

Supreme Court, U.S.  
FILED

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IN THE SUPREME COURT  
OF THE UNITED STATES

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GORDON DAVENPORT,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

An estate filed suit in tax court under 26 U.S.C. § 6213 to contest an alleged gift tax deficiency on the ground that no completed gift occurred during the tax period. For purposes of the tax court proceeding only, the estate and the Government stipulated the value of the property allegedly constituting the gift. The tax court ruled that a completed gift occurred during the tax period and that the estate owed gift tax based on the stipulated value. Thereafter, the Government sued the alleged transferee of the gift, seeking to hold him liable for the unpaid gift tax under 26 U.S.C. § 6324(b), which limits the amount of transferee liability to the value of the property transferred.

The question presented, on which the courts of appeals are divided, is as follows:

Whether the Government may rely on the res judicata effect of the tax court adjudication to establish elements of the § 6324 claim, including the alleged transferee's status as a transferee and the value of the property transferred, even though (1) the alleged transferee was not and could not have been a party to the tax court proceeding and (2) the Government has the burden of proof on these elements in the § 6324 proceeding, but the estate had the burden of proof in the tax court proceeding.

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## PETITION FOR A WRIT OF CERTIORARI

Gordon E. Davenport respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### OPINIONS BELOW

The April 9, 2007 opinion of the Fifth Circuit Court of Appeals reversing the judgment of the district court (App. 1a-17a) is reported at 484 F.3d 321. The Fifth Circuit's May 14, 2007 order denying Petitioner Gordon E. Davenport's petitions for panel and en banc rehearing (App. 85a-86a) is unreported.

The district court's June 18, 2004 opinion and order granting in part and denying in part Mr. Davenport's Motion for Summary Judgment and the Government's Cross-Motion for Partial Summary Judgment (App. 18a-39a) is reported at 327 F. Supp. 2d 725. R.757.<sup>1</sup> The magistrate judge's February 22, 2005 report and recommendation that the district court grant in part and deny in part Mr. Davenport's Second Motion for Summary Judgment and the Government's Second Cross-Motion for Partial Summary Judgment Regarding Valuation (App. 40a-50a) is unreported. R.1027. The district court's March 16, 2005 order overruling the parties' objections to the magistrate judge's February 22, 2005 report and recommendation (App. 51a-52a) is unreported. R.1079.

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<sup>1</sup> The clerk's record is cited herein with the abbreviation "R." followed by the page range cited.

The magistrate judge's January 18, 2006 opinion and order granting Mr. Davenport's Third Motion for Summary Judgment (App. 53a-56a) is unreported. R.1726. The January 18, 2006 final judgment entered by the magistrate judge (App. 57a) is unreported. R.1729.

## **JURISDICTION**

The judgment of the court of appeals was entered on April 9, 2007. Mr. Davenport timely filed petitions for panel and en banc rehearing on April 23, 2007. The court of appeals denied Mr. Davenport's petitions on May 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The question presented implicates the following provision of the United States Constitution:

U.S. Const. art. I, § 8, cl. 1:

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

The question presented implicates the following provisions of the United States Code:

26 U.S.C. § 6324 (b):

**Lien for gift tax.**—Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such 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. 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. § 6902(a):

**Burden of proof.**—In proceedings before the Tax Court the burden of proof shall be upon the Secretary to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

### STATEMENT

This case presents the issue of whether the Government may rely upon the res judicata effect of a prior tax court adjudication of a transferor's tax liability, which was based on stipulated facts, to preclude litigation of discrete elements of a § 6324 transferee liability claim the Government subsequently asserts against an alleged transferee. The

Fifth Circuit concluded that the Government may do so, even though (1) the alleged transferee was not and could not have been a party to the tax court proceeding, (2) the factual elements in question were stipulated rather than litigated in the tax court proceeding, and (3) the Tax Code allocates the burden of proof on the elements to the Government in the § 6324 proceeding but to the transferor in the tax court proceeding.

The Fifth Circuit's holding, which constitutes a fundamental misapplication of principles of claim and issue preclusion articulated by this Court, creates a split among the circuits. Apart from the Fifth Circuit, courts have uniformly held that res judicata precludes a § 6324 defendant from litigating *only* the transferor's tax liability, but *not* other elements of the § 6324 claim. The Fifth Circuit's application of res judicata also eviscerates the Tax Code's allocation of the burden of proof to the Government in transferee liability proceedings, allowing the Government to rely on factual findings from a tax court proceeding in which the Government *does not* bear the burden of proof to establish factual issues in a subsequent transferee liability proceeding in which the Government *does* bear the burden of proof. Absent correction by this Court, the Fifth Circuit's holding in this case will undermine uniform application of the Tax Code, which is both constitutionally and congressionally mandated.

### **A. The Transfers.**

Birnie Davenport and her sister Elizabeth Davenport jointly owned 3220 shares of stock in Hondo Drilling Company. R.833. While the sisters had orally agreed that they each owned half the stock, legal title to all of the shares was in Elizabeth's name. R.833. Elizabeth died in December 1979. R.832. In July 1980, Birnie transferred her interest in 1610 shares of the stock to her two nephews, Charles Botefuhr and Petitioner Gordon Davenport, and her niece, Patricia Vestal, in essentially equal amounts, using two conveyance methods.

First, Birnie transferred her interest in 537 shares to Mr. Davenport and 536 shares to Vestal through installment sale agreements that valued the stock at \$804 per share. R.835.<sup>2</sup> The \$804 price per share was determined by reference to Hondo's annual financial statement and its internal determination of the redemption price it was willing to pay shareholders to redeem their shares for the fiscal year ended August 31, 1980. R.834. Second, Birnie transferred 537 shares to Botefuhr as an outright gift. R.832. In a signed agreement, Botefuhr promised to file a gift tax return reporting Birnie's gift to

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<sup>2</sup> Birnie reported the installment sales on her 1980 income tax return and indicated on that form that the sales were to related parties. R.812. Copies of the sales agreements and Birnie's 1980 income tax return were provided to the IRS agent who later examined Elizabeth's estate. R.668. In March 1982, Birnie forgave the promissory notes Mr. Davenport and Vestal executed in connection with the installment agreements and timely filed a gift tax return reflecting forgiveness of the notes. R.835-36.

him and to pay on her behalf the gift taxes associated with his gift. Botefuhr did not fulfill this responsibility. R.814-16.

At the time of these transfers in 1980, it was anticipated that the IRS would dispute Birnie's ownership interest in the stock. True to predictions, in connection with an audit of Elizabeth's estate tax return, which listed among her estate's assets only 1610 shares of Hondo stock, the IRS took the position in 1982 that Elizabeth owned all 3220 shares of stock and that Birnie owned none. R.834. The ensuing litigation ultimately settled in 1984, when the IRS acquiesced in the estate's position that Birnie owned half of the shares in exchange for the estate's agreement to value the 1610 shares at \$2400 per share as of the time of Elizabeth's death in 1979. R.834.<sup>3</sup> Because Birnie's ownership interest in the stock was in dispute at the time of the 1980 transfers, the value of what she transferred to her niece and nephews at that time was "speculative and subjective." R.1209.

### **B. The Gift Tax Deficiency and Tax Court Proceedings.**

Birnie died in 1991. R.831. During the course of preparing her estate tax return, it came to light that Botefuhr had never filed the 1980 gift tax re-

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<sup>3</sup> Internal memoranda from the IRS acknowledge that the \$2400 per share value was higher than the value of the stock the tax court would likely find and resulted more from the IRS's effort to settle the ownership issue than an actual market valuation of the stock. R.1711.



turn or paid the applicable gift taxes on his gift as promised. R.752. In November 1991, Birnie's estate filed the estate tax return and a gift tax return, reporting the 1980 gift to Botefuhr at \$804 per share and paying gift tax of \$95,322 with the return. R.832

In 1992, the IRS audited Birnie's estate tax return and 1980 gift tax return and claimed that (1) Birnie's gift to Botefuhr should have been valued at \$2730 per share rather than \$804 per share and (2) the 1980 sales to Mr. Davenport and Vestal constituted imputed gifts of \$1861 per share because the stock was undervalued at \$804 per share in the installment agreements. R.837, 1424. Birnie's estate filed suit in tax court under 26 U.S.C. § 6213 to contest the alleged resulting gift tax deficiency, arguing principally that Birnie did not make a completed gift in the third quarter of 1980 because she did not have legal title to the stock at that time and was not listed as record owner of the stock on Hondo's books. *Estate of Davenport v. Comm'r*, 74 T.C.M. (CCH) 405 (1997). Prior to trial, the Government and the estate entered into the following stipulation:

*For the purposes of this litigation, if the Court finds that Birnie Davenport transferred Hondo stock to Patricia Vestal, Gordon Davenport and Charles Botefuhr in the calendar quarter ended September 30, 1980, the parties agree that the fair market value of such Hondo stock was \$2,000.00 per share at the time of the transfers.*

R.837 (emphasis added). Notably, of the forty-four stipulations in the tax court, this constituted *the only one* that contained this limiting language. R.830-38.

The tax court concluded that, although Birnie did not possess legal title to the Hondo stock at the time, Birnie had completed transfers of her inchoate interest in the stock in 1980. App. 82a. Utilizing the parties' stipulated value for the stock, the tax court calculated that the estate owed \$822,653.00 in unpaid gift tax. App. 5a. The estate appealed, and the Tenth Circuit affirmed. *See Estate of Davenport v. Comm'r*, 184 F.3d 1176 (10th Cir. 1999).

### **C. The Transferee Liability Proceedings.**

In March 1998, the IRS made an assessment against Birnie's estate, but the estate lacked funds to pay the assessment, which, with eighteen years of penalties and interest, had ballooned to \$5.2 million. R.703. In February 2000, the Government filed the current action in the Northern District of Oklahoma, seeking to hold Mr. Davenport, Vestal, and Botefuhr personally liable for the unpaid gift tax as transferees under 26 U.S.C. § 6324(b). R.23.<sup>4</sup> The Oklahoma district court, after denying Mr. Davenport's and Botefuhr's motions to dismiss for lack of per-

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<sup>4</sup> The Government also named Birnie's estate as an additional defendant in the action, seeking to reduce to judgment the tax court's adjudication of Birnie's tax liability through a separate count from the § 6324(b) claims asserted against the remaining defendants. R.23, 25-27.

sonal jurisdiction, granted summary judgment for the Government on its § 6324(b) claims against all three cousins. *See United States v. Estate of Davenport*, 159 F. Supp. 2d 1330 (N.D. Okla. 2001).

On appeal, the Tenth Circuit held that the district court lacked personal jurisdiction over Mr. Davenport and Botefuhr. *See United States v. Botefuhr*, 309 F.3d 1263, 1274 (10th Cir. 2002) (Ebel, J.). In considering Vestal's appeal of the summary judgment against her, the court held that the district court erred in holding that Vestal was bound by the tax court stipulation as to the value of the stock she received from Birnie. *See id.* at 1281-82. Specifically, the court held that (1) collateral estoppel, rather than res judicata, governed the determination of whether Vestal could litigate the value of the stock interest she received from Birnie for purposes of determining the scope of her § 6324 transferee liability, and (2) because the stock value had been stipulated rather than actually litigated in the tax court proceeding against Birnie's estate, collateral estoppel did not preclude Vestal from litigating the valuation issue. *See id.* at 1282-83.

On remand, the Government's case against Mr. Davenport was transferred to the Southern District of Texas. R.548. The parties filed cross-motions for summary judgment on numerous matters, including the preclusive effect of the tax court proceeding. The Government argued that res judicata prevented Mr. Davenport from litigating Birnie's tax liability and that collateral estoppel pre-

vented him from litigating the valuation issue.<sup>5</sup> R.946-60. Like the Tenth Circuit, the district court rejected the Government's argument that collateral estoppel prevented Mr. Davenport from contesting the value of the inchoate stock interest he received for purposes of establishing his maximum liability under § 6324(b) because the issue was not actually litigated in the tax court proceeding. App. 46a; R.1033-34. The district court subsequently struck the opinion of the Government's valuation expert, who had not been made aware of the dispute as to Birnie's title to the Hondo stock that existed at the time of the 1980 transfers and conceded that the existence of this dispute rendered any valuation of the stock interest Birnie transferred to Mr. Davenport "speculative and subjective." R.1209, 1590. The dis-

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<sup>5</sup> In its summary judgment briefing, the Government repeatedly argued that *res judicata* barred only relitigation of the tax liability of Birnie's estate and that *collateral estoppel alone* barred litigation of the value of the stock:

*Collateral estoppel* binds Davenport to [the] determined *stock value* . . . .

Davenport is bound to the Tax Court's determination of *gift tax* due through *res judicata* (claim preclusion). As to the determination of *individual issues* that formed the building blocks of the Tax Court's gift tax determination, . . . *collateral estoppel (issue preclusion) applies*. . . .

*Res judicata* bars [a] global attack to challenge the *amount of tax due*. *Collateral estoppel* bars relitigation of specific building block issues . . . .

With respect to the *stock itself*, Davenport is bound to the value determined by the Tax Court *through collateral estoppel*.

R. 946, 956, 957, 959-60 (emphases added).

district court thereafter granted summary judgment for Mr. Davenport because the Government had no evidence of the value of the property he received from Birnie in 1980, and thus no evidence to support imposition of any amount of personal liability under § 6324(b). R.1728.

The Government appealed to the Fifth Circuit, arguing for the first time that *res judicata*—as opposed to collateral estoppel—precluded Mr. Davenport from contesting the value of the inchoate stock interest he received from Birnie.<sup>6</sup> The Fifth Circuit reversed the judgment of the district court based on this new argument, holding that “*res judicata* binds Gordon Davenport to the value of the Hondo stock established in the tax proceeding.” App. 17a. Thus, the Fifth Circuit held that Mr. Davenport owes the Government over \$640,000<sup>7</sup> on account of a gift the Government claims he received nearly thirty years ago, even though neither Mr. Davenport nor anyone else has ever actually litigated the issues of whether

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<sup>6</sup> The Government raised this contention in passing in its objections to the magistrate judge’s report and recommendation, R.1037; however, it never presented the issue in summary judgment briefing before the magistrate judge. The Government first fully briefed its contention that *res judicata* precludes Mr. Davenport from litigating the value of the stock interest on appeal—only *after* the district court struck its valuation expert and held that the Government lacked any evidence to carry its burden of proving the value of the stock interest.

<sup>7</sup> This figure represents the value of the imputed gift to Mr. Davenport, assuming a stock value of \$2000 per share.

he even received a gift,<sup>8</sup> and, if so, the value of the gift at the time he received it.

### **REASONS FOR GRANTING THE PETITION**

The Fifth Circuit's holding that the tax court's adjudication of Birnie's tax liability precludes Mr. Davenport from litigating his status as a transferee and the value of the stock interest Birnie transferred to him creates a circuit split that this Court should resolve. The Fifth Circuit's holding conflicts with the decisions of all other circuits to have considered the issue. For seventy years those courts have uniformly held that, while a prior tax liability adjudication against a transferor precludes a § 6324 defendant from litigating the transferor's tax liability, it does *not* preclude the alleged transferee from litigating other elements of the § 6324 claim, including transferee status and the value of the property transferred. Indeed, that is precisely what the Tenth Circuit held on these same facts.

The Fifth Circuit's application of *res judicata* also eviscerates the Tax Code's allocation of the burden of proof to the Government in transferee liability proceedings. Specifically, it allows the Government to rely on factual findings from a tax court proceed-

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<sup>8</sup> While the tax court determined that an inchoate interest in stock was transferred to Mr. Davenport in 1980, whether that transfer constituted a gift depends upon whether the fair market value of the stock interest exceeded the \$804 per share purchase price he agreed to pay at the time. Given that the value of the stock has never been litigated, whether the conveyance constituted a gift has never been litigated either.

ing in which the Government *does not* bear the burden of proof to establish factual issues in a subsequent transferee liability proceeding in which the Government *does* bear the burden of proof.

Absent review by this Court, determinations of a transferor's tax liability will have a far broader preclusive effect in subsequent transferee liability proceedings that the Government initiates in the Fifth Circuit than the same determinations would have in transferee liability proceedings initiated in any other circuit. Such a result is neither fair to litigants nor consistent with the constitutional and congressional mandate of uniform construction and application of the Tax Code.

**I. THE FIFTH CIRCUIT'S USE OF RES JUDICATA TO ESTABLISH TRANSFEREE LIABILITY UNDER THE TAX CODE CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS, INCLUDING THE TENTH CIRCUIT'S HOLDING ON IDENTICAL FACTS.**

The Fifth Circuit held that the res judicata effect of the tax court's adjudication of Birnie's gift tax liability "binds [Mr.] Davenport to the value of the Hondo stock established in the tax proceeding," even though the valuation resulted from a stipulation rather than actual litigation. App. 17a. The Fifth Circuit acknowledged that its holding is in direct conflict with the Tenth Circuit's holding—on these very same facts—that principles of collateral estoppel rather than res judicata determine whether a

§ 6324 defendant is precluded from litigating particular factual issues that may also have been germane to the tax liability claim against the transferor, such as transferee status and value of the property transferred. *See Botefuhr*, 309 F.3d at 1281-83. The Tenth Circuit held that, because the value of the stock interest transferred to Birnie's niece and nephews was not actually litigated in the tax court proceeding, collateral estoppel did not preclude Vestal from litigating this issue for purposes of determining the scope of her § 6324(b) liability. *See id.* at 1283.<sup>9</sup> Had the Fifth Circuit applied the Tenth Circuit's analysis, it would have concluded that Mr. Davenport, like Vestal, is not precluded from litigating the value of the stock interest Birnie transferred to him.

The basis of the Fifth Circuit's holding—and the core of its conflict with the Tenth Circuit—is its conclusion that a § 6324 transferee liability claim constitutes the same claim as the tax liability claim against the transferor. App. 12a-13a. Thus, in the Fifth Circuit, the *res judicata* effect of a prior adjudication of the tax liability claim precludes litigation of

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<sup>9</sup> Law of the case binds the Government to this conclusion that collateral estoppel does not apply because the issue was conclusively adjudicated against the Government before the case against Mr. Davenport was transferred for want of jurisdiction. *See United States v. 49.01 Acres of Land*, 802 F.2d 387, 389-90 (10th Cir. 1986); *see also Int'l Union, UAW v. Donovan*, 756 F.2d 162, 165 (D.C. Cir. 1985) (“[W]e will adopt and give full effect to otherwise valid orders entered by the lower court prior to transfer [of the case for lack of jurisdiction] . . . . We will treat these orders essentially as being the law of the case . . .”).



factual issues pertinent to the transferee liability claim. As demonstrated below, the Fifth Circuit's same-claim holding conflicts not only with the holding of the Tenth Circuit, but also with the holdings of every other court to have addressed the issue.

This Court has long observed that *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are related but distinct preclusion doctrines. As its alternative name suggests, *res judicata* prevents relitigation of *claims*—i.e., it “puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever,” regardless of whether the ground or issue was actually litigated when the claim was first adjudicated. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983).

By contrast, collateral estoppel precludes relitigation of particular *issues*. Collateral estoppel operates to preclude litigation of a particular issue in a second suit even if the claim or cause of action involved in the second suit is different from a previously adjudicated claim involving the same issue, but *only if* the issue was *actually litigated* in connection with the prior claim. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979) (“Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.”). Thus, while *res judicata* and collateral estoppel both involve successive litigation entailing overlapping issues or elements, the distinction between the application of *res judicata*

and collateral estoppel hinges upon whether the claim adjudicated in a prior action constitutes the same claim asserted in a subsequent action.

A § 6324 transferee liability claim has the following elements: (1) tax liability on the part of a transferor; (2) the transferor's failure to pay the tax when due; (3) transfer of property by the transferor to the § 6324 defendant (transferee status); and (4) value of the property transferred to the transferee (which establishes the upper limit of the defendant's transferee liability). *See* 26 U.S.C. § 6324(b). The Government bears the burden of proving each of these elements other than the transferor's tax liability. *See Sather v. Comm'r*, 251 F.3d 1168, 1176 (8th Cir. 2001) ("The IRS must prove only that the transferee was the recipient of a taxable transfer, the gift tax was not paid when due, and the extent of the value of the gift.").

If, as the Fifth Circuit has concluded, the § 6324 transferee liability claim were the same claim as the tax liability claim against the transferor, such that *res judicata* rather than collateral estoppel determines the preclusive effect of the adjudication of one claim on the other, then the § 6324 defendant would be foreclosed from litigating *any element* of the § 6324 claim because *res judicata* prevents supporting or defending the claim on "*any ground whatever*," including the ground that particular elements of the claim are unproven. *Nevada*, 463 U.S. at 129-30 (emphasis added).<sup>10</sup> Yet, *for seventy years*, federal

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<sup>10</sup> While the Fifth Circuit couched its holding in terms of precluding Mr. Davenport's litigation of a particular factual

courts have uniformly held that, notwithstanding a prior tax liability adjudication against a transferor, the transferee may litigate all elements of the transferee liability claim other than the transferor's tax liability.

In *First National Bank v. Commissioner*, 112 F.2d 260 (7th Cir. 1940), the court held that, because a transferor and transferee are deemed to be in privity with respect to the existence and amount of the transferor's tax liability, "a judgment against a transferor for taxes . . . may, consistently with due process of law, be treated as concluding the transferee respecting the existence and amount of indebtedness so adjudged." *Id.* at 262. However, the court went on to hold that the transferee "is entitled upon the most fundamental principles to his day in court and a hearing . . . to show that he has not received property as transferee sufficient to discharge the liability." *Id.*; see also *Pert v. Comm'r*, 105 T.C. 370, 371 (1995) (holding that the preclusive effect of a tax liability adjudication against a transferor prevented an alleged transferee from relitigating the transferor's tax liability, but "leav[ing] certain other issues for trial, such as whether (or to what extent) petitioner is a transferee."). In other words, a prior tax court adjudication precludes the alleged transferee from relitigating the transferor's indebtedness, but it

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element pertinent to the § 6324 claim—specifically, "the value of the Hondo stock established in the tax court proceeding" (App. 17a)—the effect of the Court's holding is that Mr. Davenport is precluded from litigating the § 6324 claim *at all* because the *claim*—as opposed to some discrete *element* of the claim—has already been adjudicated against him.

*does not* preclude the alleged transferee from litigating either his transferee status or the value of the property transferred.

The Eleventh Circuit's decision in *Baptiste v. Commissioner*, 29 F.3d 1533 (11th Cir. 1994), on which the Fifth Circuit relied as the primary support for its holding, also makes clear that a prior adjudication of the transferor's tax liability does not preclude a § 6324 defendant from litigating elements of the transferee liability claim other than the transferor's tax liability.<sup>11</sup> Specifically, the Eleventh Circuit held that *Baptiste* was a transferee, *not* based on the res judicata effect of the tax court determination of the transferor's tax liability, but rather based on a determination that the facts alleged in the Government's pleadings, which were deemed admitted under a tax court procedural rule by virtue of *Baptiste's* failure to deny them, "are sufficient to establish, as a matter of law, *Baptiste's* status as a transferee." *Baptiste*, 29 F.3d at 1538. This determination would have been superfluous if the prior tax court decision's res judicata effect precluded *Baptiste*

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<sup>11</sup> The Fifth Circuit also relied upon *Baptiste v. Commissioner*, 29 F.3d 433 (8th Cir. 1994), which addressed a claim of alleged transferee liability involving the same transferor at issue in the Eleventh Circuit's decision cited above. The alleged transferee in the Eighth Circuit case challenged neither his transferee status nor the value of the property transferred to him. The Eighth Circuit therefore had no occasion to address whether the res judicata effect of the adjudication of the transferor's tax liability would preclude the alleged transferee from challenging his transferee status or the value of property transferred to him.

from contesting his transferee status as well as the transferor's tax liability.<sup>12</sup>

These holdings that § 6324 defendants are permitted to litigate elements of the transferee liability claim other than the transferor's tax liability demonstrate that the courts have uniformly concluded that a transferee liability claim cannot constitute the same claim as an underlying tax liability claim against the transferor for purposes of res judicata; otherwise, res judicata would preclude litigation of *any element* of the transferee liability claim. The Fifth Circuit's holding thus creates a circuit split.

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<sup>12</sup> Certain cases addressing the preclusive effect of a prior tax court adjudication of transferor tax liability upon a subsequent transferee liability proceeding identify res judicata rather than collateral estoppel as the preclusion doctrine that prevents the alleged transferee from litigating the transferor's tax liability. *See, e.g., Pert*, 105 T.C. at 376-77; *Baptiste*, 29 F.3d at 1540. The reason for this characterization is that, while the transferor's tax liability is an independent *claim* against the transferor, it is merely a single *element* of the § 6324 claim against the transferee. App. 11a ("Generally, '[t]he tax liability of a particular tax for a particular taxable year' is a *single cause of action*." (citing 15 Elizabeth K. Berman, *Mertens Law of Federal Income Taxation* § 60:33 (2000) (emphasis added))).

It does not follow from this characterization, however, that the entire § 6324 claim, which merely includes the transferor's tax liability as one of its *elements*, constitutes the *same claim* as the transferor tax liability claim, such that res judicata *also* precludes the alleged transferee from litigating elements of the § 6324 claim *other than the transferor's tax liability*, as the Fifth Circuit incorrectly concluded.

## II. THE FIFTH CIRCUIT'S HOLDING CONTRAVENES FUNDAMENTAL PRINCIPLES OF CLAIM AND ISSUE PRECLUSION ARTICULATED BY THIS COURT.

The Fifth Circuit's holding that the § 6324 transferee liability claim against Mr. Davenport constitutes the same claim as the tax liability claim previously adjudicated against Birnie's estate is inconsistent with fundamental principles of claim and issue preclusion articulated by this Court. This Court has held that a subsequently-asserted claim is the same as a prior claim, such that *res judicata* rather than collateral estoppel operates to determine the preclusive effect of the prior adjudication, only when the subsequently-asserted claim was or *could have been* asserted in the prior action. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were *previously available to the parties*, regardless of whether they were asserted or determined in the prior proceeding." (emphasis added)); *Eubanks v. F.D.I.C.*, 977 F.2d 166, 174 (5th Cir. 1992) ("The critical question for *res judicata* purposes is whether the party could or should have asserted the claim in the earlier proceeding.").

The § 6324 transferee liability claim against Mr. Davenport was not and could not have been asserted in the tax court proceeding regarding Birnie's estate and therefore cannot be the same claim as the tax liability claim. Mr. Davenport was not even a party to the tax court proceeding initiated by Birnie's estate. Indeed, he *could not have been* a party because Mr. Davenport had not been issued a

notice of deficiency or liability;<sup>13</sup> accordingly, the tax court would have lacked jurisdiction over any attempted intervention by Mr. Davenport. See *Siegel's Estate v. Comm'r*, 67 T.C. 1033, 1038 (1977) (“The record shows that no notice of deficiency or of liability as transferee has been issued to any of the persons seeking to intervene in this case. . . . Since no notice of deficiency has been issued to any of the moving parties, it is clear . . . that they may not be joined as parties in this case.”); *Guarino v. Comm'r*, 67 T.C. 329, 331 (1976). This forecloses a conclusion that the tax liability claim at issue in the tax court proceeding is the same as the transferee liability claim at issue here.

It is true, as the Fifth Circuit observed, that a transferor is deemed to be in privity with the transferee with regard to the final adjudication of the transferor's tax liability. App. 11a. However, the presence of privity cannot render the transferee liability claim against the alleged transferee the same claim or cause of action as the tax liability claim adjudicated against the transferor in an action to which the alleged transferee was not a party. This

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<sup>13</sup> While the IRS has the option of assessing transferee liability by sending a notice of liability to the alleged transferee, see 26 U.S.C. § 6901, such an assessment is not a prerequisite to a suit under § 6324. See *United States v. Geniviva*, 16 F.3d 522, 524 (3rd Cir. 1994) (citing *Leighton v. United States*, 289 U.S. 506, 507-08 (1933)); *United States v. Russell*, 461 F.2d 605, 606 (10th Cir. 1972); *Ripley v. Comm'r*, 102 T.C. 654, 659 (1994) (“[R]espondent was not required to issue a notice of transferee liability to petitioner pursuant to section 6901(a) or otherwise assess petitioner prior to taking steps . . . to enforce the special gift tax lien arising under section 6324(b)”).

Court has long acknowledged that any preclusive effect of a judgment in a prior action upon a subsequent action by or against one who is in privity with a party to the prior action, but who was not himself a party to that action, necessarily “falls under the rubric of collateral estoppel rather than *res judicata* because the latter doctrine presupposes identity between causes of action. And the cause of action [asserted in the prior action, even though arising from the same transaction as the subsequent action,] *differs by definition* from that which [the privy] subsequently seeks to litigate in his own right.” *Montana v. United States*, 440 U.S. 147, 154 (1979) (emphasis added); *see also* Note, Developments in the Law—*Res Judicata*, 65 Harv. L. Rev. 818, 862 (1952) (“Any such [preclusive] effect [of a prior judgment on a non-party to the action in which the judgment was entered] must arise through operation of collateral estoppel; *since a different party is involved in the second action, the ‘cause of action’ must be different.*” (emphasis added)); Restatement (Second) Judgments § 39 (1982), comment b (noting that, even where a non-party controls prior litigation to a sufficient extent that the judgment entered in the action may be given preclusive effect in a subsequent action by or against the non-party, only issue preclusion rather than claim preclusion applies in the subsequent action “because the person controlling the [first] litigation, as a nonparty, is by definition asserting or defending a claim other than one he himself may have”).

It is thus apparent that the § 6324(b) claim at issue here, which was not and could not have been



asserted in the tax court proceeding, cannot constitute the same claim as the tax liability claim against Birnie's estate for res judicata purposes.<sup>14</sup> The Court should grant certiorari to correct the Fifth Circuit's contrary holding, thereby addressing the circuit split the Fifth Circuit's holding creates and ensuring appropriate application of this Court's precedent. Given the extent of the Fifth Circuit's departure from well-established principles of claim and issue preclusion, summary reversal may even be warranted.

### **III. THE FIFTH CIRCUIT'S HOLDING EVISCERATES THE TAX CODE'S ALLOCATION OF THE BURDEN OF PROOF IN TRANSFEREE LIABILITY SUITS.**

"In a transferee liability case, . . . [the Government] must prove all of the elements of transferee liability except that [it] does not have the burden of proving that the transferor was liable for the tax." *Locke v. Comm'r*, 72 T.C.M. (CCH) 1481 (1996); see also 26 U.S.C. § 6902(a) ("[T]he burden of proof shall be upon the Secretary to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the

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<sup>14</sup> As a chronological matter, a transferee liability claim does not even accrue until after the tax liability claim against the transferor because one element of the transferee liability claim is proof that the tax was "not paid when due." 26 U.S.C. § 6324(b). Congress's enactment of different statutes of limitation applicable to transferor tax liability and subsequent transferee liability claims constitutes another telling indication that the claims cannot be the same for purposes of res judicata. Compare 26 U.S.C. § 6501 with *id.* § 6901.

tax.”). By contrast, in a tax liability proceeding, *the taxpayer* bears the burden of proving that the Government’s determination of tax liability is erroneous. See Tax Rule 142(a); *Healy v. Comm’r*, 345 U.S. 278, 283 n.15 (1953) (noting that the burden of proof in a transferee liability proceeding “may be contrasted to the rule that normally the burden of proof is on the taxpayer contesting the determination of the Commissioner”).

Thus, as the tax court observed, Birnie’s estate bore the burden of proving that the gift tax delinquency assessed by the Government was incorrect—i.e., of proving either (1) that no gift to Mr. Davenport or his cousins that would give rise to gift tax liability occurred in 1980 or (2) that the valuation of the stock interest the Government used to calculate the value of the alleged gift and the amount of associated gift tax was incorrect. App. 78a (“The burden of proof lies with petitioner.”). In this § 6324 suit against Mr. Davenport, however, the burden of proving that Mr. Davenport received a gift from Birnie in 1980 and, if so, the value of the gift received is upon the Government.

Allowing the Government to invoke *res judicata* to preclude Mr. Davenport from litigating his transferee status or the value of property he received eviscerates the Tax Code’s allocation of the burden of proof to the Government on these issues. If factual findings from a tax liability proceeding in which the Government *does not* bear the burden of proof are given preclusive effect in a transferee liability proceeding in which the Government *does* bear the burden of proof, then the allocation of the burden of

proof to the Government in the transferee liability proceeding is meaningless because preclusion effectively transfers the burden back to the alleged transferee.<sup>15</sup> Accordingly, *res judicata* cannot apply.<sup>16</sup> See Restatement (Second) Judgments § 28 (1982) (“Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [where] . . . *the burden [of proof] has shifted to [the other party in the subsequent action] . . .*” (emphasis added)); *cf. Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (“The difference in degree of the

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<sup>15</sup> By contrast, giving preclusive effect *only* to the determination of the tax liability of the transferor—as all the cases to address the issue prior to the Fifth Circuit have done, *see* Section 1, *supra*—is wholly consistent with the allocation of the burden of proof contemplated by the Tax Code, which specifically provides that the Government does *not* bear the burden of proving the transferor’s tax liability but *does* bear the burden on all other elements of transferee liability. 26 U.S.C. § 6902(a).

<sup>16</sup> Applying *res judicata* to relieve the Government of its obligation to carry the burden of proof on the value of the property transferred to Mr. Davenport is particularly pernicious, given that the Government’s own valuation expert concedes that the Government *could not carry that burden* because the dispute as to Birnie’s title to the stock at the time of the transfer renders any opinion regarding the value of the interest she transferred at that time inherently speculative, unreliable, and thus inadmissible. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

burden of proof in criminal and civil cases precludes application of the doctrine of res judicata.”<sup>17</sup>

**IV. RESOLUTION OF THE CIRCUIT SPLIT CREATED BY THE FIFTH CIRCUIT’S RULING IS CRITICAL TO MAINTAINING CONSTITUTIONALLY AND CONGRESSIONALLY MANDATED UNIFORMITY IN CONSTRUCTION AND APPLICATION OF THE TAX CODE.**

“It can hardly be denied that uniformity in the imposition and collection of federal taxes has always been regarded as extremely desirable in this country.” *Comm’r v. Stern*, 357 U.S. 39, 48-49 (1958) (Black, J., dissenting). Indeed, uniform application of the tax laws is constitutionally mandated: “all Duties, Imposts and Excises [levied by Congress] shall be uniform throughout the United States.” U.S. Const. art. 1, § 8, cl. 1. “Taxpayers should be treated equally without regard to the fortuity of residence . . . .” *Stern*, 357 U.S. at 49. This Court has long held that the constitutionally mandated

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<sup>17</sup> Certainly, if Congress believed that tax liability and transferee liability claims were one and the same, it would have had no occasion to enact a statute establishing a different burden of proof for transferee liability claims. This Court has long recognized that judicial decisions should not render statutory language meaningless or thwart Congressional intent as expressed in the statutory language; yet this is the precise effect of the Fifth Circuit’s holding. See *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (noting the “longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous”).

uniformity of taxation occurs only when a tax “operates with the same force and effect in every place where the subject of it is found.” *Edye v. Robertson*, 112 U.S. 580, 594 (1884); *see also Burnet v. Harmel*, 287 U.S. 103, 110 (1932) (holding that the Tax Code “is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation”).

The Fifth Circuit’s holding that the res judicata effect of a prior tax court determination precludes an alleged transferee from litigating his transferee status or the value of property transferred to him by the party primarily liable for the tax undermines the constitutional and congressional mandate of uniform construction and application of the Tax Code. The Fifth Circuit’s holding directly conflicts with seventy years of precedent from other courts to have considered the claim-preclusive effect of a prior tax liability determination upon a § 6324 defendant’s entitlement to litigate discrete factual elements of the § 6324 transferee liability claim other than the transferor’s tax liability. As noted above, all of the cases to have addressed the issue before the Fifth Circuit have held, either explicitly or implicitly, that the preclusive effect of a tax liability adjudication precludes an alleged transferee from litigating *only* the transferor’s tax liability; it does *not* preclude the alleged transferee from litigating his transferee status or the value of the property purportedly transferred to him. Further, the Fifth Circuit’s departure from this line of precedent violates fundamental principles of claim and issue preclusion articulated by this Court and renders the Tax Code’s express allocation of the burden of proof

to the Government in transferee liability cases meaningless.

Absent review by this Court, a stipulation in a tax court proceeding regarding a fact pertinent to tax liability will have much broader preclusive effect in § 6324 transferee liability proceedings the Government initiates in the Fifth Circuit than the *exact same* stipulation would have in transferee liability proceedings initiated in other circuits. In the Fifth Circuit, the transferor's stipulation to unlitigated factual issues will bind the transferee and relieve the Government of its statutory burden of proving the stipulated issues in the transferee liability case; in every other circuit, it will not. The inconsistency and uncertainty created by the Fifth Circuit's erroneous holding is neither fair to the litigants in such actions nor consistent with the congressional and constitutional mandate of uniform, consistent application of the Tax Code.

Review by this Court is necessary to correct the Fifth Circuit's serious legal error and ensure that alleged § 6324 transferees in all jurisdictions are treated consistently and in accordance with the statutory scheme mandated by the Constitution and the Congress.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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