United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 06, 2013

Mr. Bennett Evan Cooper
Steptoe & Johnson, L.L.P.
201 E. Washington Street
Suite 1600
Phoenix, AZ 85004-4453

Ms. Suzanne Ross McDowell
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, DC 20036

No. 12-20804, USA v. Finley Hilliard, et al
USDC No. 4:10-CV-2812

The following pertains to your brief electronically filed on May 29, 2013.

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LYLE W. CAYCE, Clerk

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Mr. Brian J. Spiegel
Mr. Scott Patrick Stolley
Mr. Jeffrey D. Watters

No. 12-20804

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELAINE T. MARSHALL, INDIVIDUALLY, AS EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL, AS TRUSTEE OF THE E. PIERCE MARSHALL, JR. TRUST, AND AS TRUSTEE OF THE PRESTON MARSHALL TRUST; FINLEY L. HILLIARD, INDIVIDUALLY, AS FORMER EXECUTOR OF THE ESTATE OF JAMES HOWARD MARSHALL, II, AND AS FORMER TRUSTEE OF THE ELEANOR PIERCE (MARSHALL) STEVENS LIVING TRUST; E. PIERCE MARSHALL, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ELEANOR PIERCE STEVENS; AND PRESTON MARSHALL, CO-TRUSTEE OF THE ELEANOR PIERCE (MARSHALL) STEVENS LIVING TRUST,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Hon. Gray H. Miller, Presiding

BRIEF OF *AMICI CURIAE* JOHNSON C. SMITH UNIVERSITY, BARBER-SCOTIA COLLEGE, BENNETT COLLEGE, CLINTON JUNIOR COLLEGE, AND WILBERFORCE UNIVERSITY IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

STEPTOE & JOHNSON LLP
Suzanne Ross McDowell
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-3000

STEPTOE & JOHNSON LLP
Bennett Evan Cooper
Douglas D. Janicik
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200

Attorneys for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 12-20804

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

ELAINE T. MARSHALL, INDIVIDUALLY, AS EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL, AS TRUSTEE OF THE E. PIERCE MARSHALL, JR. TRUST, AND AS TRUSTEE OF THE PRESTON MARSHALL TRUST; FINLEY L. HILLIARD, INDIVIDUALLY, AS FORMER EXECUTOR OF THE ESTATE OF JAMES HOWARD MARSHALL, II, AND AS FORMER TRUSTEE OF THE ELEANOR PIERCE (MARSHALL) STEVENS LIVING TRUST; E. PIERCE MARSHALL, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ELEANOR PIERCE STEVENS; AND PRESTON MARSHALL, CO-TRUSTEE OF THE ELEANOR PIERCE (MARSHALL) STEVENS LIVING TRUST,

Defendants-Appellants.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons listed by the parties in their certificates of interested persons under Fifth Circuit Rule 28.2.1, the following amici curiae have an interest in this matter. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae:
Johnson C. Smith University
Barber-Scotia College
Bennett College
Clinton Junior College
Wilberforce University

Appellate Counsel:
Suzanne Ross McDowell
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036

Bennett Evan Cooper
Douglas D. Janicik
STEPTOE & JOHNSON LLP
201 E. Washington Street, Suite 1600
Phoenix, Arizona 85004-2382

Johnson C. Smith University, Barber-Scotia College, and Bennett College are North Carolina non-profit corporations that have issued no stock, and therefore no publicly held company owns ten percent or more of any of their stock. Clinton Junior College is a South Carolina non-profit corporation that has issued no stock, and therefore no publicly held company owns ten percent or more of its stock. Wilberforce University is an Ohio non-profit corporation that has issued no stock, and therefore no publicly held company owns ten percent or more of its stock.

DATED this 29th day of April, 2013.

STEPTOE & JOHNSON LLP

By s/ Bennett Evan Cooper
Suzanne Ross McDowell
1330 Connecticut Ave., NW
Washington, D.C. 20036

Bennett Evan Cooper
Douglas D. Janicik
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382

Attorneys for Amici Curiae Johnson C. Smith University, Barber-Scotia College, Bennett College, Clinton Junior College, and Wilberforce University

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are among the 105 public and private institutions of higher education in the United States known as historically black colleges and universities ("HBCUs"). Johnson C. Smith University ("JCSU") is a private, coeducational, four-year research university founded in 1867. With approximately 1,700 students on a 100-acre campus in the heart of Charlotte, North Carolina, it was a founding member of the United Negro College Fund in 1944.

Barber-Scotia College is a private, coeducational college in Concord, North Carolina; it was founded in 1867 as Scotia Seminary under a commission by the Presbyterian Church, U.S.A., to establish in the South an institution for the training of black women. Bennett College is a private liberal arts college for women in Greensboro, North Carolina; it was founded in 1873 and is affiliated with the United Methodist Church. Clinton Junior College is a private, two-year liberal arts junior college in Rock Hill, South Carolina; it was founded in 1894 by the African Methodist Episcopal Zion Church. Wilberforce University, in Wilberforce, Ohio, was founded in 1856 by members of the Methodist Episcopal Church and is the first predominantly African-American private university in the nation.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief under Rule 29(a).

As HBCUs, amici curiae are concerned about the potentially devastating effect of the district court's ruling in this case on the transferee liability of innocent recipients of gifts, including HBCUs and charitable organizations generally, for unpaid gift tax and interest in amounts greater than the value of the gift. HBCUs reflect the concerns of a broad range of donees because, as is described below, HBCUs have smaller endowments than some other colleges and universities and rely more heavily on project-specific philanthropic gifts from foundations, corporations, and individuals other than their own alumni. At the same time, HBCUs do not have the development resources necessary to conduct the searching inquiry required by the district court's rulings into the tax returns and financial affairs of donors to determine what transferee liability they may face.

Johnson C. Smith University

JCSU's history and experience are representative of those of many HBCUs. It was established after the end of the Civil War with the goal of serving the black community with academic programs that prepare its students for success in the work place. About three-quarters of JCSU's current student body is black or African-American. In 1919, JCSU became the first black college in the South to offer professional courses in education. It is accredited by the Southern Association of Colleges and Schools, the National Council for the Accreditation of Teacher Education, the Association of Collegiate Business Schools and Programs, and the Council on Social Work Accreditation. In 2011, *Diverse Issues in Higher Education* ranked JCSU's College of Science, Technology, Engineering and Mathematics eighteenth among all universities and colleges in the United States in graduating African-American students in computer and information sciences, and twenty-first in mathematics and statistics.

HBCUs, Small Endowments, and Reliance on Philanthropy

"Historically and now, [HBCUs] are underfunded, whether public or private,"[2] and they have been "plagued … since their inception" by "limited financial and operational resources."[3] In particular, private HBCUs have faced a serious problem in "the slow growth or inadequacy of permanent endowment"; instead, charitable contributions have usually been "in the form of annual gifts or support for restricted purposes, such as buildings, salaries, current expenses, financial emergencies, or the basic needs in other areas of the institutions."[4] For example, as of August 2012, JCSU had an endowment of $51.1 million. And even

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[2] Cynthia L. Jackson & Eleanor F. Nunn, *Historically Black Colleges and Universities: A Reference Handbook* 46 (2003)

[3] Natalie T.J. Tindall, *Fund-raising Models at Public Historically Black Colleges and Universities*, 33 Pub. Rel. Rev. 201, 202 (2007).

[4] Jackson & Nunn, *supra*, at 121-22 (quoting Evelyn C.J. Carroll, *Priorities in Philanthropic Support for Private Negro Colleges and Universities, 1930-1973,* Univ. Mich. Ph.D. dissertation); *see* Marybeth Gasman & Nelson Bowman III, *A Guide to Fundraising at Historically Black Colleges and Universities: An All Campus Approach* 42 (2012).

before the 2008 crash, endowments were shrinking and nearly all institutions had experienced a decline in their portfolios.[5]

JCSU, like most HBCUs, has depended on the generous philanthropy of donors who believe in its cause, as opposed to its own alumni. It was originally named Biddle Memorial Institute in 1867 (and later Biddle University) for the late Major Henry Biddle when his widow, Mary D. Biddle of Philadelphia, Pennsylvania, pledged $1,400 through appeals in Presbyterian church papers. It was renamed in 1923 after Jane Berry Smith of Pittsburgh, Pennsylvania, gave funds, in memory of her late husband Johnson C. Smith, to build a theological dormitory, science hall, teachers' college, and memorial gate and to provide an endowment.

In 1924, James B. Duke authorized the establishment of The Duke Endowment, which included JCSU as one of four beneficiaries in higher education (along with Duke University). In 1996, JCSU received a $1-million gift from Irwin Belk, a prominent Charlotte businessman, which was at the time the largest gift from a living individual in the school's history. In 2011, JCSU received a $35-million gift from The Duke Endowment, one of the largest gifts ever awarded

[5] Rodney T. Cohen, *Black College Alumni Giving: A Study of the Perceptions, Attitudes and Giving Behaviors of Alumni Donors at Selected Historically Black Colleges and Universities*, 6 Int'l J. Educ. Advancement 200, 203 (2006); *see* Gasman & Bowman, *supra*, at 42 (describing "a drastic decline in endowment values").

to an HBCU, to support science programs, scholarships, and capital improvements on campus.

JCSU also has relied in recent years on major capital campaigns, including its historic "Vision Shared" capital campaign in 1998, which raised $63.8 million, and its "Pathways to Success" capital campaign in 2007, which raised $81.5 million. In 2005, it established its Corporate Alliance Program as a relationship builder to align corporate interests with university goals and objectives; in 2006, it created the 1867 Giving Societies to honor the university's most generous benefactors.

JCSU's experience is representative of that of HBCUs generally. "Most HBCUs were founded after the Civil War by philanthropists and often were affiliated with a church. They received some support from churches as well as altruistic individuals."[6] "Historically, many of these colleges have depended on the support of foundations and corporations."[7]

The reliance on large gifts is necessitated by the historically lower level of smaller contributions by the HBCUs' own alumni, about whom a school might have more information. "Although … several HBCUs have inaugurated multimillion dollar capital campaigns, alumni giving at most HBCUs – public and

[6] Eleanor Lee Yates, *Capital Campaigns*, 18 Black Issues in Higher Education No. 10, 2001 WLNR 4585150, at *3 (July 5, 2001).

[7] Cohen, *supra*, at 200.

private – has been eclipsed by donations from corporations and foundations. Annual donations from alumni average five to 10% [of total donations] when the average is approximately 25% for private colleges and 60% for elite colleges."[8] Suggested root causes of HBCU's lack of "consistent and substantial financial gifts from their alumni" include small fundraising infrastructures, limited resources in the black community, and a culture of giving to churches, in the belief that the HBCUs will always be there without alumni giving.[9]

The Limited Fundraising Infrastructure of HBCUs

HBCUs' historical reliance on large-scale philanthropy rather than consistent alumni giving is complicated, for purposes of transferee liability, by the lack of fund-development apparatuses that could conduct any sort of inquiry into prospective donors and their potential gift-tax liability. "[M]ost black colleges are resource poor and do not possess the luxury of funds for high-level development activities."[10] As one observer noted, "the fund-raising efforts of both private and

[8] Tindall, *supra*, at 202 (citations omitted); *see* Cohen, *supra*, at 201-02; Yates, *supra*, at *2-3; Gasman & Bowman, *supra*, at 30 ("Nationally, alumni giving rates hover around 20 percent and that number drops to 9 percent at HBCUs." (citations omitted)).

[9] Gasman & Bowman, *supra*, at 30-31; Cohen, *supra*, at 201, 218; *see also* Yates, *supra*, at *3-4; Jackson & Nunn, *supra*, at 124-25.

[10] Cohen, *supra*, at 219; *see* Gasman & Bowman, *supra*, at 12; ("[A]t many [HBCUs], having only a partially complete fundraising infrastructure is often the norm.").

public HBCUs linger behind the established fund-raising programs at traditionally White institutions."[11]

In particular, it is difficult for many HBCU fundraising or institutional-advancement offices to engage donors in the "two-way symmetrical model" of communication and collaboration; they tend to practice the "press agentry/publicity model" because "the 'small shop' operation, whether it is the top fund-raising officer alone maintaining the office or the officer with a few colleagues, is predominant," and "[t]he smaller shop operation may not have the time, financial resources, or people to implement the two-way symmetrical model."[12] Thus, HBCUs, like many other charitable organizations and gift recipients, do not have the resources to investigate each gift and each donor to identify sources of transferee liability.

ARGUMENT

I. Even Though Gifts to Charities Are Not Subject To Gift Tax, Charities Are Subject to Transferee Liability Under Section 6324(b).

As recipients of millions of dollars' worth of cash and non-cash gifts each year, charities and tax-exempt organizations like amici curiae and other HBCUs are exposed under the district court's rulings to uncapped and potentially

[11] Tindall, *supra*, at 202.

[12] Tindall, *supra*, at 204; *see* Gasman & Bowman, *supra*, at 12 ("In some cases, advancement offices may consist of as few as three people—a director, a secretary, and a do-everything-else person." (citation omitted)).

debilitating transferee liabilities. The Internal Revenue Code provides a gift-tax deduction for any gift, regardless of the amount, to a qualified charity, 26 U.S.C. § 2522(a)(2),[13] but the fact that gifts to such charities are themselves exempt from tax does not prevent the tax-exempt charity, like other donees, from facing gift-tax transferee liability. There are two obvious avenues of gift-tax transferee liability that lead to charities: (a) the "all-gifts" liability of all donees of the donor during the same year, and (b) the successive-transferee liability of downstream gift recipients.

A. Under the "all-gifts" rule, a charitable donee can be liable for a donor's entire gift-tax liability for gifts to other donees made during the same year.

Even though a donor's gift to a charitable organization may not itself be subject to gift tax, the organization may still face transferee liability based on a donor's taxable gift to an unrelated recipient during the same year. Section 6324(b) provides that the unpaid gift tax "shall be a lien upon *all gifts* made during the period for which the return was filed, for 10 years from the date the gifts are made," and "the donee of *any gift* shall be personally liable for such tax to the extent of the value of such gift." 26 U.S.C. § 6324(b) (emphasis added).

That a gift to a particular donee, such as an HBCU, is tax-exempt makes no difference, because it has long been established that "the tax imposed upon the

[13] Unless otherwise specified, all section references are to the Internal Revenue Code of 1986, as amended.

donor by the Act is made a lien upon all gifts (not just the gifts subject to tax) made during a calendar year," and the gift-tax statute "render[s] a donee personally liable (to the extent of the value of his gift) for the gift tax due by the donor regardless of the fact that the gift to the particular donee did not contribute to the imposition of any tax." *Baur v. Comm'r*, 145 F.2d 338, 339 (3d Cir. 1944) (construing predecessor to section 6324). "[U]nder § 6324, a donee is liable, to the extent of the value of that donee's gift, for *any* gift tax incurred by the donor during the year in which the donee received a gift, *regardless of whether* that individual donee's gift actually contributed to the donor's gift tax deficiency." *United States v. Botefuhr*, 309 F.3d 1263, 1276 (10th Cir. 2002); Charitable organizations are subject to this rule. *See, e.g., Salus Mundi Found. v. Comm'r,* No. 24741-08, T.C. Memo. 2012-61, 2012 WL 716191, at *1 (Mar. 6, 2012) (asserted income-tax transferee liability of charitable private foundations).

For example, assume that during the same year Donor gave $15,000 to Charity and $50,000 to Son. The gift to Charity is not taxable because of the charitable deduction, but the gift to Son is taxable to the extent it exceeds the annual exclusion under 26 U.S.C. § 2503(b). If Donor does not pay the gift-tax liability generated by the gift to Son, both Charity and Son would be personally liable for the gift tax under section 6324(b), even though the $15,000 gift received by Charity did not generate any gift tax.

B. Under the successive-transferee rule, a charitable donee can be liable for unpaid gift taxes as a transferee of a transferee.

A charity could also be exposed to transferee liability if it received a gift through a subsequent transfer after the original taxable gift. "When a transferee transfers assets received from the transferor to a third person, the latter may become liable as a transferee of the initial transferee." William H. Newton, III, *Transferee Liability Under Section 6901 of the Code*, 12 Hous. L. Rev. 820, 839 (1974-75); *see also Berliant v. Comm'r*, 729 F.2d 496, 497 n.2 (7th Cir. 1984) (noting that "it is well-settled that transferee liability may be asserted against a transferee of a transferee"); *Salus Mundi Found.*, 2012 WL 716191, at *7 (same).

For example, Donor gives Daughter a painting worth $500,000. Daughter later gives the painting to Charity. Neither Donor, who was directly liable for the gift tax on the gift to Daughter, nor Daughter, who was liable for the tax as a transferee, pays the tax. Charity would be liable as a successive transferee for Donor's unpaid gift tax on Donor's $500,000 gift—up to the value of the gift—even though Charity just recently came into possession of the gift and had no knowledge of its history.

C. Because transferee liability is joint and several, the IRS can choose from which transferees to collect, and a charitable donee may have no recourse against other donees.

It gets even worse. Transferee liability is joint and several, and a charitable donee could be responsible for the donor's *entire* tax bill (with interest), without regard either to how many other donees there were that year, or whether other donees may not have been as innocent as the charity. *Phillips v. Comm'r*, 283 U.S. 589, 603-05 (1931). It is no defense that not all transferees have been joined. *Id.*; *Drew v. United States*, 367 F.2d 828, 833-34 (Ct. Cl. 1966). Nor does it matter whether the donor is solvent, *Baur*, 145 F.2d at 340, or whether there has been a determination of deficiency against the donor, *Miss. Valley Trust Co. v. Comm'r*, 147 F.2d 186, 187-88 (8th Cir. 1945), or an assessment against the transferee, *United States v. Davenport*, 327 F. Supp. 2d 725, 730 (S.D. Tex. 2004), *rev'd on other grounds*, 484 F.3d 321 (5th Cir. 2007). Indeed, with gift-tax transferee liability, there is no need for the Government even to attempt to collect from the donor in the first instance. *O'Neal v. Comm'r*, 102 T.C. 666, 675 (1994).

Moreover, the Government has "absolute discretion to proceed against all, or one, or several, of [the donees] for the collection of the whole tax," and it need not explain the basis for its choice. *In re Mellon's Estate*, 32 A.2d 749, 755 (Pa. 1943); *see Benoit v. Comm'r*, 25 T.C. 656, 667 (1955) (finding it "somewhat puzzling … why the Commissioner has proceeded against petitioner for the full amount of her distribution, since her husband who was also a transferee had received the great bulk of the corporate assets"), *vacated on other grounds*, 238 F.2d 485 (1st Cir. 1956). Collecting unpaid gift-tax liability from a single charity may be far more convenient or expedient than chasing down individuals who received gifts from that donor in that year, as they may be difficult to locate, have received smaller individual gifts, or have varying degrees of financial ability to pay the transferee liability.

The charitable donee that becomes the unfortunate object of the Government's attentions may have no way to spread the burden. Although "[t]he injustice of allowing the other [transferees] to escape contribution is obvious," *Phillips-Jones Corp. v. Parmley*, 302 U.S. 233, 235 (1937), neither 26 U.S.C. § 6901 nor related Code provisions expressly provide for a right of contribution. *See* Steve R. Johnson, *Unfinished Business on the Taxpayer Rights Agenda: Achieving Fairness in Transferee Liability Cases*, 19 Va. L. Rev. 403, 427 (2000) ("Federal law does not currently provide a right of contribution in the multiple-transferee context."). And resort to state law provides no assurances: A burdened transferee may obtain contribution "*if* local law or contractual rights justify such a result," *Estate of Cury v. Comm'r*, 23 T.C. 305, 339 (1954) (emphasis added), but that predicate "usually is absent," and "[n]either federal nor state law provides a reliable right of contribution," Johnson, *supra*, at 427 n.112. Even if there is a path to contribution, charities and other innocent donees will be burdened with tracking down the other donees, which is no easy task, especially many years after the fact. For reasons *de jure* or *de facto*, the charity or other innocent recipient may be left without recourse.

II. Capping Transferee Liability for Both Unpaid Taxes and Interest at the Value of the Gift Is Required by the Statute's Plain Language and Purposes.

A. Whether or not it is "personal," a donee's transferee liability under section 6324(b) is still a liability subject to the cap.

Amici curiae agree with defendant-appellants that the plain language of section 6324 shows that Congress intended to cap a transferee's liability, including interest accrued on the unpaid gift taxes, at the value of the transferee's gift. Briefly stated, section 6324(b) explicitly provides that "the donee of any gift shall be personally liable for such *tax* to the extent of the value of such gift." 26 U.S.C. § 6324(b) (emphasis added). The Code expressly provides that the term "tax" includes interest. *See* 26 U.S.C. § 6601(e)(1) ("Any reference … to any tax … shall be deemed also to refer to interest imposed … on such tax."). As a result, section 6324's references to unpaid gift or estate "tax" must be construed to refer as well to accrued interest on such tax.[14]

To avoid this plain language, the Government has, in this and prior cases, offered an erroneous conceptual distinction, characterizing a donee's liability under section 6324(b) as a "personal liability" separate and apart from the donor's gift-tax liability. It then uses that false dichotomy to impose liability for interest on

[14] Courts have held that the gift-tax and estate-tax provisions "are *in pari materia* and must be construed together." *Botefuhr*, 309 F.3d at 1276 n.9 ("[O]ur discussion of donee liability will refer to cases arising under both §§ 6324(a) and 6324(b).").

transferees above the cap that Congress imposed as an integral part of section 6324(b). It is true that the transferee's liability is a personal liability: Section 6324(b) expressly provides that "[i]f the tax is not paid when due, the donee of any gift shall be *personally* liable for such tax to the extent of the value of such gift." 26 U.S.C. § 6324(b) (emphasis added).

But section 6324(b)'s reference to personal liability and its companion clause making the unpaid tax a "lien upon all gifts made during the period" merely mean that the government has two potential sources for collecting the donor's unpaid tax from a transferee: the gifts themselves or the transferee's other assets. "Personal liability" means "[l]iability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's *personal assets*," as opposed to a "lien" interest that "a creditor has in another's *property*, lasting usu[ally] until a debt or duty that it secures is satisfied." *Black's Law Dictionary* 926, 933 (7th ed. 1999) (emphasis added). In construing statutes, this Court and others have understood "personal liability" or "personally liable" as merely reflecting that conventional distinction among types of assets. For example, under the Bankruptcy Code, a discharge operates as an injunction against attempts to collect on "any such debt as a *personal liability* of the debtor," 11 U.S.C. § 524(a)(2) (emphasis added), and this Court has recognized that "[a] discharge in bankruptcy prevents the I.R.S. from taking any action to collect the debt as a personal liability of the debtor," but "[t]heir property remains liable for a debt secured by a valid lien, including a tax lien." *In re Orr*, 180 F.3d 656, 661 (5th Cir. 1999) (internal quotation marks omitted).[15] As a consequence, if the transferee and the gift part ways, section 6324(b)'s dual provisions for personal liability and a lien allow the Government's ability to collect to follow both.[16]

In holding that the transferee had a separate liability on which interest accrues independently of the interest on the donor's liability, the district court below lost sight of three facts: (1) the only source of a donee's personal liability is section 6324(b);[17] (2) the donee's only personal liability under that section is for the *donor's* unpaid tax liability; and (3) that section clearly caps the transferee liability not only for the donor's tax but also for any interest on such liability: "If the tax is not paid when due, the donee of any gift shall be personally liable *for such tax* to the extent of the value of such gift." 26 U.S.C. 6324(b); *see* 26 U.S.C.

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[15] Similarly, "[i]n the context of foreclosure law, the term 'personally liable for the debt' has traditionally been used to distinguish liability on the note, which is a personal obligation, from liability on the mortgage, which is an obligation limited to the property given to secure the debt." *Bank Mut. v. S.J. Boyer Constr., Inc.*, 785 N.W.2d 462, 473 (Wis. 2010).

[16] An exception would be where the donee transfers the lien-encumbered gift property to a purchaser or security-interest holder; in that event, the lien is divested, but a "like lien" attaches to all other property of the donee, including after-acquired property. 26 U.S.C. § 6324(b); Treas. Reg. § 301.6324-1(b).

[17] State law does not apply: In the context of transferee liability for gift or state taxes, federal law governs both the transferee's substantive liability as well as the applicable procedural rules. *See, e.g.*, *Schuster v. Comm'r*, 312 F.2d 311, 315 (9th Cir. 1962).

§ 6601(e)(1) ("tax … shall be deemed also to refer to interest"). The district court's reliance on section 6901 as a source of independent liability for interest is clearly contrary to the Supreme Court's holding that section 6901 is strictly a procedural statute, *Comm'r v. Stern*, 357 U.S. 39, 42 (1958), and this Court's recognition that "'[t]his provision … does not create any separate liability; it merely provides a secondary method for enforcing the existing liability of a transferor,'" *Streber v. Hunter*, 221 F.3d 701, 716 (5th Cir. 2000) (citation omitted).[18]

Transferee liability for unpaid taxes is, by its nature, akin to a vicarious liability that is derived from the donor's unpaid tax liability rather than any independent action by the transferee. The transferee's liability is "derivative," *Botefuhr*, 309 F.3d 1263 at 1276 (gift tax), or "secondary or qualified," *Murray v. United States*, 687 F.2d 386, 393 (Ct. Cl. 1982) (gift tax), rather than being completely different and apart from the transferor's underlying tax liability. "'A transferee is personally liable *for the tax*.'" *United States v. Kulhanek*, 755 F. Supp. 2d 659, 665 (W.D. Pa. 2010) (emphasis added) (citation omitted) (estate tax). In other words, that the donee is "personally" liable does not mean that "both the donor and the donee are primarily liable. The provisions of the Act … make plain … that the liability of the donor is primary and that of the donee secondary," and "it is only when the former fails to pay the tax that it becomes the liability of the

[18] Amicus curiae refers to the parties' detailed treatment of this point.

latter." *Fletcher Trust Co. v. Comm'r*, 141 F.2d 36, 39 (7th Cir. 1944) (gift tax). Indeed, the statute of limitations for a donee's liability under section 6324(b) "depends upon the statute of limitations for the donor's liability," *Botefuhr*, 309 F.3d at 1277, because "suits against persons *derivatively liable* for taxes are timely, or not, according to the rules for timeliness against taxpayers," *United States v. Wright*, 57 F.3d 561, 564 (7th Cir. 1995) (emphasis added) (internal quotation marks omitted).

Put simply, the donee's "personal" liability *is* the donor's gift-tax liability. They are one and the same. The only personal liability of the donee is imposed by section 6324(b), and that section's cap therefore applies to the donee's liability *in toto.* However "separate" one may characterize the parties' direct and derivative liabilities as being, the transferee's liability for unpaid tax and interest depends on the transferor's liability for unpaid tax and interest. The transferee steps into the transferor's shoes when liability attaches, but then steps out of those shoes when the liability for tax and interest reaches the value of the gift the transferee received. That is the clear import of section 6324(b)'s value-of-the-gift cap.

B. The application of the value cap to interest is critical because it substitutes for other protections innocent donees enjoy in cases of transferee liability in equity.

The Government and the district court below, like the Eleventh Circuit and some of the many fractured Tax Court opinions in *Baptiste*, took a very tortuous route to avoiding application of the value-of-the-gift cap in section 6324(b) to interest. Among other things, they created phantom distinctions between the donor's tax liability and the donee's "personal" liability; between the tax *deficiency* and the *use* of the money while the deficiency remains unpaid; and between the interest rate that runs up to the value of the gift and an illusory separate rate that runs beyond the value of the gift.[19] There is very little to recommend these distinctions without a difference even on a conceptual level, but the value of any discussion of them is dubious because the statute's plain language does not support them, regardless of whether the Government and some courts believe they help reach a just and fair result.

The result of their position, however, is neither just nor fair, and there is no reason to believe that Congress intended it. Gift-tax transferee liability under section 6324 is "at law" rather than "in equity" because such liability is governed by a statute, but background principles of transferee liability in equity are useful because they show what an extreme and unfair result the district court has wrought. Adopting the Government's position, the district court imposed interest under section 6324 on all transferees—even those that did not have actual or constructive

[19] *See also Baptiste v. Comm'r*, 100 T.C. 252, 256-57 (1993) (where amount transferred exceeded transferor's unpaid gift tax liability by $343,925.19, "each donee was personally liable for … [that] liability … plus interest accrued thereon and owed by the transferor of $343,925.19"); *Estate of Stein v. Comm'r*, 37 T.C. 945, 961 (1962) ("In cases where the transferred assets exceed the total liability of the transferor, the interest being charged is *upon the deficiency*" (emphasis added)).

notice of the unpaid gift tax, or the gift that actually gave rise to the tax—in a doubly hostile manner: (1) the interest runs from the date of the donor's gift-tax return, and (2) it is not subject to the value-of-the-gift cap.

In equity, only the most knowing, the most complicit transferees would be treated in this manner. In cases of transferee liability in equity, which is determined by state law,[20] interest is not capped at the value of the gift as under section 6324, but when the interest begins to accrue depends upon the culpability of the transferee. Courts have allowed interest to run from the date of the transfer where the transferee had actual or constructive knowledge of the facts or otherwise came to court with unclean hands, such as in cases of actual or constructive fraudulent transfers.[21] But "a transferee who accepts property from a delinquent taxpayer in good faith is liable for interest on his transferee liability only from the date that a notice of deficiency and demand for payment has been served on the transferee." 14 *Mertens Law of Federal Income Taxation* § 53.39, at 105 (2010).[22] Thus, where

[20] *See, e.g.*, *Comm'r v. Stern*, 357 U.S. 39, 45 (1958); *United States v. Holmes*, No. 08-cv-02446-WDM-CBS, 2011 WL 1158675, at *5 (D. Colo. Mar. 30, 2011).

[21] *See, e.g.*, *Stansbury v. Comm'r*, 102 F.3d 1088 (10th Cir. 1996) (transferees liable for interest from date of transfer rather than notice of transferee liability, even though value of transferred assets was less than transferor's liability, where transferees caused the transfer).

[22] *See, e.g.*, *Patterson v. Sims*, 281 F.2d 577, 579 (5th Cir. 1960) (innocent transferee not liable for interest beyond value of property before date he received notice of assessment against him as transferee); *Voss v. Wiseman*, 234 F.2d 237,

the transferee is "innocent" and "returns all that he has received," he "cannot be held accountable for interest prior to the time when he has notice of the existence of a debtor-creditor relationship between himself and the Government," because he had no "reason to know that he was the beneficiary of a mala fide transfer" and was "left without notice of or means to prevent the running of interest." *Pallister v. United States*, 182 F. Supp. 720, 723-24 (S.D.N.Y. 1960).

In section 6324(b), Congress did not distinguish between complicit and innocent gift recipients with respect to the accrual of interest on the unpaid gift tax as of the date of the gift-tax return. Instead, Congress protected all transferees by capping their total transferee liability, including interest, at the value of the gift that each received. Under the Government's position and the district court's decision, an innocent donee would be denied all the protections available to an innocent transferee in equity as well as the single protection that Congress provided in

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240 (10th Cir. 1956) (where delinquent corporation distributed assets to its stockholders, interest did not begin accruing because stockholders did not know of tax debt until *after* transfer); *Williamson v. Comm'r*, No. 19476-89, T.C. Memo. 1993-258, 1993 WL 207682, at *10 (June 14, 1993) (declining to assess interest against transferee from date of transfer to notice of deficiency where there was no evidence transferee participated in transferor's fraud or was aware of his fraudulent intent); Even Judge Ruwe's concurring opinion in *Baptiste* acknowledged that "in some situations where there was no culpability on the part of the transferee, interest may not begin to run *until* notice and demand has been given to the transferee." *Baptiste*, 100 T.C. at 259 n.2 (emphasis added).

section 6324, namely the value-of-the-gift cap.[23] There is no indication that Congress intended to treat innocent recipients worse in every way under section 6324 than all but the most complicit, knowing transferees are treated in equity.

C. The Government's demand for interest to compensate for the time value of money fails as a matter of law and fact.

The Government cites the general principle that interest is compensation for the use of money, and argues from it that Congress must have intended the Government's cabined view of the value-of-the-gift cap because imposing unlimited interest on a donee is simply giving the Government what rightfully belongs to it. This is "consistent with the economic realities," the Government contends, because the donee had the "continued use and enjoyment of the transferred assets while the government's tax obligation remained unpaid." Dist. Ct. ECF No. 61 at 17 (citing *Baptiste v. Comm'r*, 29 F.3d 1533, 1542 n.19 (11th Cir. 1994)).

That a transferee owes the Government money does not carry any inherent or presumptive obligation to pay interest based purely on the theory of the time value of money. The truth of this principle is illustrated by cases of transferee liability in equity, in which transferees are not always liable for interest for the

[23] Other protections in equity include the Government's obligation to exhaust its remedies against the transferor in the first instance. *See* Newton, *supra*, 12 Hous. L. Rev. at 831-32.

period before they had notice, even though they have use of the money during the pre-notice period. *See, e.g.*, *Pallister*, 182 F. Supp. at 724.

Invocation of money's time value does not supplant the explicit statutory scheme for gift-tax transferee liability. This scheme delimits the Government's right to interest. Section 6601(a) requires that interest be paid on any amount of tax that is not timely paid; here, the only unpaid tax is the donor's gift tax. A donee is personally liable for payment of the donor's unpaid "tax" under section 6324; the donee is also liable for interest on the donor's unpaid tax because section 6601(e)(1) provides that the term "tax" includes interest. However, section 6324 clearly caps the donee's transferee liability at the value of the gift.

Additionally, a gift recipient's "use of the money" may, from a time-value perspective, be illusory. In particular, the assumption that charitable organizations have "use of money" in the sense of employing it for income-producing purposes is at odds with the operation of most charities. Money received is put to work in charitable activities; even if some organizations have endowments, they usually are, as in the case of HBCUs, relatively small or committed to specific projects. In the case of a college or university, the contributed funds may be used for financial aid or to increase faculty salaries. A cash gift may be restricted and used to build a new library, laboratory, classroom building, or cancer-treatment center. The money likely has long been used up for non-profit, and non-income-producing, purposes by the time the Government comes knocking.

Moreover, colleges and universities, like other charities, often receive gifts of *non-cash* items, including land and other real estate; art, other collectables, and tangible personal property of many kinds; stock, illiquid securities, partnership interests, and oil and gas interests; and other sources of potential value. *See generally* Martin Hall & Carolyn M. Osteen, *The Harvard Manual on Tax Aspects of Charitable Giving* chs. 4-7, 11 (9th ed. 2011) (addressing types of gifts made to universities and other charitable organizations). Contributions of personal property other than cash and marketable securities may be intended for employment in the service of specific charitable purposes: Valuable artwork or antiques may be displayed in museums for educational purposes; rare books or music archives may be put to use in scholarly research; undeveloped land may be intended for expanding the college's campus or for forest-biology research. Liquidating the gift to liberate its monetary value would defeat the very charitable purpose of the gift in the first place.

In short, there is little in fact or law to support the suggestion that a donee's having received a gift of some sort is a sufficient ground in and of itself for imposing an uncapped obligation to pay interest for the entire period that the donor's gift tax remained unpaid. Indeed, most charities would be surprised to hear that they had "the use of the Government's money" while, unbeknownst to them, a donor's tax liabilities were unsatisfied.

III. The District Court's Decision Could Have Debilitating Consequences for Charities, Their Beneficiaries, and Other Donees.

In section 6324(b), Congress has clearly indicated through the value-of-the-gift cap that a charity or other donee must, in effect, return a gift from a donor that has not met his or her federal tax obligations. As explained in part I, this rule itself may lead to unjust results and hardships for charities and other innocent donees, but Congress has made the judgment that such unfairness is warranted in order to protect the public fisc. By holding that section 6324(b)'s cap does not apply to interest on the unpaid taxes, the district court achieved a result that Congress never intended: Charities and other donees may have to pay out of their own pockets, ending up worse off than if they had never received the gift.

The district court's rulings exacerbate an already difficult situation. Even well-established rules for transferee liability can impose unfair liabilities on innocent transferees, a point made clear by the Third Circuit when faced with a collection action against transferees that would result in "a forfeiture of their entire inheritance." *United States v. Geniviva*, 16 F.3d 522, 525 (3d Cir. 1994). The transferees "received their inheritance apparently believing that the affairs of their late mother's estate had been competently represented, both professionally and personally," but "[y]ears later they found out that the estate had been poorly advised … and had an unresolved, serious tax problem." *Id.* The court commented, "[W]e express a certain sorrow that what seems inherently unfair is also quite in accordance with the law, and note a compassion for the equitable position of the appellants." *Id.*; *see also Botefuhr*, 309 F.3d at 1278 n.11 ("We appreciate [the] frustration at being held liable for gifts made many years ago.").

Here, the Government would have innocent donees pay *more* than they actually received, i.e., to pay, out of their own funds, tax liabilities that were incurred years before by donors whom the donee may not even have known, and because of gifts that the donee may never have sought or even wanted. Charitable organizations, like many other donees, have little practical ability to arm themselves against such fortuities. While a recipient of a gift would, all things being equal, be well served by inquiring about the donor's gift-tax status before spending the gift, many or even most recipients, like HBCUs, lack the expertise or fundraising resources to conduct any such due diligence. Even charities that do have the personnel and resources to undertake such inquiries would be reluctant to do so for fear that they would drive away donors who would be horrified that their generosity led to interrogation about their personal affairs.

Moreover, most charities, being dedicated to using their resources for their charitable purposes, do not have or maintain a financial cushion that enables them to be selective about their donors. Charitable organizations frequently must depend on the kindness of strangers; they cannot afford to look a gift horse in the mouth, much less in its tax returns. If transferee liability is capped at the value of the gift, at least charities would not have to be concerned about ending up worse off for having been the object of generosity in the first place.[24]

The potential for uncapped interest liability puts charities in a particularly difficult bind, because interest on unpaid gift taxes could eat up not just that gift, but also other charitable contributions that would have to be tapped to pay the excess interest. Many charities, like HBCUs, do not have large unrestricted endowments or reserves with surplus funds, and they would find it difficult to obtain commercial loans to cover transferee liability. The contributions of other donors may be the only funds available to satisfy the transferee liability. And borrowing from Peter's charitable contribution to pay Paul's unpaid gift taxes may create serious donor-relations problems: One who contributes to a charity may be greatly dismayed to learn that the gift was used not for charitable purposes but instead to satisfy some other donor's unpaid taxes.

The added uncertainty over whether a donee could be liable beyond the amount of the gift it received would increase the pressure on charities to refrain

[24] An exception would be a situation where a donee received property which declined in value after the date of the gift. The donee could end up worse off than if it had never received the gift because its liability would be capped at the value of the gift on the date that it was transferred to the donee, not on the date the donee received notice of its liability as a transferee.

from using gifts to support their missions for at least some unknown period of time. But for most charities, that is simply not practical or desirable. HBCUs, for example, do not have the size or type of endowments that would allow them to do that, but instead must use gifts for their intended projects and other, more-immediate purposes. And any such forced savings that were effected would come with societal costs if a charity felt compelled to hold back on spending funds for pressing needs such as financial aid for students or much-needed repairs to campus buildings, or to liquidate non-cash gifts like land or art.

There is no indication that Congress ever anticipated or wanted such untoward results. This Court should not construe the value-of-the-gift cap to make them more likely.

CONCLUSION

The Court should reverse the district court's judgment below.

DATED this 29th day of April, 2013.

STEPTOE & JOHNSON LLP

By s/ Bennett Evan Cooper
Suzanne Ross McDowell
1330 Connecticut Ave., NW
Washington, D.C. 20036

Bennett Evan Cooper
Douglas D. Janicik
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382

Attorneys for Amici Curiae Johnson C. Smith University, Barber-Scotia College, Bennett College, Clinton Junior College, and Wilberforce University

CERTIFICATE OF SERVICE

I certify that on April 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Court's CM/ECF system. I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

Ivan Clay Dale
United States Department of Justice
Tax Division, Appellate Section
P.O. Box 502
Washington, D.C. 20044-0000

William R. Cousins, III
Robert Don Collier
Stephen A. Beck
Brian J. Spiegel
Meadows, Collier, Reed, Cousins,
Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202

Emily A. Parker
Eric G. Reis
Scott P. Stolley
Thompson & Knight, LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201

John William Porter
Jeffrey D. Watters, Jr.
Baker Botts, L.L.P.
One Shell Plaza
910 Louisiana Street, Suite 3300
Houston, Texas 77002-4995

s/ Bennett Evan Cooper

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6,850 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman.

DATED this 29th day of April, 2013.

s/ Bennett Evan Cooper
Bennett Evan Cooper
Attorneys for Amici Curiae