, 255 F.2d 504, 507 (5th Cir. 1958), cert. denied, 358 U.S. 835 (1958), and *United States* v. *Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951). The Eighth Circuit recently distinguished its decision in *Hutcherson* in *Cox* v. *Commissioner*, 121 F.2d 390, 392 (1997).

[14] Even before *Drye*, commentators had concluded that the reasoning of *United States* v. *Rodgers*, *supra*, and *United States* v. *National Bank of Commerce*, *supra*, required the conclusion that a tenancy by the entirety is subject to the federal tax lien. See S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 871 (1995); Comment, *United States v. National Bank of Commerce: Co-Owners Suffer the "Federal Law Consequences,"* 11 Del. J. Corp. L. 561, 583 (1986); Comment, *Federal Tax Liens and State Homestead Exemptions: The Aftermath of United States v. Rodgers*, 34 Buff. L. Rev. 297, 323 (1985).

administration of the revenue laws" and of ensuring that taxpayers do not receive "treatment different from that given to other taxpayers of the same class." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). The Nation's tax laws are therefore to be interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

The decision of the court of appeals disserves that principle. The tenancy by the entirety is a form of property ownership that exists in 24 States, the Virgin Islands and the District of Columbia.[15] Of all the forms of joint property ownership, the tenancy by the entirety is the *only* form that has been treated as exempt from the federal tax lien. Every other type of jointly-owned property has consistently been held subject to the federal tax lien. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. at 690-691 (homestead property); *United States* v. *Davenport*, 106 F.3d 1333, 1337 (7th Cir. 1997) (joint tenancy); *United States* v. *Kocher*, 468 F.2d 503, 507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973) (tenancy in common); *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970) (community property);

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[15] These States are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. See R. Heaton, *Administration of Entireties Property in Bankruptcy*, 60 Ind. L.J. 305, 309-310 n.24 (1985); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000). In addition, between 1972 and 1985, a tenancy by the entirety could be created in Ohio, and an entirety interest created during that period is still treated as valid. Ohio Rev. Code Ann. §§ 5302.17-5302.21 (Anderson 1989 & Supp. 2000); see *In re Cline*, 164 B.R. 592, 593-594 (Bankr. S.D. Ohio 1994).

Washington v. *United States*, 402 F.2d 3, 7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971) (property subject to dower interest). Under the decision in this case, a taxpayer who owns property in a tenancy by the entirety is thus treated more favorably than a taxpayer who owns property in the 26 States that do not recognize, or have abolished, that form of ownership.[16]

There is no adequate basis in the text or the purpose of the federal tax lien statute for this difference in treatment. To the contrary, as this Court has stated, there is a "sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). In all other respects, these two forms of ownership have consistently received equal treatment under the revenue laws (*ibid.* (emphasis added)).

> A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." *Only a fiction stands between the two.* Survivorship is the predominant and distinguishing feature of each.

Even within the group of States that recognize tenancies by the entirety, the decision in this case produces

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[16] As part of the progressive recognition of women's property rights during the Nineteenth Century (under what were generally known as the Married Women's Property Acts), several western States never chose to adopt the tenancy by the entirety and several other States elected to abolish or restrict that form of ownership. S. Johnson, *supra*, 60 Mo. L. Rev. at 843. See, *e.g.*, *Kerner* v. *McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). In England, where the tenancy by the entirety originated, that form of ownership was abolished in 1925. S. Johnson, *supra*, 60 Mo. L. Rev. at 843.

inconsistent treatment. Under the decision below, taxpayers who own entirety property in the States where creditors can attach such property for a debt owed by *one* spouse are treated less favorably than taxpayers who own such property in the States where creditors can attach such property only for a debt owed by *both* spouses.[17] See, *e.g.*, *Geiselman* v. *United States*,

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[17] Fourteen States (and the Virgin Islands and the District of Columbia) prohibit creditors from attaching entirety property for the debts of only one spouse: Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, Virginia, Vermont and Wyoming. See *Mitchell* v. *Wilmington Trust Co.*, 449 A.2d 1055, 1057-1058 (Del. Ch. 1982), aff'd, 461 A.2d 696 (Del. Super. Ct. 1983); *Finley* v. *Thomas*, 691 A.2d 1163, 1166 (D.C. 1997); *Sitomer* v. *Orlan*, 660 So. 2d 1111, 1114 (Fla. Dist. Ct. App. 1995); *Sawada* v. *Endo*, 57 Haw. 608, 617, 561 P.2d 1291, 1297 (1977); 735 Ill. Comp. Stat. 5/12-112 (West 1993 & Supp. 2000); *Diss* v. *Agri Bus. Int'l, Inc.*, 670 N.E.2d 97, 99 (Ind. Ct. App. 1996); *State* v. *One 1984 Toyota Truck*, 311 Md. 171, 187, 533 A.2d 659, 667 (1987); *SNB Bank & Trust* v. *Kensey*, 145 Mich. App. 765, 775-777, 378 N.W.2d 594, 599 (1985); *In re Van Der Heide*, 164 F.3d 1183, 1184 (8th Cir. 1999) (Missouri law); *Dealer Supply Co.* v. *Greene*, 108 N.C. App. 31, 34, 422 S.E.2d 350, 352 (1992), review denied, 333 N.C. 343, 426 S.E.2d 704 (1993); *Koffman* v. *Smith*, 453 Pa. Super. 15, 27, 682 A.2d 1282, 1288 (1996); *Bloomfield* v. *Brown*, 67 R.I. 452, 25 A.2d 354 (1942); *Masonry Prods., Inc.* v. *Tees*, 280 F. Supp. 654, 657 (D.V.I. 1968); *Rogers* v. *Rogers*, 257 Va. 323, 326, 512 S.E.2d 821, 822 (Va. 1999); *Lowell* v. *Lowell*, 138 Vt. 514, 516, 419 A.2d 321, 322 (1980); *Colorado Nat'l Bank* v. *Miles*, 711 P.2d 390, 393-394 (Wyo. 1985). Nine of the States that recognize the tenancy by the entirety, however, permit creditors to attach one spouse's interest in such property for the debts of only that spouse, subject to the rights of the nondebtor spouse: Alaska, Arkansas, Kentucky, Massachusetts, New Jersey, New York, Oklahoma, Oregon, Rhode Island, and Tennessee. See Alaska Stat. § 09.38.100(a) (Michie 2001); *Morris* v. *Solesbee*, 48 Ark. App. 123, 128, 892 S.W.2d 281, 283 (1995); *Hoffman* v. *Newell*, 60 S.W.2d 607, 613 (Ky. 1932); *In re*

961 F.2d 1, 7 (1st Cir.), cert. denied, 506 U.S. 891 (1992) (husband's interest in entirety property is subject to the federal tax lien because Massachusetts law permits creditors to attach his interest in the property); *United States* v. *Diemer*, 859 F. Supp. 126, 131 (D.N.J. 1994), rev'd on other grounds *sub nom. United States* v. *Avila*, 88 F.3d 229 (3d Cir. 1996) (same under New Jersey law); *United States* v. *Brynes*, 848 F. Supp. 1096, 1099 (D.R.I. 1994) (same under Rhode Island law); *United States* v. *Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962) (same under Tennessee law).

The arbitrary inequality of treatment that results under the rationale of the court of appeals is magnified by the fact that entirety ownership is not limited to real estate. At least fifteen jurisdictions also allow personal property—such as automobiles, stocks, bonds and bank accounts—to be owned in a tenancy by the entirety.[18]

Snyder, 231 B.R. 437, 442 (Bankr. D. Mass. 1999); *United States* v. *Jones*, 877 F. Supp. 907, 916-920 (D.N.J. 1995), aff'd mem., 74 F.3d 1228 (3d Cir. 1995); *BNY Fin. Corp.* v. *Moran*, 154 Misc. 2d 435, 436, 584 N.Y.S.2d 261, 262 (Sup. Ct. 1992); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Wilde* v. *Mounts*, 95 Or. App. 522, 524-525, 769 P.2d 802, 803-804 (1989); *Arango* v. *Third Nat'l Bank of Nashville*, 992 F.2d 611, 613 (6th Cir. 1993) (Tennessee law). The rule in Mississippi is uncertain. See *Cuevas* v. *Cuevas*, 191 So. 2d 843 (Miss. 1966).

[18] These jurisdictions are: Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Oklahoma, Pennsylvania, Tennessee, Vermont, and Virginia. See *Faulk* v. *Estate of Haskins*, 714 P.2d 354 (Alaska 1986); *Boggs* v. *Boggs*, 26 Ark. App. 188, 190, 761 S.W.2d 956, 957 (1988); *Ciconte* v. *Barba*, 161 A. 925 (Del. Ch. 1932); *In re Estate of Wall*, 440 F.2d 215, 219 (D.C. Cir. 1971); *Beal Bank, SSB* v. *Almand & Assoc., Inc.* 780 So. 2d 45, 53-54 (Fla. 2001); *Traders Travel Int'l Inc.* v. *Howser*, 69 Haw. 609, 613, 753 P.2d 244, 246 (1988); Ky. Rev. Stat. Ann. § 140.050 (Michie 1991); *State* v. *One 1984 Toyota Truck*, 69 Md. App. 235, 237-238, 517 A.2d 103, 104

Several other States allow some, but not all, types of personal property to be owned in a tenancy by the entirety.[19] And one jurisdiction that extends a tenancy by the entirety to personal property has recently expanded the protections of ownership in tenancy by the entirety to members of the same sex who form a "civil union." See Vt. Stat. Ann. tit. 15, §§ 1202(2), 1204(e)(1).

2. The decision in this case not only produces inconsistent treatment of similarly situated taxpayers, it also provides significant opportunities for obstructing and avoiding the collection of taxes. Under the reasoning of the decision below, both spouses may earn income, fail to file returns or file only separate returns,[20] place their

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(1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987); *Woodard* v. *Woodard*, 216 Mass. 1, 2, 102 N.E. 921 (1913); *Hallmark* v. *Stillings*, 648 S.W.2d 230, 233 (Mo. Ct. App. 1983); 60 Okla. Stat. Ann. § 74 (West 1994); *Madden* v. *Gosztonyi Sav. & Tr. Co.*, 331 Pa. 476, 483, 200 A. 624, 628 (1938); *White* v. *Watson*, 571 S.W.2d 493, 495 (Tenn. Ct. App. 1978); *Beacon Milling Co.* v. *Larose*, 138 Vt. 457, 461, 418 A.2d 32, 33 (1980); *Oliver* v. *Givens*, 204 Va. 123, 126, 129 S.E.2d 661, 663 (1963).

[19] For example, Michigan allows bonds, stocks, mortgages, promissory notes, debentures, and other financial assets to be held in a tenancy by the entirety. *DeYoung* v. *Mesler*, 373 Mich. 499, 505, 130 N.W.2d 38, 41 (1964) (dissenting opinion). In Michigan and Indiana, personalty derived from real estate (such as crops) and the proceeds of the sale of real estate may be owned in tenancy by the entirety when the underlying real estate was itself held in that form of ownership. See *ibid.*; *Koehring* v. *Bowman*, 194 Ind. 433, 142 N.E. 117, 118 (1924).

[20] Married taxpayers become jointly and severally liable for taxes when they elect to file joint returns. See 26 U.S.C. 6013(d)(3). Since, if they file a joint return, both spouses are liable for the resulting taxes, property held in a tenancy by the entirety could then be seized for collection. See Pet. App. 52a; W. Plumb, *supra*, at 37. The tax avoidance scheme sanctioned by the court of

assets—such as real property, stocks, bonds and bank accounts—in a tenancy by the entirety, and claim an exemption of that property from tax collection. They could then use that "exempt" property to earn income, to pay debts to third parties or to make gifts to family members free and clear of any lien or liability for taxes. It is difficult to conceive of a more simple or widely available method of evading the collection of taxes. As Judge Ryan emphasized in his separate opinion in this case, the majority opinion "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a.

The ready pathway for tax avoidance permitted under the decision below is illustrated by the pending case of *Hatchett* v. *IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000). That case involves a lawyer who accrued federal tax debts exceeding $8,000,000 for 1975 through 1991. Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four valuable parcels of real estate that he placed in a tenancy by the entirety. The district court concluded that the federal tax liens did not attach to these properties under the reasoning applied by the court of appeals in this case. 126 F. Supp. 2d at 1050-1051.

It is implausible to conclude that, in enacting the broad text of the federal tax lien statute, Congress intended to authorize such facile and transparent schemes to avoid tax collection. Instead, as this Court has emphasized, in drafting this lien provision, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."

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appeals in this case thus operates only when married taxpayers file no returns or file separate, rather than joint, returns.

Glass City Bank v. *United States*, 326 U.S. at 267. The decision of the court of appeals has thus, in short, "left us with a rule which compromises the revenue, creates a ready pathway for tax avoidance, defeats equal treatment of taxpayers, and lacks any defensible doctrinal underpinning." S. Johnson, *supra*, 60 Mo. L. Rev. at 888. See also Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. at 1498.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID ENGLISH CARMACK
JOAN I. OPPENHEIMER
Attorneys

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