No. 21-1195

IN THE
Supreme Court of the United States

ALEXANDRU BITTNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CENTER FOR TAXPAYER RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST................................. 1

SUMMARY OF ARGUMENT.................................. 3

ARGUMENT 4

I. INTRODUCTION.. 4

II. STATUTORY BACKGROUND..................... 6

III. REASONS FOR GRANTING THE PETITION 7

A. The Circuit Split and "Per-Account" Penalty Assessment Disparately Treats Similarly Situated Taxpayers. 7

B. The Fifth Circuit's Approach Harshly and Disproportionately Penalizes Less Culpable Violators. 14

CONCLUSION.. 25

TABLE OF AUTHORITIES

Page(s)

Cases

I.N.S. v. Yueh–Shaio Yang,
519 U.S. 26 (1996).. 14-15

International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965) 8

Jarnagin v. United States,
134 Fed. Cl. 368 (2017)....................................... 23

Morton v. Ruiz,
415 U.S. 199 (1974)... 14

United States v. Bittner,
469 F. Supp. 3d 709 (E.D. Tex. 2020).............. 5, 16

United States v. Bittner,
No. 20-40597 (5th Cir. Nov. 30, 2021)............ 5, 16

United States v. Boyd,
991 F.3d 1077 (9th Cir. 2021)................................ 5

United States v. DeMauro,
483 F. Supp. 3d 68 (D.N.H. 2020) 23

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2021 WL 47668683 (N.D. Cal. Oct. 13, 2021)..... 23

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363 U.S. 299 (1960).. 8

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2017 WL 2483213 (W.D. Wash. June 8, 2017) ... 20

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TABLE OF AUTHORITIES

Page(s)

Williams v. Commissioner,
131 T.C. 54 (2008) 19

Statutes

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5 U.S.C. § 706(2)(A) 15

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Subchapter B, Assessable Penalties,
Part I, General Provisions 18

26 U.S.C. § 6671 18

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31 U.S.C. § 3711(g) 18

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31 U.S.C. § 3718(a)(1) 19

31 U.S.C. § 3718(c) 19

Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* 4, 6, 7

31 U.S.C. § 5311 6

31 U.S.C. § 5314 6

31 U.S.C. § 5321(a)(5) 7

31 U.S.C. § 5321(a)(5)(B)(i) 7, 9

31 U.S.C. § 5321(a)(5)(B)(ii) 7

TABLE OF AUTHORITIES

Page(s)

31 U.S.C. § 5321(a)(5)(C)-(D) 7, 9, 12

31 U.S.C. § 5321(b)(1) 9

31 U.S.C. § 5322 7

American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418 7

Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, § 202, 84 Stat. 1114..... 6

Regulations

31 C.F.R. § 1010.350 .... 6, 13

31 C.F.R. § 1010.810(g) 7

31 C.F.R. § 1010.821 18

Administrative Guidance

I.R.M. 4.26.16.5.2.1 (June 24, 2021) 15, 17

I.R.M. 4.26.16.5.4 (June 24, 2021) 17

I.R.M. 4.26.16.5.4.1 (June 24, 2021) 17, 18

I.R.M. Exhibit 4.26-16-2, FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004 17

I.R.M. 20.1.1.2 (Nov. 21, 2017) 17

I.R.M. 20.1.1.2.1 (Nov. 25, 2011) 15

I.R.M. 20.1.1.2.2 (Nov. 25, 2011) 8

TABLE OF AUTHORITIES

Page(s)

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BRIEF OF CENTER FOR TAXPAYER RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Center for Taxpayer Rights (the "Center") respectfully submits this brief as amicus curiae in support of petitioner, Alexandru Bittner.[1]

STATEMENT OF INTEREST

The Center, a 501(c)(3) not-for-profit corporation, is dedicated to furthering taxpayers' awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights play in promoting compliance and trust in systems of taxation. The Center and its Executive Director, Nina E. Olson,[2] the former National Taxpayer Advocate, have experience advocating on behalf of taxpayers whose voices might otherwise not receive attention. The Center and its Board of Directors, which includes Alice Abreu, Professor of Law at Temple University's Beasley School of Law and Director of its Center for Tax Law and Social Policy, Elizabeth J. Atkinson, a

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[1] Consent to file this brief was provided by the parties. The Solicitor General provided consent on March 8, 2022, and Petitioner provided consent on March 2, 2022. Pursuant to Rule 37.6, it is hereby noted that this brief was not drafted in whole or in part by either counsel to the parties, nor did any of the parties or counsel thereto provide any monetary contributions intended to fund the preparation or submission of the brief.

[2] Ms. Olson has recused herself from any participation in this brief due to involvement with this case during her time as the National Taxpayer Advocate.

partner with Whiteford, Taylor, Preston LLP, Leslie Book, Professor of Law at the Villanova Law School, and T. Keith Fogg, Director of the Low-Income Taxpayer Clinic at the Harvard Law School, are committed to advocating for systemic improvements in United States tax administration. The Center, and undersigned counsel, [3] believe that the conflicting statutory interpretations of 31 U.S.C. § 5321(a)(5)(B)(i) of the U.S. Courts of Appeals for the Fifth and Ninth Circuits, respectively, regarding the application of penalties for non-willfully failing to report offshore bank accounts, create significant confusion and uncertainty and allow for disparate treatment of similarly situated taxpayers. Moreover, the statutory interpretation adopted by the Fifth Circuit, and followed by the Internal Revenue Service ("IRS"), causes significant economic harm to the least culpable taxpayers, is arbitrary and disproportionate to the violation being penalized, and is in conflict with of the IRS's internal policy

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[3] Guinevere Moore is a tax litigation attorney who tries tax and FBAR cases and routinely publishes in Forbes on tax issues. Ajay Gupta is a tax litigation attorney who is a former attorney-advisor at the United States Tax Court and currently adjunct professor of law at the DePaul University College of Law, Chicago-Kent Law School, and University of Houston Law School, where he teaches civil and criminal tax courses. Zhanna Ziering, whose admission before this Court is pending and who significantly contributed to this brief, is a nationally recognized FBAR expert and is the co-author of the Bloomberg BNA's Tax Management Portfolio, Report of Foreign Bank and Financial Accounts.

requiring penalties to be proportionate to delinquent conduct.

SUMMARY OF ARGUMENT

The legal issue presented in this case requires review by the Court to resolve two conflicting interpretations of the Bank Secrecy Act ("BSA") provision governing penalties for filing violations relating to a Report of Foreign Bank and Financial Accounts ("FBAR"): whether BSA mandates one maximum penalty of $10,000 for a non-willful failure to file a single FBAR regardless of the number of bank accounts that should have been reported on the form, or whether the failure to report each bank account on the form constitutes a separate violation subject to the $10,000 penalty. First, the conflict between the Ninth and the Fifth Circuits over their respective statutory interpretations, and the IRS's commitment to applying the Fifth Circuit's interpretation to all taxpayers outside of the Ninth Circuit, disparately treats similarly situated taxpayers and is contrary to the IRS's internal policy. Second, the Fifth Circuit's interpretation of the penalty provision itself propagates disparate treatment of similarly situated taxpayers whose failure to report offshore funds differs only in the number of unreported accounts. Finally, the "per-account" approach harshly and disproportionately impacts the least culpable but most vulnerable groups of non-willful taxpayers for reasons unrelated to the conduct the statute seeks to deter. Because only this Court can end the disparate treatment of

similarly situated taxpayers, the petition should be granted.

ARGUMENT

I. INTRODUCTION

This case demonstrates the economic significance of the conflicting interpretations of the BSA provision governing the penalties for FBAR filing violations: whether BSA mandates one maximum penalty of $10,000 for a non-willful failure to file a single FBAR regardless of the number of bank accounts that should have been reported on the form ("per-form" penalty), or whether the failure to report each bank account on the form constitutes a separate violation subject to the maximum $10,000 penalty ("per-account" penalty). The penalties in this case showcase the economic ramifications of the Fifth Circuit's "per-account" interpretation, yielding disproportionately punitive civil sanctions that are imposed on a U.S. taxpayer residing abroad for a non-willful violation of the FBAR reporting requirement.

Mr. Bittner, a U.S. citizen who resided abroad and owned foreign companies, was not aware of and consequently did not comply with the FBAR reporting obligations. Acknowledging that Mr. Bittner's failure to timely file FBAR for the years 2007-2011 (five FBARs) was not willful, the IRS assessed non-willful penalties against him on the "per-account" basis, identifying 272 separate FBAR reporting violations amounting to an aggregate $2.72 million *non-willful* FBAR penalty.

The District Court for the Eastern District of Texas struck down the IRS's statutory interpretation, holding that the non-willful FBAR penalty must be applied "per-form." *United States v. Bittner*, 469 F. Supp. 3d 709 (E.D. Tex. 2020). Reversing, the Fifth Circuit parted company with the Ninth Circuit,[4] holding that the statute mandates that the FBAR penalty be applied on a "per-account" basis. *United States v. Bittner*, No. 20-40597 (5th Cir. Nov. 30, 2021).

Relying on the Fifth Circuit decision, the IRS is now continuing to aggressively pursue non-willful penalties on a "per-account" basis,[5] even though this practice runs counter to the agency's own internal guidance. As a result, depending on where in the world they live, millions of taxpayers may face disproportionate penalties for a non-willful failure to file an FBAR, or they may face a single penalty of $10,000 per FBAR form. Only this Court can resolve the conflict between the circuits regarding the

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[4] *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021) (holding that the statute requires the penalties to be applied per form.)

[5] See Andrew Velarde, *IRS Following* Boyd *FBAR Interpretation in Ninth Circuit Only*, TAX NOTES (Feb. 7, 2022), https://www.taxnotes.com/tax-notes-federal/litigation-and-appeals/irs-following-boyd-fbar-interpretation-ninth-circuit-only/2022/02/14/7d5jp?highlight=IRS%20following%20Boyd%20fbar%20interpretation%20in%20ninth ("With two circuits split on whether non-willful foreign bank account reporting penalties apply per account or per form, the IRS is begrudgingly and quietly following the latter interpretation in the Ninth Circuit.").

proper interpretation of the BSA penalty provision and thereby provide certainty to the IRS and taxpayers, independent of where they reside, on the monetary consequences of having non-willfully failed to file an FBAR.

II. STATUTORY BACKGROUND.

1. Congress enacted the FBAR filing requirement in 1970 as part of the BSA, 31 U.S.C. § 5311 *et seq*. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, § 202, 84 Stat. 1114. The stated purpose of the BSA was "to require certain reports or records," where they have a high degree of usefulness in "criminal, tax, or regulatory investigations, risk assessments or proceedings; or in intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. Section 5314 of the BSA requires U.S. taxpayers to keep records of and report their relationship with a foreign financial agency. 31 U.S.C. § 5314. Details regarding the reportable relationship and the form of the required reporting are contained in the regulations issued by the Financial Crimes Enforcement Network ("FinCEN"). See 31 C.F.R. § 1010.350. The regulations require U.S. persons to file an annual FBAR with FinCEN reporting their financial interest in or signature or other authority over a foreign financial account, but only if the aggregate value of the assets in all of their reportable accounts exceeded $10,000 during the year. *Ibid.*

2. The BSA penalizes failures to report foreign bank accounts with both civil and criminal penalties.

31 U.S.C. §§ 5321(a)(5), 5322. Initially, only willful violations of the FBAR requirements were penalized under Section 5321 of the BSA. But in the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418, Congress added a penalty for a non-willful violation in the maximum amount of $10,000, 31 U.S.C. § 5321(a)(5)(B)(i), and increased the upper limit for willful penalties to the greater of $100,000 or 50 percent of the value of the account at the time of the violation, 31 U.S.C. § 5321(a)(5)(C)-(D). The amendment also provided a reasonable cause defense to non-willful FBAR penalties. 31 U.S.C. § 5321(a)(5)(B)(ii).

The Treasury Secretary has delegated the authority to enforce the FBAR provisions of the BSA to the Commissioner of the Internal Revenue Service. 31 C.F.R. § 1010.810(g). The delegated enforcement authority includes the investigation of possible civil FBAR violations, summons power, and assessment and collection of civil FBAR penalties. *Ibid.*

III. REASONS FOR GRANTING THE PETITION.

A. The Circuit Split And "Per-Account" Penalty Assessment Disparately Treats Similarly Situated Taxpayers.

The conflict between the circuits on proper application of non-willful penalties is in dire need of the Court's review and guidance. Following the Fifth Circuit decision, the IRS is continuing to assess FBAR penalties for non-willful conduct on a "per-

account" basis for all taxpayers residing outside of the Ninth Circuit.[6] The split between the circuits considerably undermines a fundamental tenet of consistent tax administration—treating similarly situated taxpayers similarly. See *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965). See also *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J. concurring) (opining that equal treatment by Commissioner is an "overriding principle" because the "Commissioner cannot tax one and not tax another without some rational basis for difference."). The Internal Revenue Manual expressly provides for consistency in penalty administration:

> "[t]he IRS should apply penalties equally in similar situations. Taxpayers base their perception about the fairness of the system on their own experience and the information they receive from the media and others. If the IRS does not administer penalties uniformly (guided by the applicable statutes, regulations, policies, and procedures), overall confidence in the tax system is jeopardized."

I.R.M. 20.1.1.2.2(1)(a) (Nov. 25, 2011).

Nevertheless, taxpayers residing outside of the Ninth Circuit will be subject to much harsher non-willful penalties as a result of the Fifth Circuit interpretation of the penalty provision and the IRS's

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[6] *Supra* at n. 5.

practice. Moreover, the Fifth Circuit "per-account" approach by its nature propagates disparate treatment of similarly situated taxpayers.

1. Even under the Ninth Circuit's application, the penalty can be significant—especially for low-income taxpayers. A taxpayer, unaware of the FBAR reporting requirement, may face a potential penalty of up to $60,000 for failing to file an annual FBAR form for multiple years on account of the six-year statute of limitations on assessing such penalties. 31 U.S.C. § 5321(b)(1). A $60,000 penalty is a high price to pay for the non-willful failure to file an obscure form that does not have any tax consequences. Moreover, the per-account method of imposing the penalty disproportionately affects small account holders. Unlike the willful penalty under 31 U.S.C. § 5321(a)(5)(C), the non-willful penalty under 31 U.S.C. § 5321(a)(5)(B)(i) is not calibrated to the value of the unreported account. For example, a taxpayer who, for the last six years, non-willfully failed to report a foreign account with a balance of $500,000 could be facing the same penalty under 31 U.S.C. § 5321(a)(5)(B)(i)—$60,000—as the taxpayer who failed to report an account with a balance of $100,000. Because taxpayers are being penalized for an annual failure to report the same account containing the same funds, these penalties adversely affect a smaller account holder much more than a taxpayer with a larger account balance.

The Fifth Circuit's approach magnifies this distortionary impact by multiplying the maximum $10,000 annual penalty by each unreported bank account. As a result, a taxpayer with ten reportable

bank accounts, each with a $50,000 balance, would face a maximum non-willful penalty of $100,000 for each year, and $600,000 for all six years that remain open under the statute of limitations. By comparison, a taxpayer with a single bank account with $500,000 balance would be subject to only a maximum $10,000 annual penalty, with the total exposure limited to $60,000 for the six open years. Surely Congress did not intend to penalize non-willful taxpayers more severely simply for holding smaller balances in multiple accounts than a much larger balance in a solitary account. Nonetheless, any taxpayer residing outside of the Ninth Circuit will face unpredictable and much harsher penalties for effectively identical violations.

2. Outside of the Ninth Circuit, the approach applied by the Commissioner and adopted by the Fifth Circuit disparately treats similarly situated non-willful taxpayers who failed to report bank accounts holding in the aggregate an identical sum, *e.g.* $500,000. These similarly situated taxpayers can be assessed vastly disparate penalties, based solely on the number of the unreported accounts in which the funds are held. Thus, a taxpayer who failed to report one account holding $500,000 will be assessed a maximum $10,000 penalty per year, whereas a taxpayer who failed to report ten different accounts, each holding $50,000, would be facing a maximum annual penalty aggregating $100,000 for failure to report the same total amount of offshore funds. Even more troubling, a taxpayer who failed to report ten accounts with an aggregate value even as low as $200,000, could be subject to the same

$100,000 penalty for the year, while a taxpayer who failed to report one account holding $500,000 would have a maximum annual statutory liability of $10,000.

Tying the FBAR penalty to the number of unreported accounts is what creates such an absurd result. Neither the plain reading of the statute nor its legislative history supports the proposition that in enacting the "non-willful" FBAR penalty provision, Congress sought to target the number of unreported accounts, as opposed to the failure to disclose funds held in these offshore bank accounts. Nevertheless, so-called post-legislative history indicates that the penalty provision was motivated by taxpayers' using foreign accounts to conceal income from the IRS. The Joint Committee on Taxation's "Blue Book" notes that improving compliance with FBAR reporting requirement is "vitally important to sound tax administration, to combatting terrorism, and to preventing the use of abusive tax schemes and scams." Staff of J. Comm. On Taxation, General Explanation of Tax Legislation Enacted in the 108th Congress, at 377-78 (J. Comm. Print 2005). See *United States v. Woods*, 571 U.S. 31, 47 (2013) (observing that in interpreting tax statutes, "the Blue Book, like a law review article, may be relevant to the extent it is persuasive"). Penalizing taxpayers failing to report the same amount of funds on the basis of how many accounts those funds were held in violates the principle of consistency and does not advance the evident congressional intent behind enacting the non-willful penalty provision. On the contrary, it

arbitrarily subjects a taxpayer who happens to have more bank accounts to a harsher economic sanction than one who may have the same or more unreported funds in only one account.

Because the penalty in this case is expressly designed to apply to and deter *non-willful* conduct, it is unimaginable that Congress contemplated applying it "per-account" without at least calibrating it to the amount of unreported funds. By comparison, the willful penalty, 31 U.S.C. § 5321(a)(5)(C), does exactly that, capping the penalty at the greater of $100,000, or 50 percent of the amount in the unreported bank account. Yet millions of taxpayers residing outside of the Ninth Circuit are currently faced with the prospect of such a harsh penalty for non-willful conduct.

3. Furthermore, the legislative history contains no evidence that Congress envisaged a statutory scheme in which a non-willful penalty, applied "per-account," could equal or exceed a penalty for a willful failure to report the same amount of funds. For taxpayers residing outside of the Ninth Circuit, however, such an outcome may well come to pass. For example, a taxpayer who is assessed a willful penalty for failure to report an account valued at $400,000 would be subject to a $200,000 willful FBAR penalty. On the other hand, and not unlike the facts of this case, a taxpayer who non-willfully failed to report $400,000 held in 25 separate accounts would be subject to a non-willful penalty of $250,000 if it is applied "per-account." Such a perverse outcome simply could not have been what Congress intended when it enacted the non-willful

penalty provision. But, without this Court's intervention, a result like this cannot be ruled out.

In addition, the statute contains no provision preventing multiple penalties for failure to report the same funds, even if such funds were merely transferred from one account to another. Consider a taxpayer who starts the calendar year with three accounts, numbered #1, #2, and #3, each with $100,000 in it. During the year, this taxpayer closes Account #1 and transfers its funds to a new account, Account #4, opened at another bank. She also uses $80,000 from Account #2 to purchase two certificates of deposit (CDs), each valued at $40,000. Finally, she uses $50,000 from Account #3 to acquire a short-term CD, and when it expires during the same calendar year, rolls over the funds from that CD into a new CD. This taxpayer started the calendar year with $300,000 in offshore funds, and ended the year with the same $300,000, plus some earned interest. But as a result of these transactions, this taxpayer must report eight accounts on the FBAR: Accounts #1 and #4 (even though Account #1 was closed before year-end); Account #2; the two CDs acquired with the funds from Account #2; Account #3; the short-term CD; and the CD acquired with the funds rolled over from that short-term CD. See 31 C.F.R. § 1010.350(c).

Under the Fifth Circuit's "per-account" application, this taxpayer's non-willful failure to file an FBAR reporting her financial interest in these assets would be subject to an $80,000 penalty. But, if the funds had remained untouched and uninvested, the taxpayer's aggregate non-willful

penalty would have been just $30,000 for the failure to report three accounts, under the Fifth Circuit's interpretation. That $50,000 increase in the penalty amount would likely far exceed any interest that the taxpayer might have earned from actively managing her funds, and in any case, bears no connection to the amount of the unreported funds, undeclared income, or to the government's cost of discovering them. Meanwhile, a taxpayer engaging in the exact same transaction, but one who is fortunate to reside in the Ninth Circuit, would be subject to a maximum $10,000 penalty for failure to file the FBAR form.

The foregoing disparate treatment of similarly situated taxpayers arising from the circuit conflict with the harsh consequences of the Fifth Circuit's "per-account" approach, necessitates the Court's immediate review.

B. The Fifth Circuit's Approach Harshly and Disproportionately Penalizes Less Culpable Violators.

1. As this case starkly highlights, the practical application of the Fifth Circuit's statutory interpretation yields absurd results and disproportionately penalizes non-willful conduct in direct violation of the internal IRS guidance. See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[W]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." (internal citations omitted)); *I.N.S. v. Yueh–Shaio Yang,* 519 U.S. 26, 32 (1996) ("Though the agency's

discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, or an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).").

The Internal Revenue Manual provides that penalties "should relate to the standards of behavior [it] encourage[s]" and "best aid voluntary compliance if they support a belief in the fairness and effectiveness of the tax system." I.R.M. 20.1.1.2.1(10) (Nov. 25, 2011) (Encouraging Voluntary Compliance). As such, with respect to the FBAR penalties, the Internal Revenue Manual tempers examining agents' discretion by cautioning that "given the magnitude of the statutory maximum penalties permitted for each violation, the assertion of multiple penalties should be carefully considered and calculated to ensure that amount of the penalty is commensurate to the harm caused by the FBAR violation." I.R.M. 4.26.16.5.2.1(4) (June 24, 2021).

Significantly, the account balances disclosed on an FBAR form do not correlate—in any way—to tax due. And despite this explicitly articulated policy of aiding voluntary compliance, the IRS aggressively pursues maximum non-willful (and willful) FBAR penalties without considering the penalty's proportionality to the offense and to the harm caused by the FBAR violation. The assessment of the *non-willful* penalty—a penalty for conduct lacking any

indicia of culpability—on a "per-account" basis results in economic sanction that does not just depart or deviate from the agency's policy—it outright rejects it. Mr. Bittner's failure to file the FBAR, a reporting obligation of which he was unaware because he resided abroad, could not possibly have caused the U.S. government $2.72 million of harm. Upon returning to the United States, after having lived in Romania for 20 years, Mr. Bittner voluntarily filed his delinquent FBARs immediately upon learning of his reporting obligations. *United States v. Bittner*, No. 20-40597, at *5 (5th Cir. Nov. 30, 2021). The government did not have to expend any, let alone significant, resources to investigate Mr. Bittner; the penalties were assessed based on his voluntary filings.[7] *United States v. Bittner*, 469 F. Supp. 3d 709, 721 (E.D. Tex. 2020). Far from aiding voluntary compliance, the $2.72 million in FBAR penalties harms voluntary compliance by deterring behavior like Mr. Bittner's. It is simply a windfall for the government.

Penalizing non-willful reporting violations on a "per-account" basis is unjust and unwarranted in many circumstances, especially when, as here, it results in an extremely high penalty that does not correspond to any direct loss suffered by the

[7] Mr. Bittner filed delinquent tax returns contemporaneously with the FBARs, providing the government with information necessary to ascertain his tax liability for the years at issue. See *United States v. Bittner*, 469 F. Supp. 3d at 721.

government, with respect to lost revenue, enforcement action, or otherwise. This approach leaves the agency's actions unchecked, allowing for overreach. The "per-account" penalty approach deviates from the IRS's policy to use penalties to encourage voluntary compliance, which consists of "preparing an accurate tax return, filing it timely, and paying any tax due." I.R.M. 20.1.1.2(1)-(2) (Nov. 21, 2017). And taxpayers' "[e]fforts made to fulfill these obligations constitute compliant behavior." I.R.M. 20.1.1.2(2) (Nov. 21, 2017). A taxpayer who non-willfully failed to file an FBAR may be penalized for such failure to encourage voluntary compliance. But penalizing these taxpayers additionally for each item that should have been reported on one unified FBAR, particularly in a case where a taxpayer has already voluntary rectified the prior noncompliance, is arbitrary and does not advance the policy of promoting voluntary compliance.

2. The IRS's position is rendered even more untenable by the agency's actual practice. In theory, the IRS instructs examining agents to exercise discretion in assessing penalties, including discretion to assess non-willful penalties on a "per-form" basis.[8] The Internal Revenue Manual advises

[8] I.R.M. 4.26.16.5.2.1 (June 24, 2021) (FBAR Penalties – Examiner Discretion); I.R.M. 4.26.16.5.4(6) (June 24, 2021) (Penalty for Non-willful FBAR Violations); I.R.M. 4.26.16.5.4.1 (June 24, 2021) (Penalty for Non-willful Violations – Calculations); I.R.M. Exhibit 4.26-16-2, FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004.

examining agents to limit the amount of non-willful penalties assessed for one year to the "statutory maximum for a single violation" ($10,000) unless facts and circumstances of a particular case warrant otherwise.[9] Nonetheless, the imposition of the non-willful penalties on a "per-account" basis has become the norm rather than the exception of IRS practice in recent years.[10]

Once the IRS assesses an FBAR penalty, taxpayers, especially low-income taxpayers, immediately suffer adverse consequences. Unlike tax deficiencies determined by the IRS, so-called "assessable penalties,"[11] like the FBAR penalty, do not afford taxpayers a pre-payment forum for judicial review.[12] As such, as soon as an FBAR penalty is assessed, taxpayers will have all refunds offset and applied towards the FBAR penalty,[13] and may be subject to enforced collection actions.[14] Elderly and disabled taxpayers who depend on Social

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[9] I.R.M. 4.26.16.5.4.1(2) and (4) (June 24, 2021) (Penalty for Non-willful Violations – Calculations). The statutory maximum for a non-willful violation is subject to inflation adjustments pursuant to 31 C.F.R. § 1010.821, Penalty Adjustment and Table.

[10] *Supra* at n. 5.

[11] See, *e.g.*, Title 26, Subtitle F, Chapter 68, Subchapter B, Part I; 26 U.S.C. § 6671, Rules for application of assessable penalties.

[12] 26 U.S.C. § 6671; Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases*, 73 TAX LAW 435 (2020).

[13] 26 U.S.C. § 6402.

[14] 31 U.S.C. § 3711(g).

Security income and Medicare will have their monthly benefits reduced to pay over a portion towards the FBAR penalty.[15] The collection of the FBAR penalty debt may also be contracted out to a private collection agency,[16] for which the taxpayer is charged an additional debt-service fee.[17] Without access to a pre-payment forum for judicial review,[18] all of this can occur *before* the taxpayer has an opportunity to contest the determination and amount of the penalty before an impartial tribunal.

Consequently, the Fifth Circuit's "per-account" reading of the statute will leave even those taxpayers whom the IRS perceives to be least culpable with respect to the FBAR reporting violations facing extreme penalties with potentially crushing economic impact. At the same time, taxpayers who are lucky enough to reside in the Ninth Circuit may rest assured that their liability for the FBAR reporting violation is limited to $10,000 annual penalty.

3. The perverse results from applying the non-willful penalty "per-account" become even more

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[15] 31 U.S.C. § 3716(c)(3).

[16] 31 U.S.C. § 3718(a)(1).

[17] 31 U.S.C. § 3718(c). Letter 3708, *Notice and Demand for Payment of FBAR Penalty*, provides that referral to private collection agency results in a debt-service fee of 28% of balance due. See Ziering, Elber, and Matthews, 6085 T.M., *Report of Foreign Bank and Financial Accounts (FBAR)*, B-2902.

[18] *Williams v. Commissioner*, 131 T.C. 54 (2008) (holding that the Tax Court lacks jurisdiction to consider FBAR penalties.)

unpalatable once we consider the class of taxpayers likely to be the most affected. The Fifth Circuit's absurd interpretation of the statutory penalty regime vastly and disproportionately penalizes taxpayers with foreign ties—U.S. taxpayers residing abroad[19] and foreigners or immigrants living in the United States—with no link to the magnitude of unreported income, the value of undisclosed assets, or the gravity of offending conduct.

Beginning with the last factor, gravity of taxpayer conduct, these taxpayers are likely to be the least culpable. U.S. taxpayers residing abroad are much more likely to have multiple "foreign" accounts and businesses; *i.e.*, in their country of domicile. At the same time, they are significantly handicapped in their ability to discover FBAR requirements, mostly due to their limited access to sophisticated U.S. tax return preparers.[20] As of

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[19] Complex venue rules would determine whether U.S. taxpayer residing abroad would be subject to the Fifth Circuit's "per-account" or the Ninth Circuit's "per-form" approach to computing the maximum penalty for a non-willful FBAR violation. See 28 U.S.C. § 1391(c)(3); 28 U.S.C. § 1404(a). See *e.g.*, *United States v. Pomerantz*, No. C16-0689JLR, 2017 WL 2483213, at *2 (W.D. Wash. June 8, 2017).

[20] See Laura Snyder, *The Criminalization of the American Emigrant*, TAX NOTES FEDERAL, June 29, 2020, 2279, 2282, https://www.taxnotes.com/tax-notes-today-federal/foreign-source-income/criminalization-american-emigrant/2020/07/15/2cmth?highlight=IRS%20discusses%20fbar%20penalties#2cmth-0000046; National Taxpayer Advocate Service, *2012 Annual Report to Congress*, Vol. One at 268, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Volume-1.pdf.

January 2020, there were approximately 9 million U.S. taxpayers residing abroad.[21] Still, in 2016, there were approximately only 950,000 FBAR reports filed,[22] only 204,009 of which listed a foreign address.[23] These statistics lead to only one conclusion: a very small percentage of U.S. taxpayers residing abroad are compliant with their FBAR reporting requirements. Consequently, under this regime, taxpayers who are the least likely to be appropriately educated on U.S. tax compliance matters and to be guided by qualified tax professionals with respect to their FBAR reporting obligations, remain most exposed to significant non-willful penalties. This exposure in no way implicates how they have carried on their business affairs but instead simply reflects the fact that the epicenter of their everyday lives lies in a foreign country.

The other group that will be greatly and disproportionally impacted by the "per-account" FBAR penalty regime are foreigners and immigrants residing in the United States. Just like U.S. taxpayers residing abroad, this group is likely to have an obligation to report multiple "foreign" accounts. This may be because of several

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[21] U.S. Dep't of State's Bureau of Consular Affairs, *Consular Affairs by the Numbers 2020* (Jan. 2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf.

[22] U.S. Gen. Accounting Office, GAO-19-180, *Reporting to Congressional Committees, Foreign Asset Reporting* at 58, (U.S. GAO April 2019).

[23] *Ibid.* at 59.

circumstances unique to immigrant taxpayers: they are likely to have opened bank accounts in their country of birth and never closed them after moving to the United States; they may have worked in the country of their origin and still maintain a retirement account; they may have acquired the accounts by virtue of gift or inheritance from their foreign family members; or they might have been added as signatories to their elderly parents' accounts. Regardless of the underlying reason, immigrant taxpayers are much more likely to have a higher number of foreign accounts than an average non-immigrant taxpayer residing in the United States. Immigrant taxpayers residing within immigrant communities, and in particular those who are elderly, have recently migrated, or have limited English proficiency, are also most vulnerable to inadvertently violating FBAR filing requirements. These taxpayers are much more likely to be isolated within their communities and tend to largely engage professionals, including tax return preparers, from within the community.[24] If a tax return preparer within an immigrant community is not well-versed in the FBAR reporting requirements (which were largely unfamiliar to many tax return preparers

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[24] See *e.g.*, National Academies of Sciences, Engineering, and Medicine, *The Integration of Immigrants into American Society*, Panel on the Integration of Immigrants into American Society, M.C. Waters and M.G. Pineau at 209-211, 220-225, 228, 309-317 (2015), https://nap.nationalacademies.org/read/21746/chapter/1.

even a decade ago),[25] members of that community are not likely to learn of their obligations. Furthermore, immigrants' limited English proficiency may significantly hinder their ability to stumble upon the FBAR requirements on their own. While tax education should be emphasized and fostered within immigrant communities as part of the integration process, the current system is still not adequate. These factors may result in the IRS assessing non-willful, as opposed to willful, penalties against such immigrant taxpayers. However, such taxpayers are likely to face disproportionally high non-willful FBAR penalties because they would tend to have more foreign reportable accounts as a result of their foreign roots.

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The preceding discussion shows the ramifications of the question presented in the writ of certiorari to the application of an important reporting obligation being enforced by the IRS. Imposing the non-willful FBAR penalty "per-account," as endorsed by the

[25] Until 2008-2009, when the war on foreign account holders waged by the IRS, wielding sizable FBAR penalties as potent weapon received significant press coverage—see *e.g.*, Lynnley Browning, *U.S. Seeks Reports on Americans' Foreign Bank Accounts*, N.Y. TIMES, May 15, 2008; Lynnley Browning, *Tax Evaders Face Choice: Pay or Pray*, N.Y. TIMES, Oct. 12, 2009—many experienced tax return preparers were not aware of the FBAR reporting obligations and some continued to be unaware for many years thereafter. See *e.g.*, *Jarnagin v. United States*, 134 Fed. Cl. 368, 373 (2017); *United States v. DeMauro*, 483 F. Supp. 3d 68, 87 (D.N.H. 2020); *United States v. Hughes*, No. 18-5931, 2021 WL 47668683 (N.D. Cal. Oct. 13, 2021).

Fifth Circuit, renders this penalty regime draconian, disproportionately affecting groups of taxpayers for reasons entirely unrelated to their offending conduct. The Ninth Circuit's "per-form" approach would mitigate arbitrariness, bringing the application of the penalty regime more in line with manifest congressional intent. Absent clarification from Congress, only this Court can decide what regime will prevail nationwide and end the disparate treatment of similarly situated taxpayers.

CONCLUSION

For the foregoing reasons, the Center respectfully and emphatically encourages the Court to grant the petition for writ of certiorari.

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