No. 99-48

In the Supreme Court of the United States

LEWIS COUNTY, WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a statutory consent to state and local "taxation" of property held by the Farm Service Agency of the United States Department of Agriculture (7 U.S.C. 1984) also consents to the imposition of penalties and interest accruing on such taxes under local law and to foreclosure sales of such property for satisfaction of local property taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 175 F.3d 671. A decision of the court of appeals that addresses an issue not raised in the petition is unpublished, but the decision is noted at 94 F.3d 654 (Table). The opinion of the district court (Pet. App. B1-B14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1999. A petition for rehearing was denied on May 20, 1999 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farm Service Agency (FSA) is an agency within the United States Department of Agriculture that administers a loan program for qualified farmers and ranchers (Pet. App. A5).[1] When a borrower defaults on a FSA loan, the agency acquires title to the land that secures the loan (7 U.S.C. 1985(a); Pet. App. A5). The FSA is required to sell such property to qualified farmers and ranchers whenever possible (7 U.S.C. 1985(c)(1)(B); Pet. App. A18). During the period that the agency holds such property, Congress has provided that the property "shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed" under local law (7 U.S.C. 1984).

Between 1984 and 1990, the FSA acquired 20 parcels of farmland from defaulting borrowers in Lewis County, Washington. When the County assessed taxes against these properties, the FSA declined to pay the taxes as well as the interest and penalties imposed by the County under state law (Pet. App. A6).

In 1990, the County foreclosed on three of these parcels, purportedly purchasing them at a tax sale (CR 1, at 8-9, 11-12).[2] In January 1994, the FSA paid the taxes, interest, penalties and other charges assessed on another parcel under protest, in order to pass clear title to an eligible buyer (*id.* at 11). A tax sale of the remaining 16 parcels was noticed for May 13, 1994 (*id.*

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[1] This suit was brought by the FSA in its capacity as the successor of the Farmers Home Administration. See 7 U.S.C. 6932(a), (b)(3).

[2] "CR" refers to the docket control numbers assigned by the Clerk of the District Court to the original record.

at 13). Prior to that date, the FSA paid the property taxes, penalties, interest and other charges on 15 of the parcels under protest (*ibid.*). On May 13, 1994, the County sold the remaining parcel to petitioners Kevin and Bernice Murphy (*id.* at 15).

In 1994, Lewis County took the position that the FSA was not using the defaulted properties for agriculture purposes and sought to tax those properties at a higher rate (CR. 1, at 14). The FSA paid the new assessments under protest (*id.* at 14-15).

2. The United States then commenced this action to challenge the assessment of taxes, interest and penalties on the property held by the FSA. The United States contended that, by consenting to state and local taxation "in the same manner and to the same extent as other property is taxed" (7 U.S.C. 1984), Congress did not consent to the taxation of FSA property when similar property held by state and local authorities performing a similar lending function is exempt from tax under state law. The complaint further sought a declaration that the consent to "taxation" in 7 U.S.C. 1984 did not consent to the imposition of interest, penalties and other charges under state law or to foreclosure sales of federal government property.[3]

Relying on the Tax Injunction Act (28 U.S.C. 1341), the district court dismissed the complaint for lack of jurisdiction (Pet. App. A6). Because that Act does not apply to suits brought by the United States, however, the court of appeals reversed and remanded for con-

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[3] Petitioners Kevin and Bernice Murphy filed a counterclaim in which they asserted that, if the United States prevails in its challenge to the foreclosure sales, they should be reimbursed for the value of improvements made by them to the contested property (CR 6).

sideration of the merits of the government's complaint (*id.* at A6-A7).

3. On remand, the district court ruled against the United States on the merits (Pet. App. B8-B14). The court of appeals affirmed in part, reversed in part and remanded (*id.* at A1-A24), holding "that Lewis County may [by virtue of 7 U.S.C. 1984] tax the [federal government's] properties in issue, but that it may neither impose interest and penalties nor foreclose on those properties" (Pet. App. A4).[4]

The court of appeals rejected the contention of the United States that 7 U.S.C. 1984 does not allow state and local taxation of property held by the FSA when similar property held by the Washington State Housing Finance Commission upon default of state loans is exempt from tax under state law. The court held that the statutory consent to taxation of federal property "in the same manner and to the same extent as other property is taxed" under state law (7 U.S.C. 1984) does not incorporate state-law tax immunities for state and local agencies. The court reasoned that such state-law immunities were not incorporated because, in enacting this statute, Congress sought to preserve the local tax base in counties where the FSA operated (Pet. App. A7-A9).

The court of appeals concluded, however, that the statutory consent to state and local "taxation" of federal property (7 U.S.C. 1984) does not *also* consent to the imposition of state-law penalties and interest or to the

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[4] Petitioners Kevin and Bernice Murphy filed a cross-appeal (Pet. App. A5). See note 3, *supra*. The court of appeals noted that the Murphys were not entitled to appeal because they were prevailing parties in the district court and that, in any event, the issues raised by the Murphys were premature (*id.* at A21-A23).

foreclosure of federal property under state law. Applying the decisions of this Court in *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-316 (1986), *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947), *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992), and *United States* v. *Alabama*, 313 U.S. 274, 282 (1941), the court of appeals concluded that state-law penalties and interest are not within the scope of the waiver because consent to "taxation" "does not unequivocally include the assessment of interest and penalties" (Pet. App. A16). In reaching that conclusion, the court noted that its decision conflicts with the decision of the Fourth Circuit in *Federal Reserve Bank* v. *Richmond*, 957 F.2d 134 (1992), and with the decision of the Fifth Circuit in *Reconstruction Finance Corp.* v. *Texas*, 229 F.2d 9, cert. denied, 351 U.S. 907 (1956). The court stated that it "disagree[s] with the approach of the Fourth and Fifth Circuits" in those cases (Pet. App. A14).

The court of appeals remanded for the district court to address whether Lewis County had improperly assessed FSA property under the higher, non-agricultural rate (Pet. App. A19-A20, A22) and for further proceedings on the Murphys' counterclaim (*id.* at A4, A19 n.8, A21 n.9, A22-A24). See notes 3, 4, *supra*.

ARGUMENT

The courts of appeals are in conflict on the question whether a statutory consent to the imposition of state and local taxes on federal property also constitutes consent to the imposition of state-law penalties and interest on such taxes or to foreclosure sales of federal property. In the petition for a writ of certiorari filed in *United States* v. *County of Cook*, No. 99-345, the

United States has requested the Court to review that issue.[5] As the court of appeals noted, however, the proper disposition of the present case does not ultimately require resolution of that conflict (Pet. App. A14 n.6). The petition for a writ of certiorari in this case should therefore be denied.

1. It is, of course, well established that, in the absence of statutory consent, "a State may not * * * lay a tax 'directly upon the United States'." *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943). The "absolute federal immunity from state taxation" applies whenever the state "levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities" (*United States* v. *New Mexico*, 455 U.S. at 733, 735) or when the state tax scheme "operat[es] so as to discriminate against the Government or those with whom it deals" (*Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 812 (1989), quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

By consenting to state and local "taxation" of certain types of federal property under 7 U.S.C. 1984, Congress did not also consent to the imposition of penalties and interest under state law or to foreclosure sales of federal property. "[I]n the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. . . . There can be no consent by implication or by use of any ambiguous language." *United States* v. *N.Y. Rayon Importing*

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[5] We are providing a copy of the petition filed by the United States in No. 99-345 to petitioners in this case.

Co., 329 U.S. 654, 659 (1947). That same principle applies with equal force to penalties. See *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Moreover, any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). Applying these settled principles, the court of appeals correctly concluded in this case that a consent to the imposition of state and local "taxation" is not an unambiguous waiver of immunity from state-law penalties and interest and does not authorize foreclosure sales of federal property (Pet. App. A15-A19).[6]

In reaching that conclusion, the court of appeals noted (Pet. App. A13-A14) that its decision conflicts with the decision of the Fourth Circuit in *Federal Reserve Bank* v. *Richmond*, 957 F.2d 134 (1992). In the *Richmond* case, the Fourth Circuit had before it a federal statute that consented to state and local "taxes upon real estate" owned by Federal Reserve banks (12 U.S.C. 531). The court held in *Richmond* that the term "taxes" in that statute should be interpreted consistently with the state definition of "taxes," which encompassed penalties and interest as well as basic tax charges. The court reasoned in *Richmond* that Congress should not be understood to have permitted the States "to tax the real property of the Federal Reserve banks and yet require them to alter their

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[6] Petitioners erroneously seek to rely (Pet. 26) on a regulation (7 C.F.R. 1925.4(b)) that authorizes the FSA to make additional loans to a borrower—in the amount of the borrower's delinquent taxes plus any accrued penalty—to bring taxes current in order to stave off default. That regulation has no bearing on the scope of the waiver by the United States of immunity from state and local "taxation" under 7 U.S.C. 1984.

settled practices concerning the collection of these taxes." 957 F.2d at 137. In reaching that conclusion, the Fourth Circuit correctly noted that its decision was "in agreement with" (*ibid.*) the decision of the Fifth Circuit in *Reconstruction Finance Corp.* v. *Texas*, 229 F.2d 9, cert. denied, 351 U.S. 907 (1956), which held that a statute that authorizes "taxation" of federal property incorporates "settled State rules in determining whether the word 'taxation' * * * includes penalties and interest." 229 F.2d at 11. In the present case, the Ninth Circuit stated that it "disagree[s] with the approach of the Fourth and Fifth Circuits" in the *Reconstruction Finance* and *Richmond* cases (Pet. App. A14).[7]

The court of appeals went on to note in this case that, even if the analysis of the *Reconstruction Finance* and *Richmond* cases were applied here, "the County would fare no better" (Pet. App. A14 n.6). This is because interest and penalties are not "a part of the tax" under Washington law (*ibid.*, quoting *Henry* v. *McKay*, 533, 3 P.2d 145, 148 (Wash. 1931)). Whether the analysis of the Ninth Circuit or of the Fourth and Fifth Circuit is

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[7] Petitioners err in contending (Pet. 8, 10, 24-26) that the decision in this case conflicts with *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946). That case presented the question whether Congress, in allowing "any real property of the [Reconstruction Finance] [C]orporation [to be] subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed" (15 U.S.C. 610 (Supp. I 1941), permitted Beaver County to tax as real property heavy factory machinery when such machinery was considered part of the factory real estate under state law. That case concerned the definition of the term "real estate" as used in that statute; it did not involve the issue presented in this case of whether a waiver of immunity from "taxation" extends to state-imposed penalties, interest and foreclosure.

applied to this case, the result is thus the same: by consenting to state "taxation," Congress did not consent to the imposition of the penalties and interest assessed in this case.

Because resolution of the conflict in the reasoning adopted by the Fourth, Fifth and Ninth Circuits is not necessary to the proper disposition of this case, review by this Court is not warranted. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. There is no conflict between the decision below and cases such as *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *United States* v. *Tipton*, 898 F.2d 770 (10th Cir. 1990), and *Pearlstein* v. *SBA*, 719 F.2d 1169 (D.C. Cir. 1983), on which petitioners rely (Pet. 21-23). Those cases involve whether state law provides the rule of decision in determining the priority of the statutory liens that the United States acquires through its lending programs. They do not involve the scope of the various statutory waivers of the immunity of the United States from state and local "taxation."

Contrary to the petitioners' assertion (Pet. 20), this case does not implicate the exception to the rule against imposing interest against the United States described by this Court in *Standard Oil Co.* v. *United States*, 267 U.S. 76, 79 (1925). In *Standard Oil*, the Court held that the United States, in entering the insurance business—issuing policies in familiar form and providing that in case of disagreement it would be subject to suit—accepted the ordinary incidents of suits in such business, which included the payment of interest. *Ibid.* In the present case, however, the United States has not "cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." *Library of Congress* v. *Shaw*, 478 U.S. at 317 n.5. To the contrary,

the United States has merely allowed a limited form of "taxation" of federal property (7 U.S.C. 1984). This Court has consistently held that such limited waivers of sovereign immunity "will be strictly construed" and that all ambiguities are to be resolved "in favor" of immunity (*Lane* v. *Pena*, 518 U.S. 187, 192 (1996), quoting *United States* v. *Williams*, 514 U.S. 527, 531 (1995)).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioners incorrectly assert (Pet. 11-12) that the United States was required to exhaust state remedies before bringing its challenge to state and local taxes in federal court. This Court has made abundantly clear that the United States may litigate its tax claims against States and local governments without exhausting state and local remedies. See *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966). The decision on which petitioners rely—*United States* v. *California*, 507 U.S. 746 (1993)—is plainly inapposite, for it concerns the different situation in which the United States asserts a claim obtained as the subrogee of a private party. The Court held in *California* that, when the United States merely steps into the shoes of a private party as subrogee, its rights are subject to all preexisting defenses to that claim, including the requirement of exhaustion of remedies. *Id.* at 756-757. In *California*, the Court expressly noted that exhaustion of state remedies is *not* required when "the [g]overnment [is] proceeding in its sovereign capacity." *Id.* at 757, citing *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940).