No. 98-1101

In the Supreme Court of the United States

ROHN F. DRYE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the interest of an heir in an estate constitutes "property" or a "right[] to property" to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 152 F.3d 892. The orders of the district court (Pet. App. 19a-24a, 25a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998 (a Monday), and was granted on April 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 26 U.S.C. 6321 provides:

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

2. 26 U.S.C. 6322 provides:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

3. 26 U.S.C. 6331(a) provides, in relevant part:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien

provided in this chapter for the payment of such tax.

4. 26 U.S.C. 6334 (1994 & Supp. III 1997) provides, in relevant part:

> (a) Enumeration
>
> There shall be exempt from levy –
>
> (1) * * * Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;
>
> (2) * * * So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;
>
> (3) * * * So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value.
>
> (4) * * * Any amount payable to an individual with respect to his unemployment * * * under an unemployment compensation law * * * .
>
> (5) * * * Mail, addressed to any person, which has not been delivered to the addressee.
>
> (6) * * * Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a

person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll * * * and annuities based on retired or retainer pay under chapter 73 or title 10 of the United States Code.

(7) * * * Any amount payable to an individual as workmen's compensation * * * under a workmen's compensation law * * * .

(8) * * * If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) * * * Any amount payable to or received by an individual as wages or salary for personal services * * * to the extent that the total of such amounts * * * does not exceed the applicable exempt amount determined under subsection (d).

(10) * * * Any amount payable to an individual as a service-connected * * * disability benefit * * * .

(11) * * * Any amount payable to an individual as a recipient of public assistance under [specified federal and state programs].

> (12) * * * Any amount payable to a participant under the Job Training Partnership Act * * * .
>
> (13) * * * Except to the extent provided in subsection (e), the principal residence of the taxpayer * * * .
>
> * * * * *
>
> (c) Notwithstanding any other law of the United States * * * , no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

STATEMENT

1. Prior to June 1991, the Internal Revenue Service assessed income taxes and various penalties against petitioner Rohn Drye.[1] Because petitioner failed to pay these assessments, the Service filed notices of tax lien upon "all property and rights to property" belonging to him (26 U.S.C. 6321). Pet. App. 3a. The federal tax lien arises on all "property and rights to property" of the taxpayer "at the time the assessment is made" and continues in existence "until the liability for the amount so assessed * * * is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322.[2]

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[1] All references in this brief to "petitioner" are to Rohn Drye.

[2] The federal tax lien that arises under Section 6321 applies not only to property in which the taxpayer already has an interest but also to "all property and rights to property" thereafter acquired by the taxpayer. See, *e.g.*, *United States* v. *McDermott*, 507 U.S. 447, 448 (1993); *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

In August 1994, petitioner's mother died intestate, leaving an estate with a total value of approximately $233,000 to petitioner as her sole legal heir.[3] At the time of his mother's death, petitioner was insolvent and owed the government approximately $325,000 on the unpaid tax assessments for which notices of outstanding liens had been filed. Pet. App. 3a, 22a.

Because he was the "sole surviving heir" (C.A. App. 50), petitioner was appointed administrator of his mother's estate on August 17, 1994. See note 3, *supra*. In February 1995, however, petitioner executed and filed in the probate court an instrument entitled "Disclaimer and Consent" in which he disclaimed his entire interest in his mother's estate. Pet. App. 3a, 21a. Pursuant to that disclaimer, the estate passed by operation of state law to petitioner's daughter, Theresa Drye. *Id.* at 21a.[4] Petitioner's daughter concurrently established

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[3] Under Arkansas law, upon the death of an intestate, the estate passes "[f]irst, to the children of the intestate." Ark. Code Ann. § 28-9-214 (Michie 1987). As the "Petition for Appointment of Administrator" filed by petitioner in the Arkansas probate court states, his interest in his mother's estate was "that of sole surviving heir" (C.A. App. 50).

[4] Under Arkansas law, upon the death of the decedent intestate, real property passes immediately to the decedent's heirs and personal property passes to the personal representative for distribution to the heirs. Ark. Code Ann. § 28-9-203 (Michie 1987); see Pet. App. 32a-33a. An heir may disclaim his interest in the estate by filing a written disclaimer. Ark. Code Ann. § 28-2-101 (Michie 1987); see Pet. App. 30a-31a. If such a disclaimer is filed, state law creates a legal fiction that the disclaimant predeceased the decedent, with the result that the disclaimant's share of the estate passes to the next person in line to receive that share. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a. By filing such a disclaimer, an heir may prevent his state-law creditors from

a trust (The Drye Family 1995 Trust), the beneficiaries of which were petitioner, his wife, and his daughter. *Id.* at 3a-4a, 22a. Petitioner resigned as administrator of the estate and his daughter replaced him. *Id.* at 3a, 22a. The state probate court thereupon authorized the distribution of the estate property to petitioner's daughter, who used the property to fund the trust. *Id.* at 3a-4a.

After petitioner revealed his beneficial interest in this family trust during negotiations with the Internal Revenue Service in 1995, the government filed a notice of tax lien against the trust, as Drye's nominee. Pet. App. 4a, 21a.[5] The Service also levied upon accounts held in the trust's name at an investment company. The account proceeds of $134,004.33 were paid to the government pursuant to the levy. *Id.* at 4a, 23a.

2. On May 1, 1996, the trust filed a wrongful levy suit against the United States in federal district court under 26 U.S.C. 7426. The trustee contended that, because of the disclaimer of petitioner's interest in the estate, petitioner never held an interest in that estate to which the federal tax liens could attach. Pet. App. 2a, 4a, 26a. The United States filed a counterclaim against petitioner, the trust, the trustee, Sue Drye (petitioner's wife), and Theresa Drye (petitioner's daughter), seeking to reduce the assessments against petitioner to judgment and to foreclose on its tax liens (C.A. App. 6-7, 64, 67-71).

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obtaining payment from that share of the estate. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a.

[5] Property held in the name of a nominee or alter ego of a taxpayer is subject to levy for the collection of the taxpayer's tax liability. *Shades Ridge Holding Co.* v. *United States*, 888 F.2d 725, 728 (11th Cir. 1989) (citing *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977)), cert. denied, 494 U.S. 1027 (1990).

The district court granted the government's motion for summary judgment. Pet. App. 19a-24a. The court concluded that petitioner "obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens properly attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens." *Id.* at 23a. In response to the trustee's motion for reconsideration, the court emphasized that federal law determines the proper application of federal tax liens and that "a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens." *Id.* at 26a.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court explained that, under the federal tax lien statute, the court is to look to state law to determine "whether a given set of circumstances creates a right or interest" (*id.* at 12a) and then look to federal law to determine whether that right or interest constitutes "property" or "rights to property" (26 U.S.C. 6321) to which the federal tax lien attaches (Pet. App. 12a-13a, citing *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985)). See also Pet. App. 6a-8a.[6] The court held that an interest in property under state law constitutes "property" or "rights to property" under federal law (to which the federal tax lien attaches under 26 U.S.C. 6321) if the interest is transferable and has pecuniary value (Pet. App. 7a, 14a).

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[6] The court stated (Pet. App. 12a) that it parted company with the Fifth Circuit's decision in *Leggett* v. *United States*, 120 F.3d 592 (1997), and the Ninth Circuit's decision in *Mapes* v. *United States*, 15 F.3d 138 (1994), because those cases erroneously apply state law, rather than federal law, in ascertaining whether the interest possessed by the taxpayer constitutes "property" or "rights to property" under Section 6321.

The court of appeals concluded that petitioner's right to inherit the property of his mother's estate satisfied this standard because that right was transferable and had pecuniary value (Pet. App. 8a, 14a). Petitioner's interest thus represented "property" or "rights to property" for purposes of the federal tax lien statute, and the tax liens filed against petitioner attached to his interest in his mother's estate. *Id.* at 13a.

The court explained that petitioner's subsequent disclaimer of his interest under state law could not extinguish the federal liens that previously attached to that interest. The fact that, for purposes of state law, the disclaimer is treated as if it relates back to the date of the decedent's death does not mean that, at the time the lien attached, petitioner held no "property" or "rights to property" in the estate. Because the federal liens validly attached to that property *before* the disclaimer was made, petitioner's subsequent efforts to dispose of his interest could not defeat the federal lien. Title to the property transferred to the trust remained subject to the preexisting federal tax lien, and the levy on the assets held in the name of the trust to satisfy petitioner's debt was therefore not wrongful. Pet. App. 4a-5a, 17a-18a.

The court of appeals noted that 26 U.S.C. 6334 manifests a specific intent that the federal tax lien apply even to interests in "property" and "rights to property" that are validly disclaimed under state law. That statute establishes a comprehensive list of property interests that are exempt from the federal tax levy, and "[p]roperty or rights to property disclaimed under state law are not included in the list of exempt property" (Pet. App. 16a). Since 26 U.S.C. 6334(c) expressly provides that "no property or rights to property shall be exempt from levy other than the property specifically

made exempt by [26 U.S.C. 6334(a)]," the fact that Congress did *not* "exclude property exempt from levy under state law" in the list of interests that are exempt from levy under federal law "is indicative of its intention that such property be subject to federal levy" (Pet. App. 16a).

SUMMARY OF ARGUMENT

1. Under Section 6321 of the Internal Revenue Code, the United States has a lien "upon all property and rights to property" of a delinquent taxpayer. 26 U.S.C. 6321. That lien reaches "every interest in property that a taxpayer might have" (*United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985)) and therefore attached to the rights that petitioner acquired in his mother's estate.

Whether an interest that arises under state law constitutes "property" or "rights to property" for purposes of the federal tax lien is determined solely as "a matter of federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. Under the applicable federal standard, the interest of an heir in an estate constitutes "property" or "rights to property" because that interest is "protected by law," is transferable and has "an exchangeable value." See *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982). Indeed, it is well settled that such a "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725.

2. Once the federal tax lien attached to petitioner's interest in the estate, the lien could not be divested by "an indirect transfer [of that interest] effected by means of a disclaimer" (*Jewett* v. *Commissioner*, 455 U.S. at 310). The federal tax lien "cannot be extin-

guished * * * simply by a transfer or conveyance of the interest" (*United States* v. *Rodgers*, 461 U.S. 677, 691 n.16 (1983)), for property subject to a federal tax lien passes "cum onere." *United States* v. *Bess*, 357 U.S. 51, 57 (1958) (quoting *Burton* v. *Smith*, 38 U.S. (13 Pet.) 462, 483 (1839)). The state-law "legal fiction" under which the disclaimer has "the effect of canceling the transfer to the disclaimant *ab initio*" does not destroy the federal tax lien, for federal taxation looks to the realities of the taxpayer's rights and is not "struck blind by a disclaimer." *United States* v. *Irvine*, 511 U.S. 224, 239-240 (1994). A state-law right "to renounce or repudiate must not be misconstrued as an indication" that the taxpayer, in fact, "never owned" the property. *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971). The "retroactive * * * legal fiction * * * cannot change the 'readily realizable economic value' * * * which the[] taxpayer[] enjoyed" prior to the disclaimer. *Healy* v. *Commissioner*, 345 U.S. 278, 283 (1953). Once the federal lien attached to the taxpayer's "right to receive [the] property" of the estate, state law was "inoperative" to destroy the lien. *United States* v. *National Bank of Commerce*, 472 U.S. at 722, 725. "[I]t is of the very nature and essence of [the federal tax lien] that no matter into whose hands the property goes, it passes cum onere." *United States* v. *Bess*, 357 U.S. at 57.

ARGUMENT

THE INTEREST OF AN HEIR IN AN ESTATE CONSTITUTES "PROPERTY" OR A "RIGHT[] TO PROPERTY" TO WHICH THE FEDERAL TAX LIEN ATTACHES UNDER 26 U.S.C. 6321 EVEN THOUGH THE HEIR THEREAFTER PURPORTS RETROACTIVELY TO DISCLAIM THE INTEREST UNDER STATE LAW

A. *Federal Law Determines Whether A Right Or Interest Created Under State Law Constitutes "Property" Or "Rights To Property" To Which A Federal Tax Lien Attaches Under 26 U.S.C. 6321*

Section 6321 of the Internal Revenue Code provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all property and rights to property*, whether real or personal, belonging to such person." 26 U.S.C. 6321 (emphasis added). "[T]he purpose of the federal tax lien [is] to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950). To achieve that goal, Congress employed the broadest terminology "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). In explaining the sweeping breadth of the statutory language, the Court has stated: "While one might not be enthusiastic about paying taxes, it is still true that 'taxes are the life-blood of government, and their

prompt and certain availability an imperious need.'" *United States* v. *National Bank of Commerce*, 472 U.S. at 733 (quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)).

"The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the [federal] tax lien could attach." *Aquilino* v. *United States*, 363 U.S. 509, 512 (1960). In addressing that threshold issue, this Court has made clear that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. Although "state law controls in determining the nature of the legal interest which the taxpayer had in the property," whether that interest is sufficient to constitute "property" or "rights to property" under Section 6321 is determined solely as a matter of federal law and "state law is inoperative" for this purpose. *Id.* at 722 (quoting *United States* v. *Bess*, 357 U.S. 51, 57 (1958)). See also *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983); *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 175-176 (6th Cir. 1996).

For example, in *United States* v. *National Bank of Commerce*, 472 U.S. at 727, the Court held that the right of a co-depositor to withdraw funds from a joint bank account was an interest in "property" or a "right[] to property" to which the federal tax lien attached even though, under state law, a creditor could not seize and exercise the co-depositor's right of withdrawal. Noting that the federal tax lien statute "relates to the taxpayer's rights to property and not to his creditor's rights," the Court held that it was improper to "remit[] the IRS to the rights only an ordinary creditor would

have under state law," for that improperly "compare[s] the government to a class of creditors to which it is superior." *Ibid.* (quoting *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 274 n.8 (5th Cir. 1976)). "[O]nce it has been determined that state law has created property interests sufficient for [the] federal tax lien to attach, state law 'is inoperative to prevent the attachment' of such liens." *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983) (quoting *United States* v. *Bess*, 357 U.S. at 57).

Thus, while it is "state law [that] creates legal interests," it is "the federal statute [that] determines when and how they shall be taxed." *United States* v. *Mitchell*, 403 U.S. 190, 197 (1971) (quoting *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932)). If "federal law [were] not determinative of the [classification] of the state-created interest, states could defeat the federal tax lien by declaring an interest not to be property, even though the beneficial incidents of property belie its classification." *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992). See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d at 176 ("Federal law did not create [the taxpayer's] equitable income interest [in a spendthrift trust] but federal law must be applied in determining whether the interest constitutes 'property' for purposes of § 6321"); *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986) (although a liquor license did not constitute "property" and could not be reached by creditors under state law, it was nevertheless "property" subject to federal tax lien); W. Plumb, Jr., *Federal Tax Liens* 27 (3d ed. 1972) ("it is not material that the economic benefit to which the [taxpayer's local-law property]

right pertains is not characterized as 'property' by local law").[7]

B. *The Interest Of An Heir In A Decedent's Estate Constitutes "Property" Or "Rights To Property" To Which The Federal Tax Lien Attaches Under 26 U.S.C. 6321*

1. The terms "property" and "rights to property" as used in Section 6321 are not defined in the statute. In ordinary usage, the term "property" is a flexible concept with a meaning that varies with context, and "[n]o decision of this court has announced a rule that will embrace every case." *Scranton* v. *Wheeler*, 179 U.S. 141, 152 (1900) (Takings Clause).[8] In enacting Section

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[7] See also S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 859 (1995) (footnotes omitted):

> The predominance of substance over state-created labels and formalities is demonstrated by the fact that the federal tax lien attaches to economic rights and interests even if the applicable state law does not classify them as property interests. For example, in *United States v. National Bank of Commerce*, the right to withdraw money from a bank account was not called a property right by Arkansas law but nonetheless was held to be a sufficient property interest for federal tax collection purposes.

[8] For example, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, No. 98-149 (June 23, 1999), slip op. 6, the Court stated that a "civil right" to be free from competition is not a "property right" for purposes of the Fourteenth Amendment merely because that right has "pecuniary" value. *Ibid.* Instead, the Court explained that a "hallmark" of a "property" right under that Amendment is "the right to exclude others." *Id.* at 5. Although that constitutional analysis does not guide the meaning of the phrase "property or rights to property" as employed by Congress in Section 6321, we note that the interest of an heir in an estate unquestionably includes "the right to

6321, however, it is evident that Congress employed the broadest possible language "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 720. When Congress uses the term "property" in this broad sense, it "reach[es] every species of right or interest protected by law and having an exchangeable value." *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982) (quoting S. Rep. No. 665, 72d Cong., 1st Sess. Pt. 1, at 39 (1932); H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

In general use, the term "propery" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest * * * ." *Black's Law Dictionary* 1382 (rev. 4th ed. 1968). An interest in "property" thus encompasses (i) any "right" that represents "a legally enforceable claim of one person against another," (ii) any "privilege" that constitutes "a legal freedom on the part of one person * * * to do a given act," and (iii) any "power" that "is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." Restatement of Property §§ 1-3 (1936).[9]

Applying these basic principles under Section 6321, courts have routinely held that any right or interest that has "pecuniary value and is transferable" consti-

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exclude others" from receiving that property. See, *e.g.*, Pet. App. 8a, 13a; notes 10 & 12, *infra*.

[9] An "interest" in property refers to "varying aggregates of rights, privileges, powers and immunities" or "any one of them." Restatement of Property § 5 (1936).

tutes "property" or "rights to property" for purposes of the tax lien statute. See *United States* v. *Stonehill*, 83 F.3d 1156, 1159-1160 (9th Cir.) (chose-in-action is subject to federal tax lien), cert. denied, 519 U.S. 992 (1996); *In re Kimura*, 969 F.2d at 810-811 (liquor license is subject to federal tax lien); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-1172 (6th Cir. 1990) (same), cert. denied, 501 U.S. 1212 (1991); *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986) (same); *Little* v. *United States*, 704 F.2d 1100, 1104-1106 (9th Cir. 1983) (state-law right of redemption is subject to federal tax lien because it "represents an economic asset in the sense that it has pecuniary value and is transferable").

2. a. Under these standards, the court of appeals correctly concluded (Pet. App. 8a) that the rights that petitioner acquired in his mother's estate at the time of her death constituted "property" or "rights to property" to which the federal tax lien attaches. As petitioner acknowledges, at the time of his mother's death, he was "the party entitled to inherit the estate" (C.A. App. 87). He thus acquired a "right" to receive the entire value of the estate (less its administrative expenses) and a "power" to compel the transfer of that property to him. See Restatement of Property, *supra*, §§ 1-3; Pet. App. 8a. Those property interests were protected by law and plainly had a substantial pecuniary value. *Id.* at 3a, 8a.[10]

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[10] Under the Arkansas law of intestate succession, real estate passes immediately to the heirs (subject to the administrator's right to sell it if cash is needed to pay claims or legacies) while personalty passes to the administrator for eventual distribution to the heirs. Ark. Code Ann. § 28-9-203(c) (Michie 1987). In both contexts, the heir has an enforceable right to receive the property or its equivalent (Pet. App. 8a, 13a). The fact that actual transfer

It is well established that a "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725 (quoting *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (8th Cir. 1980)). Because the federal tax lien attaches to "whatever rights the taxpayer himself possesses" (*ibid.*), the lien attached to petitioner's valuable right to receive his mother's estate as her sole legal heir.

b. The broad concept of "property" that Congress has employed in the Internal Revenue Code requires only that the "property" or "right[] to property" be an enforceable interest that has pecuniary value. See *Jewett* v. *Commissioner*, 455 U.S. at 309; page 16, *supra*. It is not necessary to that broad concept for such an interest also to be freely transferable. Indeed, many types of recognized "property" interests are *not* transferable. For example, an interest in a spendthrift trust is commonly understood to constitute a "property" interest even though the beneficiary may not transfer that interest to third parties. See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d at 176. As the court explained in the *Bank One* case (*ibid.*):

> [W]hen Congress says, as it has done in § 6321, that an unpaid tax "shall" constitute a lien upon "all" of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on

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of personal property may be delayed until the end of the period of administration does not alter the conclusion that the heir's right is a valuable "right[] to property" within the meaning of Section 6321. See *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (8th Cir. 1980) (the right to receive property in the future "is itself a property right * * * even though the right to payment * * * has not matured").

property that is alienable under state law and on property that is not.

It is, in any event, unnecessary for the Court to address in the present case whether transferability is a necessary component of the concept of "property" or "rights to property" under Section 6321. This is because, as the court of appeals correctly held (Pet. App. 8a), petitioner's valuable right to receive the property of the estate plainly *is* transferable under Arkansas law. A prospective heir may validly assign his expectancy in an estate under Arkansas law, and the assignment will be enforced when the expectancy ripens into a present estate. *Clark* v. *Rutherford*, 298 S.W.2d 327, 329 (Ark. 1957); *Bradley Lumber Co.* v. *Burbridge*, 210 S.W.2d 284, 288 (Ark. 1948). Arkansas law provides staunch protection for such an assignment from an unreliable heir by providing that the heir's right to disclaim an estate is barred not only by acceptance of the property but also by any "assignment, conveyance, encumbrance, pledge, or transfer of the property or interest." Ark. Code Ann. § 28-2-102 (Michie 1987).[11]

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[11] Although the issue was not raised or addressed in this case, it appears that this protection from disclaimers provided by state law to any "encumbrance" on the heir's interest (Ark. Code Ann. § 28-2-102 (Michie 1987)) would not be of assistance to any "third party," such as the United States. The courts that have addressed this issue have concluded "that a lien created by third parties is not an 'encumbrance' under the statute which bars the debtor's right to renounce." *In re Estate of Opatz* v. *Speldrich*, 554 N.W.2d 813, 816 (N.D. 1996) (applying the uniform statutory provisions also applicable in Arkansas). To avoid an interpretation of the statute that would make it largely ineffective, these courts have concluded that only an "encumbrance created by the disclaimant"—and not

c. When petitioner's mother died, leaving him as her sole legal heir, petitioner thus acquired an enforceable legal right that was valuable and transferable. That right constituted an interest in "property" and a "right[] to property" to which the federal tax lien attached. At the moment that the right arose, the United States "step[ped] into the taxpayer's shoes" and "acquire[d] whatever rights the taxpayer himself possesse[d]." *United States* v. *National Bank of Commerce*, 472 U.S. at 725 (quoting *United States* v. *Rodgers*, 461 U.S. at 691 n.16 (quoting 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.4, at 111-102 (1981))). See also M. Saltzman, *IRS Practice and Procedure* ¶ 14.07[1], at 14-35 (2d ed. 1991).

C. *The Federal Tax Lien That Attached To Petitioner's Rights To Property Was Not Retroactively Divested By A Disclaimer Of Those Rights Under State Law*

After the federal tax lien attached to petitioner's "property" and "rights to property," he disclaimed his right to the estate and thereby transferred that right to his daughter. She thereafter received and transferred the underlying property to the family trust, in which petitioner possesses a life estate (Pet. App. 17a). The court of appeals correctly concluded that petitioner's disclaimer did not defeat the previously-attached federal tax lien, for "once a lien has attached to an interest in property, the lien cannot be extinguished * * * simply by a transfer or conveyance of the interest." *United States* v. *Rodgers*, 461 U.S. at 691 n.16.

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one created by "third parties"—would bar a disclaimer. *Ibid.* See *Brown* v. *Momar, Inc.*, 411 S.E.2d 718, 721 (Ga. Ct. App. 1991).

1. Petitioner errs in contending that, because of his valid state-law disclaimer, he never acquired any interest in his mother's estate. He argues that, on her death, he acquired "nothing more than a personal right of decision as to whether to accept or reject the gift of inheritance offered" (Pet. Br. 13). He contends that such a "personal right of decision" is not "property" or a "right[] to property" to which the federal tax lien attached under Section 6321 because it "had no pecuniary value and was not transferable" (*ibid.*).

It is well established, however, that the "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725. In particular, the power that petitioner held to compel the delivery of that valuable property to himself or to transfer that property to another plainly constitutes a "right[] to property" within the broad scope of Section 6321.[12] As

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[12] Far from possessing only a "personal right of decision," petitioner held a broad spectrum of rights and interests under state law. In particular, petitioner had a protected and enforceable right to receive the assets of his mother's estate, less the costs of administration. See Ark. Code Ann. § 28-9-203(c) (Michie 1987). That right was enforceable by suit in state court. See, *e.g.*, *id.* §§ 28-1-102 (interested persons include heirs, devisees, and others having property right, interest in, or claim against an estate), 28-48-105 (interested persons may petition for removal of personal representative of estate for, *inter alia*, mismanagement or dereliction of duty), 28-53-101 (persons claiming interest in property of decedent as heirs or distributees can petition probate court for administration of estate to determine their respective interests in estate), 28-53-102 (partial distributions), 28-53-110 (suits to recover improper distributions); see *Goza* v. *Fidelity & Cas. Co.*, 178 S.W.2d 498 (Ark. 1944). The rights possessed by petitioner were also transferable by assignment or by disclaimer. See Pet. App. 8a.

the court of appeals correctly held, "[u]nder Arkansas law the right to inherit has pecuniary value * * * and is transferable" and therefore "is property or a right to property" to which the federal tax lien attached (Pet. App. 8a, 17a). See page 19, *supra*.

The manifest flaw in petitioner's reasoning is that it incorrectly assumes that the characterization of the interest for purposes of state law controls in determining whether the interest constitutes "property" or a "right[ ] to property" under Section 6321. The Fifth Circuit made that same error in *Leggett* v. *United States*, 120 F.3d 592 (1997), in holding that the federal tax lien did not attach to the interest of the taxpayer in his aunt's estate because the "right of decision" whether to accept the estate "was not, itself, a property right *under Texas law*." *Id.* at 596 (emphasis added). In reaching that conclusion, the Fifth Circuit relied on the holding of a Texas appellate court that the state-law "'relation back' doctrine is based on the principle that a bequest or gift is nothing more than an offer which can be accepted or rejected." *Id.* at 595.[13]

Even if that narrow characterization of the nature of the state-law interest were correct (which it is not, see notes 10 & 12, *supra*), an "offer which can be accepted or rejected" is nonetheless itself an interest in "property" or a "right[] to property" for purposes of Section 6321. It is a "species of right or interest protected by law and having an exchangeable value." *Jewett* v. *Commissioner*, 455 U.S. at 309; pages 16, 18, *supra*.

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[13] In Texas, as in Arkansas, however, the right of a prospective heir to receive property from an estate is assignable, and the assignee may enforce the assignment upon the death of the ancestor. See *Clark* v. *Gauntt*, 161 S.W.2d 270, 272 (Tex. Comm'n App. 1942); page 19, *supra*.

Whether the state courts would describe such a valuable, transferable interest as a "property" interest *for purposes of state law* is not determinative in applying the federal tax lien. Although state law determines "the nature of the legal interest which the taxpayer had," whether that interest is sufficient to constitute "property" or "rights to property" under Section 6321 is determined solely as a matter of federal law and "state law is inoperative" for this purpose. *United States* v. *National Bank of Commerce*, 472 U.S. at 727; page 13, *supra*.[14]

Petitioner errs in relying (Pet. Br. 9) on the fact that, at common law, a "gift" creates no enforceable right until it is accepted and delivered. See *Marshall* v. *Dossett*, 20 S.W. 810, 811 (Ark. 1892) ("The promise to make a gift of chattels * * * confers no title or right of possession to the property promised, and affords no ground for a remedy against the promisor, by replevin or otherwise."); 38A C.J.S. *Gifts* § 16 (1996). Unlike an incomplete gift, the prospective interest of an heir in an estate is an enforceable and transferable right that vests immediately upon the death of the decedent and remains in existence until it is fulfilled (by the receipt of the property of the estate) or is transferred by assign-

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[14] The Fifth Circuit accordingly erred in *Leggett* in concluding that "state law determines whether a taxpayer has a property interest to which a federal lien may attach" and that "Section 6321 adopts the state's definition of property interest." 120 F.3d at 594, 597. The Ninth Circuit similarly erred in *Mapes* v. *United States*, 15 F.3d 138, 140 (1994), in holding that a timely renunciation under state law retroactively "had the effect of preventing [the taxpayer] from acquiring any interest in the estate." In both of these cases, the taxpayers held vested, legally enforceable rights to receive or transfer the property of the estate at the time the tax lien attached.

ment or by an "indirect transfer, effected by means of a disclaimer" (*Jewett* v. *Commissioner*, 455 U.S. at 310). Because this legally protected interest in the decedent's estate is valuable and transferable, it constitutes a "right[ ] to property" to which the federal tax lien attaches under Section 6321.

2. a. Petitioner incorrectly asserts that the federal tax lien is retroactively destroyed by the legal fiction under state law that a disclaimer "relates back for all purposes to the date of death of the decedent" (Pet. Br. 12 (quoting Ark. Code Ann. § 28-2-108 (Michie 1987))). A state-law "legal fiction" of a retroactive renunciation of an interest in property "does not bind the federal collector" (*United States* v. *Mitchell*, 403 U.S. at 204). Instead, as this Court stated in *United States* v. *Irvine*, 511 U.S. at 239, "[c]ases like * * * this one illustrate * * * why it is that state property transfer rules do not translate into federal taxation rules." In *Irvine*, after a gift had been fully executed by delivery of the property in trust, the taxpayer had disclaimed her beneficial interest under the provisions of state law. Under "state property rules," the taxpayer's subsequent disclaimer was treated as "having the effect of canceling the transfer to the disclaimant *ab initio*." *Ibid.* This Court held, however, that the relation back of the disclaimer under state law did not mean that, for purposes of federal law, the taxpayer never held a "property" interest in the assets of the trust. *Ibid.* Federal law is not "struck blind" by the State's "legal fiction" of a retroactive disclaimer. *Id.* at 240. Instead, for purposes of federal law, the state-law disclaimer simply operates as an "indirect transfer" of the "property" to others. *Id.* at 233. Accord, *Jewett* v. *Commissioner*, 455 U.S. at 310.

The Court has consistently held that the federal tax lien "cannot be extinguished * * * simply by a transfer or conveyance of the interest." *United States* v. *Rodgers*, 461 U.S. at 691 n.16. Any such transfer of "property" or "rights to property" made (as in this case) *after* the tax lien has attached cannot undermine the effectiveness of the lien, for property subject to a federal tax lien passes "cum onere." *United States* v. *Bess*, 357 U.S. at 57. See also *Phelps* v. *United States*, 421 U.S. 330, 334-335 (1975); *Beaty* v. *United States*, 937 F.2d 288, 290-292 (6th Cir. 1991).

"Once it has been determined that state law creates sufficient interests" for "property" or "rights to property" to exist, state law becomes "inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (quoting *United States* v. *Bess*, 357 U.S. at 56-57) (internal brackets and quotation marks omitted). The "legal fictions" adopted under state law and, in particular, the state-law "doctrine of relation back" may not be applied "to destroy the realities of the situation" (*United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 50 (1950)). "Congress had not meant to incorporate state-law fictions as touchstones of taxability"; instead, federal taxation looks to the realities of the taxpayer's rights. *United States* v. *Irvine*, 511 U.S. at 240.[15] As this Court held in *United States* v.

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[15] Certain types of "qualified" disclaimers are given effect solely for purposes of the federal wealth-transfer taxes (Subtitle B, §§ 2001-2704 of the Internal Revenue Code (1994 & Supp. III 1997)) under Section 2518 of the Code, 26 U.S.C. 2518. The federal tax lien is part of the tax collection provisions contained in Subtitle

Mitchell, 403 U.S. 190 (1971), a state-law right "to renounce or repudiate must not be misconstrued as an indication" that the taxpayer, in fact, "never owned" the property. *Id.* at 204.[16]

The courts below thus correctly concluded that "a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens" (Pet. App. 26a; see *id.* at 17a). It is immaterial that the "legal fiction" under the state-law doctrine of relation-back precludes any recovery for private creditors against the property. The federal tax lien "relates to the taxpayer's rights to property and not to his creditor's rights." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. The "retroactive * * * legal fiction * * * cannot change the 'readily realizable

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F, however, rather than the substantive gift and estate tax provisions of Subtitle B:

> The fact that a qualified disclaimer by an estate beneficiary is deemed to relate back to the decedent's death for state property law or federal gift tax purposes is not sufficient to preclude a federal tax lien for the disclaimant's delinquent taxes from attaching to the disclaimed property as of the moment of the decedent's death. * * * [T]he qualified disclaimer provision in § 2518 only applies for purposes of Subtitle B and the lien provisions are in Subtitle F. As a result, once the lien attached, it could not be defeated by the disclaimant's subsequent attempt to protect the property from the federal government's claim.

J. Pennell, *Recent Wealth Transfer Tax Developments*, in *Sophisticated Estate Planning Technique* 69, 117-118 (A.L.I.-A.B.A. Continuing Legal Educ. 1997).

[16] In *United States* v. *Mitchell*, 403 U.S. at 201-202, the Court held that, although a wife's renunciation of a marital interest was treated as retroactive under state law, that state-law fiction is not operative in determining the wife's liability for tax on her share of the community income realized before the renunciation.

economic value' * * * which the[] taxpayer[] enjoyed" prior to the disclaimer. *Healy* v. *Commissioner*, 345 U.S. 278, 283 (1953).[17] As a "matter of federal law" (*United States* v. *National Bank of Commerce*, 472 U.S. at 727), the federal tax lien attached to petitioner's interest in that "realizable economic value" at the time it arose. Petitioner's subsequent renunciation and transfer of that interest to his daughter cannot destroy either "the realities of the situation" or the federal tax lien (*United States* v. *Security Trust & Sav. Bank*, 340 U.S. at 50). As the Second Circuit held in *United States* v. *Comparato*, 22 F.3d 455, 457 (1993), cert. denied, 513 U.S. 986 (1994), "once the federal liens attached [to the property right, the taxpayers'] subsequent renunciations pursuant to state law were not effective against the federal liens."[18] "[T]he priority of the tax lien is governed by federal law, and federal law makes no

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[17] Taxation is not the only area in which Congress has not recognized state-law disclaimers. Under Sections 541(a)(5) and 549 of the Bankruptcy Code, the bankruptcy trustee may avoid post-petition disclaimers. 11 U.S.C. 541(a)(5), 549. See A. Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587, 589 (1989).

[18] In *Comparato*, the Second Circuit held that the federal tax lien was not defeated by a subsequent renunciation of a property interest that was "retroactive to the creation" of the interest under New York law. N.Y. Est. Powers & Trusts Law § 2-1.11(d) (McKinney 1998). That holding draws direct support from this Court's decision in *Irvine*. See W. Elliot, *Federal Tax Collections, Liens, and Levies* ¶ 9.09[3][d][ii], at S9-10 to S9-11 (2d ed. 1999 Cum. Supp. No. 1) (footnotes omitted):

> In *Irvine* * * * [t]he Supreme Court reaffirmed the principle followed in *Comparato* that "although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." The Court then applied federal law in determining the validity of Irvine's disclaimer for federal gift tax purposes.

provision for a subordination by use of a legal fiction." *Rodriguez* v. *Escambron Dev. Corp.*, 740 F.2d 92, 98 (1st Cir. 1984).[19]

b. The conclusion that a state-law disclaimer cannot retroactively destroy an existing tax lien is reinforced by the provisions of Section 6334 of the Code. That Section establishes a comprehensive list of property interests that are exempt from the federal tax levy (26 U.S.C. 6334(a)), and then specifies that "no property or rights to property shall be exempt from levy other than the property made exempt" in that statute (26 U.S.C. 6334(c)). As the court of appeals correctly concluded in this case, the fact that "property or rights to property disclaimed under state law" are *not* included in the list of interests exempt from levy under this statute indicates "that such property [is] subject to federal levy" (Pet. App. 16a). Accord, *United States* v. *Comparato*, 22 F.3d at 458:

> [O]nce state law provided [the taxpayers] with a vested interest * * * , federal law controlled whether their interests were exempt from levy by the United States. * * * Since § 6334(a) does not provide an exemption for [the taxpayers'] interests in their son's estate, the federal tax liens are effective against their interests despite their subsequent renunciations pursuant to [state law].

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[19] Other courts have similarly concluded that a state-law disclaimer cannot "relate back" to defeat a previously-attached federal tax lien. See, *e.g.*, *In re Adler*, 869 F. Supp. 1021, 1026-1028 (E.D.N.Y. 1994); *Tinari* v. *United States*, 78 A.F.T.R.2d (RIA) 96-6381 (E.D. Pa. 1996); *United States* v. *Solheim*, 71A A.F.T.R.2d (RIA) 93-4153 (D. Neb. 1990), aff'd on other grounds, 953 F.2d 379 (8th Cir. 1992).

In *United States* v. *Mitchell*, 403 U.S. at 204, this Court explained that a state-law renunciation of a property interest that is effective retroactively to make that interest exempt from creditors under state law "does not bind the federal collector." Instead, "[f]ederal law governs what is exempt from federal levy." *Ibid.* The Court held in *Mitchell* that the text of Section 6334 "is specific and * * * clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." *Id.* at 205. To the contrary, "[t]he fact that * * * Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of liens under [Section 6321]." *United States* v. *Bess*, 357 U.S. at 57. Accord, *United States* v. *Rodgers*, 461 U.S. at 701 (it would "frustrate the policy of the statute [to] read[] such an exception into it").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys

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