No. 21-1195

# In The Supreme Court of the United States

ALEXANDRU BITTNER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On 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

GUINEVERE MOORE
*Counsel of Record*
MOORE TAX LAW GROUP LLC
2205 W. Armitage Avenue, Suite 1
Chicago, IL 60647
(312) 549-9990
guinevere.moore@mooretaxlawgroup.com

ZHANNA A. ZIERING
AJAY GUPTA
AARON M. ESMAN
MOORE TAX LAW GROUP LLC

*Attorneys for Amicus Curiae*

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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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, 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

[1] Consent to file this brief was provided by the parties. The Solicitor General provided consent on July 19, 2022, and Petitioner provided consent on July 28, 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.

the Villanova Law School, and T. Keith Fogg, 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[3] believe that the interpretation of 31 U.S.C. § 5321(a)(5)(B)(i) adopted by the U.S. Court of Appeals for the Fifth Circuit regarding the application of penalties for non-willfully failing to report offshore bank accounts is incorrect and enables disparate treatment of similarly situated taxpayers. Moreover, this statutory interpretation, which is followed by the Internal Revenue Service ("IRS"), causes significant economic harm to the least culpable taxpayers, is disproportionate to the violation being penalized, and is in conflict with the IRS's internal policy requiring penalties to be proportionate to delinquent conduct. Instead, the Center agrees with the contrary statutory interpretation adopted by the Ninth Circuit, which the Center believes results in fair and proportionate application of penalties.

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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. Zhanna Ziering 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. Ajay Gupta is a tax litigation attorney who is a former attorney-advisor at the United States Tax Court and current 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. Aaron Esman is a tax litigation attorney who litigates FBAR cases and regularly speaks on tax issues at bar association conferences.

## SUMMARY OF ARGUMENT

The legal issue presented in this case requires 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 (the "per-form" approach) or whether the failure to report each bank account on the form constitutes a separate violation subject to the $10,000 penalty (the "per-account" approach). First, the per-account interpretation of the penalty provision propagates disparate treatment of similarly situated taxpayers whose failure to report foreign accounts differs only in the number of unreported accounts and is contrary to the IRS's internal policy. Second, 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. Finally, should the Court find any ambiguity in the language of the statute, the rule of lenity would require the Court to construe a civil penalty statute strictly against the government and in favor of the taxpayer.[4] For these reasons, and as

[4] Although typically invoked to construe an ambiguous criminal statute against the government, the rule of lenity has also been applied to ensure that "one is not to be subjected to a [civil] penalty unless the words of the statute plainly impose it." *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (internal quotation marks and citation omitted).

set forth in Petitioner's Brief, filed on August 18, 2022, the Center believes that the Supreme Court should reverse the decision of the Fifth Circuit espousing the per-account interpretation, and adopt the per-form interpretation of the statutory provision.

## 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, or whether the failure to report each bank account on the form constitutes a separate violation subject to the maximum $10,000 penalty. The penalties in this case showcase the economic ramifications of the per-account interpretation, yielding disproportionately punitive civil sanctions that are imposed on a U.S. taxpayer 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 and imposing an aggregate $2.72 million *non-willful* FBAR penalty.

The District Court for the Eastern District of Texas disagreed with 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,[5] holding that the statute mandates that the FBAR penalty be applied on a per-account basis. *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021).

The IRS is now continuing to aggressively pursue non-willful penalties on a per-account basis,[6] even though this practice runs counter to the agency's own internal guidance and contravenes the principles in the Taxpayer Bill of Rights, codified in 26 U.S.C. § 7802(a)(3) as well as the Eighth Amendment, which prohibits excessive fines. As a result, taxpayers are facing penalties in the millions of dollars for a non-willful failure to file a single FBAR reporting multiple

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

[6] 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.").

accounts, rather than facing a single penalty of $10,000 for the failure to file a single FBAR form. The Court should adopt the per-form interpretation of the BSA penalty provision and thereby provide taxpayers with one maximum $10,000 penalty for the non-willful failure to file one 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 Internal Revenue. 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. THE PER-ACCOUNT PENALTY ASSESSMENT DISPARATELY TREATS SIMILARLY SITUATED TAXPAYERS.

The IRS has continued to assess FBAR penalties for non-willful conduct on a per-account basis for all taxpayers residing outside of the Ninth Circuit.[7] The per-account approach by its nature causes disparate treatment of similarly situated taxpayers thus undermining a fundamental tenet of consistent tax administration as well as the Taxpayer Bill of Rights, which entitles taxpayers to "a fair and just tax system."[8] See *International Business Machines Corp.*

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[7] *Supra* at n. 6.

[8] 26 U.S.C. § 7803(a)(3)(J). Scholars have debated whether the codification of the Taxpayer Bill of Rights in section 7803(a)(3) provides taxpayers with actionable right. See*, e.g.*, Alice G. Abreu and Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281 (Nov. 27, 2017) and Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy,* TAX NOTES, May 22, 2000, p. 1133. See also Leandra Lederman, *Taxpayer Rights in the Lurch: A Response to Professor Johnson,* TAX NOTES, Aug. 21, 2000, p. 1041 (expanding the description of her proposed remedy in responding to Steve Johnson, *A Residual Damages Right Against the IRS: A Cure Worse Than the Disease,* TAX NOTES, July 17, 2000, p. 395); Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations*, 69 TAX LAW. 597, 614–24 (2016); see also Christina Thompson, *Substantive Rights or Normative Policy? The TBOR's contribution to federal tax compliance and enforcement,* PROCEDURALLY TAXING, http://procedurallytaxing.com/substantive-rights-or-normative-policy-the-tbors-contribution-to-federal-tax-compliance-and-enforcement/. Nevertheless, even if the Taxpayer Bill of Rights does not provide taxpayers with actionable rights, as at least one

*(cont'd)*

*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).

1. Even under the per-form interpretation, 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

court has held, *Facebook v. IRS*, 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal., May 14, 2018), its codification should allow courts to use its "violation as a factor that informs their decisions." Abreu and Greenstein at 1307.

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 $10,001. Because a taxpayer is being penalized for an annual failure to report the one account, regardless of whether the account has $10,001 or 50 times that amount, the penalty disproportionately affects taxpayers with smaller accounts.

The per-account interpretation 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, nine of which have just a $1,000 balance, and one of which has a balance of $1,001, 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, amounts far in excess of the account balances. By contrast, a taxpayer with a single bank account with a $500,000 balance—50 times as much—would be subject to only a $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 taxpayers who hold a much larger balance in a solitary account. This example highlights the fact that the per-account method amounts to an excessive fine and violates 26 U.S.C. § 7803(a)(3) because the penalty would be in excess of the total amount in the accounts. See also *Austin v. United States*, 509 U.S. 602 (1993).

2. The per-account approach 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 they deposited the $500,000. 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 of $100,000 for failure to report the same total amount of offshore funds. Even more troubling, in accordance with the per-account interpretation, a taxpayer who failed to report ten accounts with an aggregate value even as low as $10,001, could be subject to the same $100,000 penalty for the year, while a taxpayer who failed to report one account holding $1,000,000 would have a maximum annual statutory liability of $10,000.

Tying the FBAR penalty to the number of unreported accounts is what creates such absurd results. 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. Indeed, the 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 who fail to report the same total amount of funds on the basis of the number of accounts in which those funds were held violates the principle of consistency, the right to a fair and just tax system, 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 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.

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. Under the per-account penalty application, 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 similar to 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, under the per-account penalty application, a non-willful penalty can easily exceed the amount of a willful penalty.

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 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 per-account 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.

The foregoing disparate treatment of similarly situated taxpayers is contrary to the fundamental tenet of tax administration and is inconsistent with congressional intent behind enacting the non-willful penalty provision.

Keeping in mind that the failure to report the accounts is *non-willful*, penalizing the taxpayer based on a per-account basis is merely punitive, and will not deter non-compliant conduct or encourage compliant conduct.

## IV. THE PER-ACCOUNT APPROACH HARSHLY AND DISPROPORTIONATELY PENALIZES LESS CULPABLE VIOLATORS.

### A. The Aggregate Amount of Penalty under the Per-Account Statutory Interpretation and the IRS's Application May Be Grossly Disproportionate to the Penalized Conduct.

1. As this case starkly highlights, the practical application of the per-account 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). Therefore, 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 its 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.

Penalizing non-willful reporting violations on a per-account basis is unjust and unwarranted in many circumstances and can result in an extremely high penalty that does not correspond to any direct loss suffered by the 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 in order 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; it does the opposite.

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.[9]

[9] 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 *(cont'd)*

The Internal Revenue Manual advises 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.[10] 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.[11]

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,"[12] like the FBAR penalty, do not afford taxpayers a pre-payment forum for judicial review.[13] Therefore, as soon as an FBAR penalty is assessed, taxpayers will have all refunds offset and

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(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.

[10] 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.

[11] *Supra* at n. 6.

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

[13] 26 U.S.C. § 6671; Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases*, 73 TAX LAW 435 (2020).

applied towards the FBAR penalty,[14] and may be subject to enforced collection actions.[15] Elderly and disabled taxpayers who depend on Social Security income and Medicare will have their monthly benefits reduced to pay over a portion towards the FBAR penalty.[16] The collection of the FBAR penalty debt may also be contracted out to a private collection agency,[17] for which the taxpayer is charged an additional debt-service fee.[18] Without access to a pre-payment forum for judicial review,[19] 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 per-account interpretation 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.

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[14] 26 U.S.C. § 6402.

[15] 31 U.S.C. § 3711(g).

[16] 31 U.S.C. § 3716(c)(3).

[17] 31 U.S.C. § 3718(a)(1).

[18] 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.

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

### B. The Per-Account Statutory Interpretation Disproportionally Penalizes the Least Culpable Non-Willful Taxpayers

1. The perverse results from applying the non-willful penalty per-account become all the more unpalatable once we consider the class of taxpayers likely to be the most affected. The per-account absurd interpretation of the statutory penalty regime vastly and disproportionately penalizes taxpayers with foreign ties—foreigners or immigrants living in the United States and U.S. taxpayers residing abroad — 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. The group that is harmed the most by the per-account FBAR penalty regime are foreigners and immigrants residing in the United States. These individuals are much more likely to have an obligation to report multiple "foreign" accounts because of several 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. Furthermore, due to historical utilization of their foreign accounts, these individuals are much more likely to maintain low balances therein. 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.[20] 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 even a decade ago),[21] members of that community are not

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[20] 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.

[21] Until 2008-2009, when the IRS began aggressively pursuing United States persons who failed to report foreign accounts 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*, *(cont'd)*

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, and likely to have small balances in those accounts, as a result of their foreign roots.

The other group that will be greatly and disproportionately impacted by the per-account FBAR penalty regime are U.S. taxpayers residing abroad. These individuals 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. [22] As of January 2020, there were

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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).

[22] 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-

*(cont'd)*

approximately 9 million U.S. taxpayers residing abroad.[23] Still, in 2016, there were approximately only 950,000 FBAR reports filed,[24] only 204,009 of which listed a foreign address.[25] 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.

2. The government's aggressive pursuit of FBAR penalties and disproportionate financial sanctions for willful and non-willful violations completely disregard the IRS's decades-long failure to educate

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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.

[23] 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.

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

[25] *Ibid.* at 59.

taxpayers and tax professionals about FBAR reporting obligations.

Prior to 2008-2009, many experienced tax professionals and return preparers were not aware of the FBAR reporting obligations and some continued to be unaware for many years thereafter.[26] To this day, widely available tax preparation software, such as TurboTax, cannot be relied on to educate taxpayers unfamiliar with the FBAR reporting obligation about the filing requirement. See *United States v. Hughes*, No. 18-5931, 2020 WL 1536509, *7-8 (N.D. Cal. Mar. 31, 2020) (Turbo Tax did not automatically prompt user to prepare an FBAR form even when the box on Schedule B was checked "yes"; TurboTax user had to affirmatively seek out the FBAR form)*; United States v. Clemons*, 18-cv-258, 2019 WL 7482218 (M.D. Fla. Oct. 29, 2019) (TurboTax did not alert the user to the FBAR obligation after the user answered "yes" to the question regarding the ownership of foreign bank accounts). Even as of 2022, TurboTax software does not provide sufficient guidance to its users regarding FBAR filing obligations. A Q&A between TurboTax and one of its software users, posted to the TurboTax website on January 4, 2022, identifies the affirmative steps that a software user must take to ensure that foreign accounts are accurately acknowledged on Schedule B and reported on other forms, including Form 8938.[27] Therefore, a TurboTax user who is not

[26] See *supra* at n. 21.

[27] See https://ttlc.intuit.com/turbotax-support/en-us/help-article/tax-forms/file-fbar-report-fincen-

*(cont'd)*

independently aware of the FBAR filing obligation or who mistakenly believes that income from foreign sources is not reportable on the U.S. tax return, may not learn of the FBAR filing obligation through TurboTax.

3. The excessiveness (and unreasonableness) of the per-account non-willful penalties is further exacerbated by the fact that the FBAR reporting obligations are not straightforward and easily comprehensible for an average U.S. person to navigate in determining whether or not an item is reportable on the FBAR. Yet the application of the per-account penalty does not consider the complexity of the reporting requirement with respect to each reportable account. While a filer may be able to ascertain the requirement to report foreign deposit and/ or custodial accounts on the FBAR form,[28] the definition of the reportable account is far broader. The FBAR regulations and guidance published by FinCEN and IRS encapsulate arrangements and relationships that a lay person (and frankly many tax professionals who are not intimately familiar with the nuances of the FBAR reporting rules) may not intuitively consider to be reportable.[29] For example, the definition of a foreign financial account includes

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114/L6YDgKByn_US_en_US?uid=l6qv0w13 (last visited August 12, 2022).

[28] But even then, not unfrequently, we have witnessed confusion by foreigners and U.S. taxpayers residing abroad about what is considered a "foreign" account. In these cases, the individuals did not view accounts held in their country of residence or origin as "foreign."

[29] 31 C.F.R. § 1010.350.

foreign life insurance or annuity policies with cash value,[30] an account with mutual funds or similarly pooled funds,[31] certain foreign retirement plans,[32] and in certain circumstances, a safety deposit box.[33] In addition, the definition of the terms financial interest,[34] signature authority,[35] and the obscure and undefined "other authority,"[36] which still befuddles many tax practitioners, is certainly broader than the colloquial meaning of these terms.

The rules relating to the FBAR reporting requirements are complicated and compliance with these rules requires a sophisticated understanding of their scope and breadth. Yet, even incorrect advice by a tax professional, that results in the assertion of the non-willful penalties (rather than willful), can cause

[30] 31 C.F.R. § 1010.350(c)(3)(ii).

[31] 31 C.F.R. § 1010.350(c)(3)(iv)(A).

[32] See Internal Revenue Service, IRS FBAR Reference Guide at 3, available at https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf (last visited March 25, 2022). The Guide identifies a Canadian Registered Retirement Savings Plan (RRSP), Canadian Tax-Free Savings Account (TFSA), Mexican individual retirement accounts (Fondos para el Retiro), and Mexican Administradoras de Fondos para el Retiro (AFORE) as examples of foreign financial accounts reportable on the FBAR.

[33] I.R.M. 4.26.16.2.2.(3)(c) (Nov. 6, 2015). The I.R.M. provides that a safety deposit box may be considered a reportable account if the financial institution holding the safety deposit box has access to its contents and can dispose of the contents upon instructions from the box owner.

[34] 31 C.F.R. § 1010.350(e).

[35] 31 C.F.R. § 1010.350(f).

[36] *Ibid.*

economically devastating penalties that do not correlate to any direct loss suffered by the government. Such sanction is too punitive for the conduct that the IRS finds to be non-willful and is not in line with this Court's precedent.

The Supreme Court in *United States v. Boyle*, 469 U.S. 241 (1985) considered reliance on tax professionals in the context of reasonable cause defense to tax penalties. The Court stated that:

> When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place.

*Id.* at 251 (citing *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir, 1950)). However, the per-account penalty approach does just that. To avoid such draconian sanctions, the filer would need to get a second and third opinion, just to ensure that every item on the FBAR is adequately reported. That simply cannot be the burden that Congress intended to bestow on U.S. persons when it enacted the non-willful penalty provision.

## V. THE RULE OF LENITY MANDATES THE PER-FORM STATUTORY INTERPRETATION.

The per-form penalty application is evidenced by the language of the statute, is supported by legislative history, and is consistent with the congressional objective for enacting non-willful penalties. [37] Nevertheless, even if there is statutory ambiguity that cannot be resolved by other rules of statutory construction, the rule of lenity mandates the per-form interpretation of the penalty provision. Fundamental to the rule of lenity is the principle that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). Traditionally used in the analysis of criminal statutes, the rule of lenity has also been applied to civil penalty statutes. See *Commissioner v. Acker*, 361 U.S. 87 (1959). The rule of lenity requires statutes imposing tax penalties to "be construed strictly" against the government and in favor of the taxpayer. See *id.* at 91; *Rand v. Commissioner,* 141 T.C. 376, 393 (2013) ("under the rule of lenity statutes that impose a penalty are to be construed in favor of the more lenient punishment"). Further, a taxpayer cannot be "subjected to a penalty unless the words of the statute plainly impose it." *Acker* at 91.

The objective advanced by the rule of lenity is consistent with both congressional intent and the IRS's obligation to administer and enforce tax laws

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[37] See Brief for the Petitioner, at 17-35.

justly and fairly.[38] In the last several decades, Congress has made significant strides in taxpayer rights protection, including through the introduction of bipartisan legislation to reform and modernize the IRS, as well as codifying specific taxpayer rights.[39] The Taxpayer Bill of Rights, proposed by the National Taxpayer Advocate, adopted by the IRS, and codified in the Internal Revenue Code, requires that taxpayers have a "fair and just tax system" and limits taxpayer's liability to "the correct amount of tax," inclusive of penalties. See 26 U.S.C. §§ 7803(a)(3)(J), 7803(a)(3)(C). Protection of taxpayer rights, including fairness in administration of penalty provisions, is paramount to maintaining a fair and just tax system. Prior to its codification, the National Taxpayer Advocate provided the following statement to a congressional subcommittee hearing on IRS oversight as to why the Taxpayer Bill of Rights is vital:

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[38] See 26 U.S.C. § 7803(a)(3)(J); Internal Revenue Service, IRS Publication 1, Your Rights as a Taxpayer, https://www.irs.gov/pub/irs-pdf/p1.pdf (last visited August 14, 2022).

[39] See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452; Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1002, 112 Stat. 685 (requiring the IRS to "review and restate its mission to place a greater emphasis on serving the public and meeting taxpayer's needs"); Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242 (codifying the modern Taxpayer Bill of Rights, adding ten specific taxpayer rights to the Internal Revenue Code); Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (outlining ways in which the IRS can improve its service to the taxpayers).

Taxpayer rights are central to our tax system and to tax compliance. If taxpayers believe they are treated, or can be treated, in an arbitrary and capricious manner, they will mistrust the system and be less likely to comply voluntarily. If taxpayers have confidence in the fairness and integrity of the tax system, they will be more likely to comply… Just as the Constitution's Bill of Rights sets out the relationship between the federal government and U.S. citizens and imposes limits on the federal government's power, I believe a thematic, principle-based list of core taxpayer rights would provide a foundational framework for taxpayers and IRS employees alike that would promote effective tax administration… The IRS is largely an enforcement agency, and from time to time, it inevitably will overreach… A Taxpayer Bill of Rights is not a panacea that will prevent all problems or errors in judgment. However, a Taxpayer Bill of Rights would serve as an organizing principle for tax administrators in establishing agency goals and performance measures, provide foundational principles to guide IRS employees in their dealings with taxpayers, and provide information to

> taxpayers to assist them in their dealings with the IRS.[40]

Application of the rule of lenity to civil penalty statutes, such as 31 U.S.C. § 5321(a)(5), advances congressional intent and the IRS's duty to protect taxpayer rights because it requires any ambiguity in the penalty statute to be resolved in the manner that mitigates penalty exposure. The FBAR penalty statute does not unambiguously impose the non-willful penalty on a per-account basis. Moreover, as the preceding discussion shows, such an interpretation of the non-willful penalty provision renders this penalty regime draconian, disproportionately affecting groups of taxpayers for reasons entirely unrelated to their offending conduct. Such a result contradicts congressional intent and commitment to protecting taxpayer rights, as demonstrated by the codification of the Taxpayer Bill of Rights. Applying the rule of lenity to resolve the purported statutory ambiguity in favor of the per-form interpretation mitigates arbitrariness, bringing the application of the penalty regime more in line with manifest congressional intent and modern tax policy.

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[40] Hearing on Internal Revenue Service Oversight Before the Subcommittee on Financial Services and General Government – H. Comm. on Appropriations, 13th Cong. (Feb. 26, 2014) (Written Statement of Nina E. Olson, National Taxpayer Advocate).

## CONCLUSION

For the foregoing reasons, the Center respectfully and emphatically encourages the Court to adopt the per-form interpretation of the FBAR non-willful penalty provision.

Respectfully submitted,

GUINEVERE MOORE
*Counsel of Record*
MOORE TAX LAW GROUP LLC
2205 W. Armitage Avenue, Suite 1
Chicago, IL 60647
312.549.9993
Guinevere.moore@mooretaxlawgroup.com

ZHANNA A. ZIERING
AARON M. ESMAN
MOORE TAX LAW GROUP LLC
11 Broadway, Suite 615
New York, NY 10004

AJAY GUPTA
MOORE TAX LAW GROUP LLC
2205 W. Armitage Avenue, Suite 1
Chicago, IL 60647

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