No. 22-598

In The
Supreme Court of the United States

ARTHUR BEDROSIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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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, Arthur Bedrosian.[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, 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, Hon. Nelson A. Diaz 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 partner with Whiteford, Taylor, Preston LLP, Leslie Book, Professor of Law at the Villanova Law School, and T. Keith Fogg,

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[1] Pursuant to Rule 37.2, the notice of the intent to file this brief was provided to Petitioner on January 6, 2023, and to the Solicitor General on January 9, 2023. 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.

former 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[2] are gravely concerned that the objective recklessness standard, which has been increasingly applied by the lower courts, including by the Third Circuit in this case, to find a "willful" violation under 31 U.S.C. § 5321(a)(5)(C), is eroding the distinction between penalized willful and non-willful conduct. Moreover, the diluted standard of "willfulness" minimizes the government's burden to establish that the violation was indeed due to *willful* misconduct to sustain exorbitant and often disproportionate penalty assessments. The overly broad definition of "willfulness" results in uninformed and unwary taxpayers being assessed willful penalties when Congress has expressly provided for non-willful penalties. Taxpayers who are subject to willful FBAR penalties are forced to defend against them in United States District Court after the penalty has been assessed. As a result of the current application of the FBAR willfulness standard and the way FBAR

[2] Zhanna A. Ziering is a nationally recognized FBAR expert and is the co-author of the Bloomberg BNA's Tax Management Portfolio, T.M. 6085, Report of Foreign Bank and Financial Accounts. Guinevere M. Moore is a tax litigation attorney who tries tax and FBAR cases and routinely publishes in Forbes on tax issues. Aaron M. Esman is a tax litigation attorney who litigates FBAR cases and regularly speaks on tax issues at bar association conferences.

penalties are administered by the Internal Revenue Service (the "IRS"), taxpayers who find themselves in the position of having willful FBAR penalties imposed are rarely provided a meaningful opportunity for judicial review.

SUMMARY OF ARGUMENT

The question presented in this case provides the Court with a unique opportunity to contemporaneously review and harmonize the two Bank Secrecy Act ("BSA") penalty provisions relating to filing violations of a Report of Foreign Bank and Financial Accounts ("FBAR") at a critical point in the life of FBAR jurisprudence.

Congress created a two-tier penalty regime to penalize violations of the FBAR reporting provision, including penalties for both willful and non-willful violations of the FBAR statute. 31 U.S.C. § 5321(a). This Court has not opined on the appropriate standard for determining whether a taxpayer has committed a "willful" or a "non-willful" FBAR violation. Given the notable absence of a statutory definition of a "willful" violation under 31 U.S.C. § 5321(a)(5)(C), lower courts have filled in this vacuum by adopting the definition of willfulness that the Court held generally applicable to civil liability provisions in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), which includes objective recklessness. Under the objective recklessness standard, a willful FBAR violation is committed if the taxpayer engages in action that objectively entails "an unjustifiably high risk of harm that is either known or is so obvious that it should be known." *Id*. at 68 (internal

quotation omitted). The objective analysis of the FBAR violation infers knowledge (or imputed knowledge) of such a high risk of harm from the taxpayer's signature on a tax return containing Schedule B because the small print on the bottom of the page, Schedule B, Part III references FBAR filing obligation for taxpayers meeting certain criteria.[3] One by one, courts have broadened the intent-based statutory provision to include objectively reckless conduct.[4] Application of the *Safeco* standard, by both the IRS and lower courts, has resulted in the complete deterioration of any discernable difference between the application of willful and non-willful FBAR penalties.

Applying the objective recklessness standard to determine willfulness in FBAR violations has proven unworkable, because under this standard, almost all taxpayers who signed and filed federal income tax returns that include a Schedule B and also failed to file complete and accurate FBARs will meet the objective recklessness standard for "willfully" failing to do so. The objective recklessness standard fails to account for an individual's particular facts and circumstances, applying the same measuring stick to

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[3] See *e.g., Bedrosian v. United States*, 912 F.3d 144, 152-53 (3d Cir. 2018) ("*Bedrosian I"); Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019).

[4] See *e.g., Bedrosian I*, 912 F.3d at 152-53*; Norman*, 942 F.3d at 1115; *United States v. Schwarzbaum,* 24 F.4th 1355, 1363 (11th Cir. 2022); *United States v. Rum*, 995 F.3d 882, 891 (11th Cir. 2021); *United States v. Horowitz*, 978 F.3d 80, 89 (4th Cir. 2020).

all taxpayers. In fact, under the objective recklessness standard there is no room for consideration of a taxpayer's level of sophistication, familiarity with filing tax returns, or ability to read and understand Schedule B, Part III of the IRS Form 1040, *U.S. Individual Income Tax Return*, which in small print at the bottom of the page, directs some taxpayers to file an FBAR only if certain criteria are met. Moreover, the objective standard handicaps the courts' ability for any meaningful judicial review, because under this standard, any taxpayer who signed and filed a tax return with a Schedule B, but failed to file a complete and accurate FBAR, can be found willful as a matter of law. This amounts to a mere rubber stamp of any IRS determination. The current state of willful FBAR penalty jurisprudence does not reflect the two-tiered penalty regime Congress established, resulting in non-willful conduct being as likely to be subject to a willful penalty as willful conduct, while at the same time depriving courts of any meaningful ability to review the penalties.

This case presents the Court with a unique opportunity to articulate the appropriate level of intent that would trigger the willful and non-willful penalties in light of the conduct the penalties seek to deter and the monetary sanctions in connection therewith. As such, this case is a well-timed and pertinent companion to *Bittner v. United States,* No. 21-1195 (cert. granted June 21, 2022). In that case, the Court granted *certiorari* to review the manner in which the statutory "non-willful" FBAR penalty provision is applied ("per account" or "per form").

Granting the petition for *certiorari* here would only aid this Court and lower courts in balancing the two-tier penalty system and avoid continued application of the FBAR statute in a way that does not comport with Congressional intent when it amended the statute to provide for a two-tier penalty regime.

ARGUMENT

I. INTRODUCTION

This case seeks the Court's intervention with the interpretation and application of the BSA provision governing penalties for failure to file a complete and accurate FBAR. The statutory interpretation of the manner in which the FBAR "non-willful" penalty provision is applied ("per account" or "per form") is currently pending before this Court,[5] and this case asks the Court to determine what it means to "willfully" violate 31 U.S.C. § 5314, warranting the significantly enhanced penalty under 31 U.S.C. § 5321(a)(5)(C).

Section 5314 of Title 31 and the regulations promulgated thereunder require every U.S. person who has a financial interest in or signature or other authority over a foreign financial account valued at greater than $10,000 during the calendar year to file an FBAR form reporting such account and information relating thereto. 31 C.F.R. § 1010.350. Failure to do so is punishable by civil and criminal

[5] *Bittner v. United States,* No. 21-1195 (cert. granted June 21, 2022).

sanctions. 31 U.S.C. §§ 5321(a)(5) and 5322. In 2004, Congress amended the FBAR statute to provide for a two-tier civil penalty structure. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418. In general, non-willful FBAR reporting violations are subject to a maximum $10,000 penalty. 31 U.S.C. § 5321(a)(5)(B). However, if the violation was "willful," the penalty is drastically increased to the greater of $100,000 or 50% of the value of the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C). A separate penalty may be imposed for each year the violation occurs.

The drastic difference between the "non-willful" and "willful" penalties leads to the inexorable conclusion that *Congress* distinguished non-willful conduct from willful conduct, and *Congress* sought to penalize the latter much more severely. The Joint Committee on Taxation's "Blue Book" reflects the general understanding that the penalty amount will increase concomitantly with egregiousness of the offending conduct. See Staff of J. Comm. On Taxation, General Explanation of Tax Legislation Enacted in the 108th Congress, at 377-78 (J. Comm. Print 2005) ("Congress believed that increasing the prior-law penalty for willful noncompliance with this requirement and imposing a new civil penalty that applies without regard to willfulness in such noncompliance will improve the reporting of foreign financial accounts.").

Yet, in less than two decades since the two-tier penalty regime was adopted, any meaningful distinction between the penalized willful conduct

and non-willful conduct has been eroded by including objectively reckless conduct in the definition of "willfulness." See, *e.g., Bedrosian I* at 152-53.[6] In practice, defining a willful FBAR violation to include objectively reckless conduct results in the IRS sanctioning materially indistinguishable conduct by drastically disparate penalties.[7] Reviewing courts, bound by precedent that applies the same objectively reckless standard, lack any meaningful ability to review the assessment or reduce the penalty. Lack of a discernable difference between conduct meriting the non-willful penalty and conduct warranting an enhanced penalty for willful violations results in imposition of willful penalties in cases where the violation is merely negligent or inadvertent, without a meaningful opportunity for taxpayers to present, or reviewing courts to consider, the individual taxpayer's facts and circumstances that indicate non-willful conduct.

Then-National Taxpayer Advocate Nina E. Olson, who is currently the director of the Center for

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[6] See also, *Norman,* 942 F.3d at 1115*; Schwarzbaum,* 24 F.4th at 1363; *Rum*, 995 F.3d at 891; *Horowitz*, 978 F.3d at 89.

[7] See *e.g.*, *United States v. Schwarzbaum*, No. 18-cv-81147-BLOOM/Reinhart, 2020 WL 1316232, at *9-12 (S.D. Fl. Mar. 20, 2020) (finding the conduct to be non-willful in one year, while indistinguishable conduct in subsequent years found to be willful). See also *United States v. Hughes*, No. 18-5931, 2021 WL 47668683 at *23-24 (N.D. Cal. Oct. 13, 2021) (the only factual distinction between the willful and non-willful violation was the inclusion of Schedule B with the taxpayer's tax returns).

Taxpayer Rights, foresaw in 2014 the predicament that taxpayers and courts now face. In her 2014 Annual Report to Congress, she identified problems resulting from the disappearing distinction between willful and non-willful FBAR violations, as well as the government's outsized leverage in FBAR penalty disputes. [8] Almost a decade later, the courts consistently sustain significant penalties for what is at most negligent conduct, necessitating the Court's intervention because only this Court has the ability to uniformly interpret the FBAR penalty provision under 31 U.S.C. § 5321(a)(5)(C), and provide lower courts and the IRS with the tools to discern between willful and non-willful conduct under that statute.

II. REASONS FOR GRANTING THE PETITION.

Despite the absence of a clear split between the circuits, the Center for Taxpayer Rights urges the Court to grant Petitioner's petition for *certiorari* now, because (1) the objectively reckless standard has led to a uniform application of the law that is at odds with the plain language of the statute, (2) given the uniform application and the apparent futility of judicial review, a circuit split may not arise, and (3) in light of the Court's current docket that already includes consideration of a different subsection of the same statute at issue here, granting certiorari now

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[8] See National Taxpayer Advocate, *2014 Annual Report to Congress*, Executive Summary at 33, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_EXECUTIVE-SUMMARY-508.pdf.

would create uniform and correct application of the statute as a whole.

A. Application of the Objectively Reckless Standard Has Resulted in No Material Distinction Between An Objectively Reckless Violation and A Non-Willful Violation.

1. The absence of a statutory definition for "willful" violations under 31 U.S.C. § 5321(a)(5)(C) created a legal vacuum, resulting in reviewing courts filling that vacuum without a reliable precedent. Initially, the appropriate standard for "willfulness" was thought to be a "voluntary, intentional violation of a known legal duty."[9] But in a quintessential instance of *bad facts making bad law*,[10] courts, with

[9] *Ratzlaf v. United States*, 510 U.S. 135, 142 (1994). See *e.g.*, *United States v. Williams*, No. 1:09-cv-437, 2010 WL 3473311 (E.D. Va. Sept. 1, 2010).

[10] "The IRS may meet its burden of proving willfulness if it shows a violation is a 'voluntary, intentional violation of a known legal duty.' Because Schedule B of Form 1040, *U.S. Individual Income Tax Return*, asks if the taxpayer has a foreign account and references the FBAR filing requirement, however, the government has been successful in arguing—in cases involving bad actors—that filing a Schedule B can turn a subsequent failure to file an FBAR into a willful violation (called 'willful blindness'), at least if combined with other factors such as efforts to conceal the account." National Taxpayer Advocate, 2014 Annual Report to Congress, Executive Summary at 33-34, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_EXECUTIVE-SUMMARY-508.pdf.

little analysis, began expanding the definition of "willful" FBAR violations to include "willful blindness"[11] and "reckless"[12] conduct. Consequently, a number of reviewing courts, including the Third Circuit, relied on the Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) to adopt a broad definition of willfulness to include objective recklessness.[13] With minor semantic variations, courts interpreting the willful FBAR penalty statute have found the FBAR reporting violation to be willful if the taxpayer "(1) clearly ought to have known that (2) there was a grave risk that [the FBAR filing requirement was not being met] and . . . (3) he [or she] was in a position to find out for certain very easily." *Bedrosian I* at 153 (citing *United States v. Carrigan*, 31 F.3d 130, 134 (3d Cir. 1994) and *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989)).

Yet, over the last decade, the objective recklessness standard, as applied by both the IRS and reviewing courts, has steadily devolved into a troublesome and unworkable test to determine which FBAR penalty provision, if any, should apply to a taxpayer's failure to file a complete and accurate FBAR. The main problem is that the evidence required to establish objective recklessness is

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[11] See *United States v. Williams*, 489 Fed App'x 655 (4th Cir. 2012).

[12] *United States v. McBride*, 908 F. Supp. 2d 1186, 1209 (D. Utah 2012).

[13] See *e.g.*, *Norman*, 942 F.3d at 1115.

common to most taxpayers who signed and filed federal income tax returns that included Schedule B, Part III.[14] To sustain a willful FBAR penalty, current FBAR jurisprudence requires the government to prove by a preponderance of the evidence[15] that a taxpayer was reckless in failing to file a complete and accurate FBAR.[16] Under the objective recklessness standard, the government is required to prove only that the taxpayer was aware of the foreign accounts when their federal income tax return containing a Schedule B was signed by the taxpayer.[17] This is so because at the very bottom of Schedule B, Part III, in small print, the form directs certain taxpayers who meet certain requirements to file an FBAR, accurately reporting every foreign account. Accordingly, under the current objective standard, because Schedule B directs certain

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[14] See, *e.g.*, *Hughes*, 2021 WL 47668683 at *23-24.

[15] See, *e.g.*, *United States v. Garrity*, 304 F. Supp. 3d 267, 274 (D. Conn. 2018); *United States v. Bohanec*, 263 F. Supp. 3d 881, 889 (C.D. Cal. 2016); *McBride*, 908 F. Supp. 2d at 1201.

[16] See, *e.g.*, *Norman,* 942 F.3d at 1115*; Bedrosian I* at 153; *Rum*, 995 F.3d at 891; *Horowitz*, 978 F.3d at 89.

[17] See, *e.g., Norman,* 942 F.3d at 1115; *Bohanec*, 263 F. Supp. 3d at 890; *Horowitz*, 978 F.3d at 90; *Hughes*, 2021 WL 47668683 at *23-24. See also National Taxpayer Advocate, 2022 Purple Book, Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration at 78 (Dec. 31, 2021) https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook.pdf (the "2022 Purple Book"); I.R.M. 4.26.16.5.5.1 (June 24, 2021) (Willful FBAR Violations—Defining Willfulness); I.R.M. 4.26.16.5.5.2 (June 24, 2021) (Willful FBAR Violations—Evidence).

taxpayers to file an FBAR if they have checked a box in Part III, the taxpayer who signed and filed that tax return but did not file a complete and accurate FBAR is very likely be found to have acted recklessly and therefore be subject to significant willful FBAR penalties.[18]

At its core, this analysis is based on a legally fictitious premise, a presumption of a taxpayer's knowledge of the contents of their tax returns, including small print on the bottom of Schedule B, solely because the taxpayer's signature is on the return.[19] Setting aside the fact that this damning inference is completely divorced from the reality of everyday life – an overwhelming majority of the taxpayers, and in particularly those that employ tax professionals to prepare their tax returns, do not read every line of the draft tax return – it also allows the courts to completely disregard (or hold unnecessary) a taxpayer's actual testimony about whether he or she actually read their tax returns (and if not, why not) and in particular the question on the bottom of Schedule B.[20]

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[18] 2022 Purple Book at 78 (Dec. 31, 2021) ("[T]he government might reasonably argue (and a court might reasonably find) that *any* failure to file an FBAR form is willful where a taxpayer filed a federal tax return that included Schedule B [of Form 1040], which directs taxpayers to the FBAR filing requirement.").

[19] See *Williams*, 489 Fed App'x at 655.

[20] See, *e.g., Williams*, 489 Fed App'x at 659; *McBride*, 908 F. Supp. 2d at 1206. Cf. *United States v. Flume*, No. 5:16-CV-73,

(cont'd)

This incredibly overbroad definition of willfulness, which would apply to anyone signing and filing a tax return, converts the intent-based enhanced FBAR penalty into a strict liability penalty, rendering Congress's efforts to establish a two-tier penalty regime meaningless.[21] With an objective to deter noncompliance, Congress introduced non-willful penalties and substantially enhanced the penalties for willful violations to ensure that the noncompliant conduct is

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2018 WL 4378161, at *7 (S.D. Tex. 2018), *Schwarzbaum,* 24 F.4th at 1363; *Hughes*, 2021 WL 47668683 at *23-24.

[21] See *Lowe v. SEC*, 472 U.S. 181, 208 n.53 (1985) (a court "must give effect to every word that Congress used in the statute"); see also *Schwarzbaum*, 2020 WL 1316232, at *8 (S.D. Fl. Mar. 20, 2020) ("Imputing constructive knowledge of filing requirements to a taxpayer simply by virtue of having signed a tax return would render the distinction between a non-willful and willful violation in the FBAR context meaningless."); *Jones v. United States*, SACV 19-00173 JVS (RAO), 2020 WL 4390390, at *9 (C.D. Cal. May 11, 2020) (in the FBAR context, "signing a tax return on its own cannot automatically make the taxpayer's violation 'willful' as that would collapse the willfulness standard to strict liability."); *United States v. Schik*, 20-cv-02211 (MKV), 2022 WL 685415, at *8 (S.D.N.Y. Mar. 8, 2022) ("When Congress included penalties for "willful violations" of Section 5321(a)(5), it explicitly delineated between failures to report that are and are not willful. Willfulness, therefore, must mean something more than mere negligence. The Government's suggested reading of the word-that willfulness should be found categorically even when an unsophisticated taxpayer did not know of an obligation to report and relied on a tax preparer- would abrogate that distinction.").

proportionally penalized.[22] In practice, the current objective recklessness standard has effectively re-written the statute, with taxpayers facing only a strict-liability willful penalty for mostly negligent or inadvertent FBAR violations.

Because of these concerns, the National Taxpayer Advocate recommended Congress adopt limitations on the amount of willful penalties the government can impose and explicitly clarify that the government cannot rely solely on the taxpayer's signature on the tax return and the small print on the bottom of Schedule B to establish that taxpayer was objectively reckless, and therefore, willful.[23] We agree that penalties may be warranted in some circumstances to deter noncompliance and encourage voluntary compliance. This is precisely the reason why Congress enacted a two-tier penalty regime, and introduced non-willful penalties, while reserving willful penalties for conduct that must be more egregious than a common failure to scrutinize a small print at the bottom of Schedule B.

2. As a result, the objective recklessness standard encompasses violations that could be intentional, negligent or inadvertent, all punished equally by financially devastating willful penalties. Similar to the facts of this case, taxpayers could report some accounts on their FBAR while omitting

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[22] Staff of J. Comm. On Taxation, General Explanation of Tax Legislation Enacted in the 108th Congress, at 377-78 (J. Comm. Print 2005).

[23] 2022 Purple Book at 78.

others, which could occur for a number of innocuous reasons. For example, a taxpayer residing abroad may not understand that the term "foreign accounts" includes the accounts in the taxpayer's country of residence. Or while the taxpayer is making good faith efforts to comply, there could be a fundamental misunderstanding of the complex FBAR rules, such as a broad and complicated definition of a reportable account.[24] Yet, under the objective recklessness standard, both of these circumstances would support the finding of willfulness because this standard does not leave meaningful room for the reviewing court to consider any subjective attributes of the noncompliant taxpayer, including taxpayer's education, background, fluency with the English language, or ability to comprehend the FBAR reference on Schedule B. Nor are the reviewing courts required to consider circumstances specific to the violation: for example whether there was a good faith effort to comply by at least reporting some of the accounts, whether there was a fundamental misunderstanding of the reporting requirements, whether the taxpayer used TurboTax or other tax preparation software that by default checked the box "no" on the bottom of Schedule B, whether the taxpayer used a tax return preparer who did not inquire about taxpayer's ownership of foreign accounts or explain the scope of the reporting requirements, whether the taxpayer spoke with an ill-informed but confident friend or colleague who gave incorrect advice that the taxpayer dutifully

[24] See 31 C.F.R. § 1010.350(c).

followed, or whether the taxpayer even understood (or could understand) that the reference to "foreign" accounts referred to all accounts outside of the United States. Under the objective standard, almost every FBAR violation will be willful because, objectively, the small print at the bottom of Schedule B tells taxpayers who signed and filed their tax returns and meet certain criteria they may have to file an FBAR.

Low-income and foreign United States taxpayers, who may not think it is required to inform paid tax return preparers about the existence of foreign financial accounts, are particularly at risk. For example, taxpayers who are born outside of the United States often have bank accounts outside of the United States for many reasons, and just as often without giving the matter any thought, do not inform tax preparers of the existence of those accounts, because they have nothing to do whatsoever with the United States. A United States citizen who has grown up outside the United States, a so-called "accidental American," would not perceive her bank accounts in her native country to be "foreign" accounts. Yet, under the objective standards, those taxpayers are expected to carefully review the small print at the bottom of Part III on Schedule B, realize that an FBAR would likely be required if certain filing criteria are met, and ask their tax preparers if such a form is required. The penalty for failing to do so, under the objective standard, is the greater of $100,000 or one half of the highest amount in the account, which is a harsh sanction generally, but in particular as a penalty for

inadvertence, oversight or a mistake. Congress did not intend for such an absurd result and expressly guarded against it by amending the statute to provide for a non-willful penalty.

In applying the objective recklessness standard, the reviewing court is not testing the recklessness by comparing it to others with similar facts and circumstances. For example the objective analysis would not require a reviewing court to determine whether the non-filer, *in light of his background, age and English fluency*, (1) clearly ought to have known that (2) there was a grave risk that the FBAR filing requirement was not being met and (3) was in a position to find out for certain very easily.[25] Nor does it take into consideration the complexity of the FBAR reporting requirements; the definition of what is considered a reportable foreign account is incredibly nuanced and cannot be very easy to find out for certain.[26] The practical impact of applying the objective recklessness standard eliminated any last shred of the intent requirement. But when Congress has expressly provided for different levels of penalties for willful conduct and non-willful

[25] See, *e.g., Schwarzbaum,* 2020 WL 1316232, at *9-12.

[26] For example, the definition of "other authority" has befuddled practitioners and the courts alike. 31 C.F.R. § 1010.350(f). See, *e.g.*, *United States v. Horowitz*, 361 F. Supp. 3d 511, 524 (D. Md. 2019).

conduct, a taxpayer's specific circumstances must be analyzed to determine which penalty applies.[27]

3. The fact that "willfulness" does not require actual intent and the courts' rejection of any subjectivity in their analysis under the reckless standard has allowed the government to successfully sustain willful penalties on motions for summary judgment without the need of trial or individual's testimony.[28] The government's success highlights the ease to establish the "requisite intent" for the willful violation without even giving taxpayers the opportunity to present the relevant facts and circumstances of their case, or to present evidence regarding their own willfulness, or lack thereof.[29] This strict liability outcome simply does not comport with the two-tier penalty scheme the statute requires.

4. Finally, last week the Court denied *certiorari* in *Toth v. United States,* 598 U.S. __ (Jan. 23, 2023). In *Toth*, petitioner sought the Court's review of the First Circuit's finding that the Excessive Fines Clause of the Eighth Amendment to the U.S.

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[27] See *e.g.*, *Schik*, 2022 WL 685415 at *6; *Jones*, 2020 WL 4390390 at *9; *Hughes*, 2021 WL 47668683 at *23-24; *United States v. Katholos*, 17-CV-531 (JLS) (HKS), 2022 WL 3328223 (W.D.N.Y. Aug. 10, 2022).

[28] See *e.g.*, *Kimble v. United States*, 141 Fed. Cl. 373 (Fed. Cl. 2018), *affirmed* 991 F.3d 1238 (Fed. Cir. 2021); *Horowitz*, 361 F. Supp. 3d at 511. Cf. *Schik*, 2022 WL 685415 at *7; *Katholos*, 2022 WL 3328223 at *9; *Jones,* 2020 WL 4390390 at *9.

[29] *See e.g.*, *Kimble*, 141 Fed. Cl. at 373.

Constitution does not apply to the FBAR penalties. *Id.* Departing from the silent rejection of the petition by the Court, Justice Gorsuch penned a dissent, echoing concerns voiced by the taxpayers and tax practitioners alike, both across the country and globally – a glaring absence of any functional oversight in connection with the IRS's discretion to assess willful vs. non-willful penalties. As it stands today, should the IRS arbitrarily decide to impose a significant FBAR penalty for a willful violation, it will likely meet its burden of proving willfulness under the objective recklessness standard in court and, without the protection of the Excessive Fines Clause, there is no safety valve left to guard taxpayers against the government overreach or to ensure that the penalty is commensurate to the violation.[30] The practical futility of judicial review under the objective standard is a significant deterrent for taxpayers to devote any additional time or resources to seek judicial review of the penalties the IRS has administratively imposed. As a result, FBAR penalties are a very lucrative revenue raiser

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[30] The IRS acknowledges the need for proportionality in penalty administration but as evidenced by the FBAR penalty cases, it departs from that fundamental principle in practice. See I.R.M. 20.1.1.2.1.(8) (11-25-2011) (Encouraging Voluntary Compliance) ("The IRS has the obligation to advance the fairness and effectiveness of the tax system. Penalties should do the following: [1] Be severe enough to deter noncompliance, [2] Encourage noncompliant taxpayers to comply, [3] Be objectively proportioned to the offense, and [4] Be used as an opportunity to educate taxpayers and encourage their future compliance.").

for the government. The penalties are assessed for a reporting violation, which has no corresponding tax loss, and the government can win an FBAR judgment without spending significant resources on litigation. In 2020 alone, the government assessed $95.2 million and collected $46.6 million in FBAR penalties.[31]

Absent the Court's intervention, the status quo, in which the IRS exercises complete control over which penalty – willful or non-willful – is assessed and there is no meaningful measure of judicial review over whether an individual taxpayer did, *in fact*, act willfully or non-willfully, will continue unabated.

B. An Effective and Fair Review of the Non-Willful Penalty Provision Requires a Concurrent Review of the Willful Penalty Provision.

The petition for *certiorari* in this case presents the Court a unique opportunity to provide a holistic review of the BSA penalty provision for FBAR reporting violations and concomitantly reconcile the two-tier penalty system that is in concert with the congressional intent.

The question of appropriate statutory interpretation and application of the penalties for

[31] IRS Small Business/Self-Employed Division, 2020 Report of Foreign Bank and Financial Accounts (FBAR) Report to Congress, at 10, https://assets.law360news.com/1498000/1498227/2020%20fbar%20report%20-%20final%20version%20(1).pdf.

non-willful FBAR violations is currently pending before this Court in *Bittner v. United States* (No. 21-1195) (filed Feb. 28, 2022) (cert. granted June 21, 2022). The question presented is whether the 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.

During the *Bittner* oral arguments, the Court referenced the correlation of non-willful penalties to willful penalties in both the monetary sanctions and in conduct. Justice Kagan noted, "willfulness is an awfully hard standard in contexts like this for the government to meet, and we know that in --in --in countless contexts." Transcript of Oral Argument at 20:1-5, *Bittner v. United States* (No. 21-1195) (Nov. 2, 2022). But, as a matter of fact, for the reasons stated above, it is *not* a hard standard at all for the government to meet under the current objective recklessness standard that lower courts are applying. This case presents the Court with an opportunity to clarify exactly how hard the standard the government must meet to prove a willful FBAR violation should be under the statute.

When comparing the language between the willful and non-willful statutory provisions, Justice Gorsuch observed, "One could easily understand that Congress would say with respect to willful violations, we're really going to whack you, right, and we're going to take 50 percent of every account where

there's a willful violation, and--and that was the law as originally drafted." *Id*. at 60:1-7.

The disparity in how this Court seems to view the willfulness test as discussed during *Bittner*'s oral argument and how the test is actually applied by the lower courts and the IRS demonstrates a dire need for judicial interpretation of both willful and non-willful FBAR penalty provisions to ensure the appropriate proportionality of the penalty to the penalized conduct. Congress unequivocally intended to penalize conduct with lesser culpability with a non-willful penalty, reserving a significantly enhanced willful penalty for significantly more culpable (*i.e.*, *willful*) conduct. However, FBAR jurisprudence has evolved into a mechanical application of a standard that completely disregards the intended dichotomy between the penalty provisions. The current application of the two sets of penalty provisions highlights the absurdity of the results. For example, conduct that is deemed objectively non-willful is penalized by non-willful penalties applied on per-account basis resulting in the aggregate astronomical non-willful penalty assessment.[32] Then the willful penalty has been applied to conduct not materially distinguishable from non-willful conduct, again with significant penalties.[33]

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[32] *Bittner v. United States* (No. 21-1195) (filed Feb. 28, 2022) (cert. granted June 21, 2022).

[33] See, *e.g., Schik,* 2022 WL 685415 (an almost 100-year-old Holocaust survivor penalized $8.8 million in willful penalties).

Absent application of a proper standard for willful FBAR violations, the Court's ultimate decision in *Bittner* on the application of the non-willful penalty could be practically insignificant. For example, if the Court determines that the non-willful penalty is limited to $10,000 per form, the IRS could simply impose a willful penalty for seemingly identical violation. After all, if the taxpayer signed IRS Form 1040, filed it, and included a Schedule B, then under the lower court's statutory interpretation there is little else for the IRS to prove in order to establish the willful penalty should apply. On the other hand, if this Court decides that the penalty should be imposed per account, the IRS could simply pick and choose which penalty, willful or non-willful, results in a higher sanction and impose these interchangeably. The fact that the IRS would be able to do so, and under the reckless standard the finding of willfulness would be sustained in most courts, directly contradicts the statutory two-tier penalty regime, thus necessitating the Court's concurrent review of the complete FBAR penalty scheme.

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In 2014, former Secretary of Defense Donald Rumsfeld filed his tax returns with a caveat:

> "I have sent in our federal income tax and our gift tax returns for 2013. As in prior years, it is important for you to know that I have absolutely no idea whether our tax returns and our tax payments are accurate. The tax code

> is so complex and the forms are so complicated, that I know I cannot have any confidence that I know what is being requested and therefore I cannot and do not know, and I suspect a great many Americans cannot know, whether or not their tax returns are accurate."[34]

Secretary Rumsfeld's caveat surely did not relieve him of the responsibility to make best efforts to file truthful and accurate tax returns and – if required – FBARs. But his observation about the ability of the average Americans to know whether their returns were correct or not is an astute one that puts the question presented to this Court in perspective. If well-educated and high-ranking government officials do not know whether their tax returns are correct and do not understand our complex tax laws, should average Americans be expected to do so and be harshly penalized for inadvertence, mistake or oversight? Should low-income and foreign-born taxpayers? Congress provided for a two-tiered penalty regime for FBAR violations for a reason, and this Court's interpretation of that two-tiered penalty is sorely needed.

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[34] Letter from Donald Rumsfeld to the Internal Revenue Service (Apr. 15, 2014), https://web.archive.org/web/20140720223306/https://twitter.com/RumsfeldOffice/status/456156891534483456.

CONCLUSION

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

Respectfully submitted,

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