No. 11-860

In the Supreme Court of the United States

XIANLI ZHANG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. 1801 note, nonimmigrant alien employees and their employers in the Commonwealth of the Northern Mariana Islands are required to pay taxes under the Federal Insurance Contributions Act, 26 U.S.C. 3101 and 3111.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 187a-222a) is reported at 640 F.3d 1358. The opinion of the Court of Federal Claims (Pet. App. 131a-185a) is reported at 89 Fed. Cl. 263.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2011. A petition for rehearing was denied on October 11, 2011 (Pet. App. 223a-224a). The petition for a writ of certiorari was filed on January 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Northern Mariana Islands (NMI) occupy the northern end of the Mariana archipelago in the Pa-

cific Ocean. Guam, the southernmost island in the archipelago, is a separate political entity under the sovereignty of the United States. The United States military occupied the NMI at the close of World War II, and the United Nations subsequently designated portions of Micronesia, including the NMI, as the Trust Territory of the Pacific Islands (Trust Territory). The United States was appointed as trustee of the Trust Territory. Under the trusteeship agreement, the United States did not have sovereignty over the NMI, but it was empowered to apply domestic federal law to the NMI. See Pet. App. 135a-136a, 190a.

In the 1970s, negotiations to establish a permanent union between the United States and the NMI resulted in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant). See Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (48 U.S.C. 1801 note). The Covenant was approved by NMI voters in a plebiscite and by the United States Congress through a joint resolution, and it was signed into law by President Ford on March 24, 1976. Most of the Covenant's provisions became effective on that date. On January 1, 1987, pursuant to President Reagan's November 1986 proclamation terminating the trusteeship agreement, the remaining provisions of the Covenant took effect, and the Commonwealth of Northern Mariana Islands (CNMI) entered into full union with the United States. See Pet. App. 136a-137a, 191a.

b. Of particular relevance here, Article VI of the Covenant governs "Revenue and Taxation." Pet. App. 192a. Section 606(b) of that Article provides that

> *[t]hose laws of the United States which impose excise and self-employment taxes to support or which*

> *provide benefits from the United States Social Security System* will on January 1 of the first calendar year following the termination of the Trusteeship Agreement or upon such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States *become applicable to the Northern Mariana Islands as they apply to Guam.*

Id. at 193a (quoting Covenant § 606(b)) (emphases added by court of appeals). The question presented here is whether Section 606(b) requires nonimmigrant alien employees and their employers in the CNMI to pay certain taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 and 3111.

2. Petitioners Xianli Zhang, Guimin Lu, Bao Hua He, Baowei Ding, and Jilin Hu are Chinese citizens who worked in the CNMI for various employers, including petitioner Hyunjin (Saipan) Corporation (Hyunjin), between 2003 and 2006. In April 2008, petitioner Zhang and the other employees filed suit in the Court of Federal Claims (CFC), seeking a refund of approximately $9862 that they had paid in FICA taxes on their wages during that three-year period. In July 2008, petitioner Hyunjin filed suit in the CFC for a refund of approximately $1.4 million that it had paid in FICA taxes on the wages of hundreds of its foreign contract employees during the same period. See Pet. App. 188a-189a.

The CFC consolidated the cases and subsequently granted the government's motion for judgment on the pleadings. Pet. App. 131a-185a. As that court recognized, the FICA imposes taxes on the wages paid by employers and the wages earned by employees. See *id.* at 132a-133a; see also 26 U.S.C. 3101, 3111. The FICA defines "wages" to include "all remuneration for employ-

ment." 26 U.S.C. 3121(a) (Supp. IV 2010). It defines "employment" as "any service, of whatever nature, performed" "by an employee for the person employing him, irrespective of the citizenship or residence of either," if that service is performed "within the United States." 26 U.S.C. 3121(b) (Supp. IV 2010). The FICA further provides that "[t]he term 'United States' when used in a geographical sense includes * * * Guam." 26 U.S.C. 3121(e)(2).

The CFC held that "the term 'United States' is used in a geographical sense in FICA," and that the FICA therefore applies to Guam. Pet. App. 161a. The CFC further explained that, pursuant to Section 606(b) of the Covenant, "laws of the United States which impose excise and self-employment taxes to support [the Social Security System] become applicable to the Northern Mariana Islands as they apply to Guam." *Id.* at 146a, 161a-162a. The CFC therefore concluded that "FICA applies to Guam through [26 U.S.C.] 3121(e)(2) and [S]ection 606(b) of the Covenant applies FICA to the CNMI [in the same way as] Guam." *Id.* at 162a. The CFC then considered and rejected petitioners' various arguments that Section 606(b) of the Covenant does not extend the FICA to the CNMI. *Id.* at 166a-185a.

3. The court of appeals affirmed. Pet. App. 187a-222a. Like the CFC, the court of appeals held that, under Section 3121(e)(2) of the Internal Revenue Code, the FICA applies to Guam and, under Section 606(b) of the Covenant, the FICA applies to the CNMI as it applies to Guam. *Id.* at 203a-204a. The court of appeals rejected petitioners' argument that Section 606(b) extends only the FICA employer tax and not the FICA employee tax. *Id.* at 211a-221a. The court found it "reasonable to conclude that 'excise' in Covenant § 606(b) refers to both

the employee and employer FICA taxes." *Id.* at 212a; see *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 240 (2002) ("The tax law imposes, not only on employees, but also 'on every employer,' an 'excise tax,' *i.e.*, a FICA tax."). Finally, the court of appeals rejected petitioners' arguments that two statutes enacted after the Covenant took partial effect in 1976, but before it took full effect in 1987, limited the Covenant's application of FICA taxes to the CNMI. See Pet. App. 204a-210a.

ARGUMENT

The court of appeals correctly held that, under the Covenant between the United States and the Commonwealth of the Northern Mariana Islands, FICA taxes apply to employers and employees in the CNMI. The decision below does not conflict with any decision of this Court or any other court of appeals. The decision also does not effect any practical change in the application of FICA taxes to employees and employers in petitioners' positions, but rather confirms the propriety of long-standing practice. Further review is not warranted.

1. The court of appeals correctly held that FICA taxes apply to employers and employees in the CNMI. As the court explained, the FICA applies by its terms to Guam, and Section 606(b) of the Covenant provides that excise taxes to support the Social Security System (which include FICA taxes) apply to the CNMI as they apply to Guam. See Pet. App. 203a-204a.[1]

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[1] Because the court of appeals held that Section 606(b) of the Covenant extends FICA taxes to employment services performed in the CNMI, the court did not address the government's arguments that Sections 502(a)(2) and 601(c) of the Covenant achieve the same result. See Pet. App. 199a n.6. Those provisions, which were fully briefed by

a. The FICA imposes taxes on the wages paid by employers and the wages earned by employees. See 26 U.S.C. 3101, 3111. The FICA defines "wages" to include "all remuneration for employment." 26 U.S.C. 3121(a) (Supp. IV 2010). It defines "employment" as "any service, of whatever nature, performed" "by an employee for the person employing him, irrespective of the citizenship or residence of either," if such service is performed "within the United States." 26 U.S.C. 3121(b) (Supp. IV 2010). The FICA further provides that "[t]he term 'United States' when used in a geographical sense includes * * * Guam." 26 U.S.C. 3121(e)(2). As the court of appeals noted, Section 3121(b) uses the term "United States" in a geographical sense, *i.e.*, to refer to employment services performed "within the United States." See Pet. App. 203a. Section 3121(e)(2) therefore extends the FICA's coverage to include employment services performed within Guam.

The court of appeals correctly rejected petitioners' argument that the term "United States" in Section 3121(b) refers to the citizenship of employees or employers rather than to the geographical location where the relevant work is performed. Section 3121(b) defines "employment" as any service performed "by an employee for the person employing him, *irrespective of the citizenship or residence of either*." 26 U.S.C. 3121(b) (Supp. IV 2010) (emphasis added). As the court of appeals observed, "[i]t is evident from the definition of 'employment' that citizenship is not the basis for applying FICA taxes, because the statute indicates that FICA taxes apply to employment 'irrespective of the citizen-

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the government in the courts below, supply alternative bases for affirming the Federal Circuit's judgment in this case.

ship' of the employer or employee." Pet. App. 203a. The court of appeals therefore correctly concluded that Section 3121(b) uses the term "United States" in a geographical sense, and that Section 3121(e) therefore extends FICA's application to employment services performed within Guam.

b. The court of appeals further reasoned that, because the FICA applies by its terms to Guam, it likewise applies to the CNMI under Section 606(b) of the Covenant. Section 606(b) of the Covenant provides that

> *[t]hose laws of the United States which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System* will on January 1 of the first calendar year following the termination of the Trusteeship Agreement or upon such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States *become applicable to the Northern Mariana Islands as they apply to Guam.*

Pet. App. 193a (quoting Covenant § 606(b)) (emphases added by court of appeals). The court recognized that "FICA is unquestionably a law that imposes excise taxes to support Social Security." *Id.* at 202a; see *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 204 (2001) ("The Federal Insurance Contributions Act (FICA) * * * impose[s] excise taxes on employee wages to fund Social Security."). The court therefore correctly concluded that Section 606(b) of the Covenant "applies the FICA statutes to the CNMI as they apply to Guam." Pet. App. 202a.[2]

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[2] Petitioners argue that Section 606(b)'s language is merely "precatory." Pet. 18; see Pet. 14-15. But there is nothing precatory about

The court of appeals correctly rejected petitioners' argument that Section 606(b)'s reference to "excise and self-employment taxes" covers only the FICA tax on wages paid by employers (see 26 U.S.C. 3111) and not the FICA tax on wages earned by employees (see 26 U.S.C. 3101). See Pet. App. 211a-221a. As the court recognized, it is "reasonable to conclude that 'excise' in Covenant § 606(b) refers to both the employee and employer FICA taxes." *Id.* at 212a; see *id.* at 212a-214a, 218 n.14. The term "[e]xcise" broadly includes "[a] tax imposed on * * * the engaging in an occupation." *Black's Law Dictionary* 506 (5th ed. 1979); see *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 240 (2002) ("The tax law imposes, not only on employees, but also 'on every employer,' an 'excise tax,' *i.e.*, a FICA tax."); *Public Employees' Ret. Bd.* v. *Shalala*, 153 F.3d 1160, 1161 (10th Cir. 1998) ("The federal Social Security and Medicare systems are funded by excise taxes, separate and distinct from federal income taxes, imposed on employees, employers, and self-employed individuals.").[3] FICA taxes imposed on covered employees fit comfortably within that settled understanding of the term "excise tax."

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a statute stating that, as of a particular date, the federal laws which impose taxes to support the Social Security System "*will* * * * become applicable to the Northern Mariana Islands as they apply to Guam." Covenant § 606(b) (emphasis added).

[3] Petitioners argue that an earlier edition of *Black's Law Dictionary* "in effect during the negotiations of the Covenant excluded the employee income tax from the definition of 'excise taxes.'" Pet. 10 n.5. That is incorrect. The relevant edition stated that the term "excise taxes" has been interpreted to mean "every form of charge imposed by public authority on performance of an act, enjoyment of privilege, or *engagement in occupation*." *Black's Law Dictionary* 672 (rev. 4th ed. 1968) (emphasis added).

As the court of appeals observed, moreover, "the relevant legislative history demonstrates that Congress intended to apply both the employee and employer FICA taxes to the CNMI through Covenant § 606(b)." Pet. App. 218a; see *id.* at 170a. "The House and Senate Reports accompanying the Covenant state that § 606(b) applies 'the laws' that impose taxes to support the social security system to the CNMI," without "distinguish[ing] the employer FICA tax from the employee FICA tax" or "suggest[ing] that one tax applies but the other does not." *Id.* at 218a. The Covenant also established the Northern Mariana Commission on Federal Laws (Commission), which reported to Congress on additional federal laws that should be extended to the CNMI. In one of those reports to Congress, the Commission stated that, under Section 606(b) of the Covenant, "[e]mployers and employees" in the CNMI "are" subject to FICA taxes. *Welcoming America's Newest Commonwealth: The Second Interim Report of the N. Mariana Islands Comm'n On Federal Laws to the Congress of the United States* 415 (1985).

2. Petitioners do not address in any detail the court of appeals' analysis of the relationship between the FICA and the Covenant. They suggest (Pet. 13) that if Congress had intended the result reached by the courts below, it would have amended the FICA to make it expressly applicable to the CNMI. But as explained above, that suggestion ignores Section 606(b) of the Covenant, which renders any amendment to the FICA unnecessary by specifically referring to federal laws that impose excise taxes to benefit the Social Security System. Petitioners primarily argue instead (Pet. 11-12, 23-33) that two statutes enacted between 1976 (when the Covenant became federal law) and 1987 (when the Cove-

nant was fully implemented) limit the Covenant's application of FICA taxes to the CNMI. The court of appeals correctly rejected those arguments. See Pet. App. 204a-210a.

a. In 1981, Congress amended the definitional section of the Social Security Act, 42 U.S.C. 1301, "to include the CNMI with regard to some, but not all, Social Security benefit laws." Pet. App. 204a. Petitioners argue (Pet. 23-24) that Section 1301 limits the Covenant's application of FICA taxes to the CNMI. But while the 1980 amendments addressed the scope of particular *benefit* provisions of the Social Security Act, they did not address the scope of the FICA's *taxation* provisions. See Pet. App. 205a (court of appeals explains that Section 1301 "does not refer to the Covenant or to FICA taxation"). The court of appeals correctly recognized that repeals by implication are disfavored, and that petitioners "have not identified a 'clearly expressed congressional intention' to alter the substitution of the CNMI for Guam in the Covenant." *Ibid.* (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984)). To the contrary, given the absence of any reference to FICA taxation in the 1981 amendments, those amendments are most naturally understood to reflect Congress's continuing intent that the application of FICA taxes to services performed in the CNMI would be governed by Section 606(b) of the Covenant.

b. In 1983, Congress authorized the President to treat NMI citizens as United States citizens for the purposes of various federal statutes. See Act of Dec. 8, 1983 (1983 Act), Pub. L. No. 98-213, § 19, 97 Stat. 1464. Section 19(a) of the 1983 Act authorized the President to provide by proclamation that "the requirement of United States citizenship or nationality" in certain fed-

eral statutes would not apply to NMI citizens. Section 19(a) thus allowed the Executive to accelerate NMI citizens' receipt of various statutory benefits for which they otherwise could not have qualified until they became United States citizens (which ultimately occurred in 1987 when the Covenant was fully implemented). Section 19(b) further provided that "[a] statute which denies a benefit or imposes a burden or a disability on an alien * * * shall, for the purposes of this Act, be considered to impose a requirement of United States citizenship or nationality." *Id.* § 19(b), 97 Stat. 1464. Section 19(b) made clear that, if the President issued the proclamation authorized by Section 19(a), NMI citizens would be able to receive statutory benefits (or escape statutory burdens or disabilities) that the specified federal statutes deny to (or impose upon) "aliens." See Pet. App. 205a-210a.

Petitioners argue (Pet. 25-28) that Section 19(b) of the 1983 Act "excludes CNMI aliens from participating in, and paying taxes to support, federal benefits programs conditioned upon United States citizenship." Pet. App. 205a. As applied to FICA taxation, that argument depends on, *inter alia*, the assumption that the FICA's tax provisions "den[y] a benefit or impose[] a burden or a disability on an alien" within the meaning of Section 19(b). That premise is incorrect. Particularly when read in conjunction with Section 19(a), Section 19(b)'s reference to "[a] statute which denies a benefit or imposes a burden or a disability on an alien" is limited to statutes that disadvantage aliens *as such—i.e.*, that disadvantage aliens vis-à-vis citizens. The FICA tax provisions do not operate in that manner, but instead impose tax burdens on citizens and aliens alike, based solely on the location where the relevant services are performed.

See 26 U.S.C. 3121(b) (Supp. IV 2010) (defining "employment" to include services performed "within the United States," "irrespective of the citizenship or residence of either" the employee or the employer). If (as we explain above) the CNMI is properly treated as part of "the United States" for purposes of FICA taxation, Section 19(b) of the 1983 Act does not exempt any category of aliens from the generally applicable requirement that FICA taxes be paid on all wages earned at that location.

3. The decision below addresses an issue of first impression. As far as the government is aware, from 1987 (when the Covenant was fully implemented) until 2008 (when this action was filed), no taxpayer in the CNMI—whether an employer, employee, or self-employed individual—disputed its liability for FICA taxes on grounds similar to those advanced by petitioners in this case. The decision below therefore does not conflict with any decision of any other court of appeals, and its effect is simply to confirm the prevailing practice of paying FICA taxes on wages earned in the CNMI.

a. Contrary to petitioners' contention (Pet. 19-20), the decision below does not conflict with *Armstrong* v. *Northern Mariana Islands*, 576 F.3d 950 (9th Cir. 2009), cert. denied, 130 S. Ct. 3500 (2010). In *Armstrong*, a group of taxpayers sought tax rebates and interest under the CNMI tax code. The United States District Court for the District of the Northern Mariana Islands dismissed the suit for lack of subject-matter jurisdiction, and the Ninth Circuit affirmed. As relevant here, the court of appeals interpreted Section 601(a) of the Covenant, which provides that "[t]he income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax * * *

in the same manner as those laws are in force in Guam." That provision of the Covenant extends the federal income tax laws to the CNMI, but it does not specify whether the courts of the United States or those of the CNMI will have jurisdiction over tax disputes.

Relying on several considerations specific to that jurisdictional context, the court of appeals in *Armstrong* concluded that CNMI courts were the proper fora for resolution of the parties' tax dispute. The court first observed that Section 601(a), by providing that federal income tax laws will come into force "as a local territorial income tax," suggests that jurisdiction lies in local CNMI courts. See *Armstrong*, 576 F.3d at 957. The court also noted that the CNMI legislature had implemented Section 601(a) by adopting the Internal Revenue Code, 26 U.S.C. 1 *et seq.*, as a local territorial tax in a statute that vested jurisdiction over tax disputes in CNMI courts. See *Armstrong*, 576 F.3d at 957. Finally, the court explained that Congress had expressly vested jurisdiction over tax-related matters in the federal district court for Guam, see 48 U.S.C. 1421i(h)(1), but had not explicitly conferred analogous authority on the federal district court for the Northern Mariana Islands. See *Armstrong*, 576 F.3d at 956. For those reasons, the court of appeals concluded that the jurisdiction of the federal district court in Guam is broader with respect to tax-related matters than the jurisdiction of the federal district court in the CNMI. See *id.* at 957.

In both this case and in *Armstrong*, the courts of appeals construed the relevant provisions of the Covenant to determine the applicability of federal law to the CNMI. In both cases, the courts concluded that the substantive federal laws at issue (the FICA in this case and the income tax laws in *Armstrong*) apply to the CNMI

in the same manner as they apply to Guam. In *Armstrong*, the court of appeals decided a question of federal jurisdiction that is not presented in this case, and the court did so with reference to the Covenant, other federal statutes, and local CNMI statutes. The decision below is fully consistent with that approach. Far from "mechanically" applying the FICA to the CNMI, Pet. 19, the court of appeals in this case carefully analyzed the text of 26 U.S.C. 3121 and Section 606(b) of the Covenant. See pp. 6-8, *supra*.

b. Petitioners contend that, under the reasoning of the decision below, "not less than twelve different federal programs * * * are made applicable to nonimmigrant alien workers who have never been admitted into the United States under the provisions of the [Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*]." Pet. 12. As explained above, however, nonimmigrant workers in the CNMI and their employers have been paying FICA taxes since the Covenant took full effect in 1987. The decision below does nothing more than reject petitioners' challenge to the status quo.

In any event, the statutes on which petitioners rely do not support their argument. For instance, petitioners cite (Pet. 12) Title II of the Social Security Act, 42 U.S.C. 1301, but Congress has specifically addressed which Title II programs apply to the CNMI. See p. 10, *supra*. Other subchapters of Title II address topics like State block grants and administrative matters, see, *e.g.*, 42 U.S.C. ch. 7, subch. IV, V, VII, XIX and XXI, and petitioners do not explain how those provisions could plausibly be interpreted to require the payment of Social Security benefits to nonimmigrant workers in the CNMI. The other federal statutes listed by petitioners present no more significant difficulties.

c. The court of appeals' decision in this case is limited to FICA taxation, and it follows logically from the combination of two congressional policy choices. First, Section 606(b) of the Covenant reflects Congress's determination that, for purposes of Social Security taxes and benefits, the CNMI should be treated as part of the United States. See pp. 6-9, *supra*. Second, the FICA provisions governing taxation of wages make clear that, so long as the relevant services are performed within the United States, wages are subject to FICA tax "irrespective of the citizenship or residence of either" the employee or employer. 26 U.S.C. 3121(b) (Supp. IV 2010); see pp. 6-7, *supra*.

Because Section 606(b) of the Covenant is limited to United States laws "which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System," Pet. App. 193a (emphasis omitted), the decision below has no necessary implication for the applicability to the CNMI of federal statutes other than those governing Social Security taxes and benefits. And, to the extent that various forms of Social Security benefits are otherwise unavailable to aliens (or to particular categories of aliens), the court of appeals' decision does not purport to override those limitations. Rather, the decision below reflects the court's awareness that, under the background rules governing FICA taxes, the taxability of wages turns on the location where services are performed, not on the citizenship of the employee or employer. See *id.* at 203a ("It is evident from the definition of 'employment' that citizenship is not the basis for applying FICA taxes."). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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