In The
United States Court of Appeals
for the Seventh Circuit

No. 17-2937

PHILIP G. GROVES,

Plaintiff-Appellant,

v. UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
No. 1:16-cv-02485
The Honorable Gary Feinerman

BRIEF OF
AMERICAN COLLEGE OF TAX COUNSEL
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2937

Short Caption: Philip G. Groves v. United States of America

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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American College of Tax Counsel as Amicus Curiae

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Skadden, Arps, Slate, Meagher & Flom LLP

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Armando Gomez Date: September 14, 2018

Attorney's Printed Name: Armando Gomez

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Alan Swirski Date: September 14, 2018

Attorney's Printed Name: Alan Swirski

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N/A

Attorney's Signature: s/ Keith Neely Date: September 14, 2018

Attorney's Printed Name: Keith Neely

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American College of Tax Counsel (the "College") respectfully submits this brief as amicus curiae in support of appellant Philip G. Groves.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.[2]

Effective tax enforcement requires uniform, predictable and prompt application and administration of the tax code. The College submits this brief because the tax law needs to have clear and unambiguous rules, and those rules need to allow taxpayers, their advisors, and the Internal Revenue Service (the "IRS") to have settled expectations as to outcomes. The College is deeply concerned that the failure to apply the catch-all statute of limitations contained in 28 U.S.C. § 2462 to penalties imposed under the tax code, including the penalty under 26 U.S.C. § 6700 ("Code section 6700") at issue here, runs contrary to the larger congressional objective of providing protection against stale demands.[3] The decision below, under which an advisor could remain forever exposed to liability for past conduct, violates longstanding principles of fairness and repose that are deeply embedded within the American legal tradition. In addition, the College is concerned that the failure to apply the catch-all statute of limitations in this case

[2] Four members of the Board of Regents, Charles P. Rettig, Caroline D. Ciraolo, Michael J. Desmond, and Jenny L. Johnson Ware abstained from the decision of the Board of Regents to prepare and file this brief, and did not participate in the preparation or review of this brief.

[3] *United States v. Brockamp*, 519 U.S. 347 (1997).

reflects outdated assumptions about the uniqueness of the tax law, a doctrine that is sometimes referred to as "Tax Exceptionalism."[4]

[4] Over twenty years ago, this Court rejected Tax Exceptionalism in the context of evaluating the appropriate standard of deference due to tax regulations. *See Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 982 (7th Cir. 1998) (stating that "consistency in the law forms the backbone of effective jurisprudence").

SUMMARY OF ARGUMENT

Statutes of limitation have long played a vital role in the American legal system. This is why Congress enacted 28 U.S.C. § 2462: to provide a broad, catch-all statute of limitations that applies to any "action, suit or proceeding" that is commenced "for the enforcement of any . . . penalty." If an action falls within § 2462's expansive reach, it must be commenced within five years from the date when the claim first accrued.

Penalties imposed by the IRS pursuant to Code section 6700 fall within the plain language of 28 U.S.C. § 2462 and should be subject to a five-year statute of limitations. A penalty assessment under Code section 6700 qualifies as an "action, suit or proceeding" within the meaning of § 2462, and it is commenced "for the enforcement of [a] . . . penalty." This reading is strongly supported by legislative history, which indicates § 2462 grew out of statutes of limitation that applied *exclusively* to the revenue laws. Moreover, unlike anti-fraud provisions in which Congress expressly excepts application of § 2462's five-year statute of limitations, Code section 6700 contains no analogous exception.

Well-established policy reasons support this plain language application of § 2462's statute of limitations to this case. Statutes of limitation further crucial societal interests, such as promoting repose and ensuring that claims are brought before the evidence supporting them deteriorates. Both interests strongly support the plain language application of § 2462's statute of limitations in this context.

Lastly, including Code section 6700 within § 2462's reach is consistent with the Supreme Court's recent rejection of Tax Exceptionalism, an outdated doctrine that advances the view that tax law is not subject to certain generally applicable legal principles. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011) (rejecting the view that Treasury Department regulations are entitled to a different level of deference than other administrative regulations).

For all of these reasons, we respectfully encourage this Court to reverse the decision of the district court.

ARGUMENT

I. The Plain Text of the Statute Confirms that the Catch-All Statute of Limitations Applies

In determining the meaning of a statutory provision, courts must "look first to its language, giving the words used their ordinary meaning." *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . . ." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

28 U.S.C. § 2462 provides that an "action, suit or proceeding" that is commenced "for the enforcement of any . . . penalty" must take place within five years from the date when the claim first accrued. By the plain language of 28 U.S.C. § 2462, the five-year, catch-all statute of limitations applies to Code section 6700.

A. A Penalty Assessment under Section 6700 is an "action, suit or proceeding" Within the Meaning of the Catch-All Statute of Limitations

Code section 6700 permits the IRS to penalize an advisor who knowingly makes materially false or fraudulent statements in the context of promoting abusive tax shelters. *See* 26 U.S.C. § 6700(a)(2)(A). These penalties are not insubstantial; they are "equal to 50 percent of the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed." 26 U.S.C. § 6700(a)(2).

The penalty imposition process, although nominally an *ex parte* assessment, is implemented in a similar manner as other government enforcement proceedings that are subject to § 2462's catch-all limitations period. Penalties are assessed, for example, only after a formal investigation has been approved by an IRS Exam Manager. *See* I.R.M. 20.1.6.1.4. After the investigation but before the penalty is assessed, the proposed assessment must be "personally approved (in writing) by the immediate supervisor of the individual making such determination." 26 U.S.C. § 6751(b)(1).[5] Throughout this penalty imposition process, the IRS instructs its examiners to ensure that "[e]ach taxpayer . . . have the opportunity to have his or her interests heard or considered," I.R.M. 20.1.6.1.3, an important characteristic that is central to an "action, suit or proceeding."[6]

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[5] Although the Seventh Circuit has not yet addressed the issue, the Second Circuit recently held that 26 U.S.C. § 6751(b)(1) "requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency . . . asserting such penalty" and that "compliance . . . is part of the Commissioner's burden of production and proof." *Chai v. Commissioner*, 851 F.3d 190, 221 (2d Cir. 2017). The Tax Court has since adopted this reading, *see Graev v. Commissioner (Graev III),* 149 T.C. No. 23, slip op. at 5, 14 (Dec. 20, 2017), and several other circuits have entertained *Graev* arguments. *See Mellow Partners v. Comm'r*, 890 F.3d 1070 (D.C. Cir. 2018); *PBBM-Rose Hill, Ltd. v. Comm'r*, No. 17-60276, slip. op. (5th Cir. Aug. 14, 2018).

[6] The district court assumed "that *administrative* actions, suits and proceedings . . . are potentially subject to § 2462." App. A-5. However, relying on the Second Circuit's rationale in *Capozzi v. United States*, 980 F.2d 872 (2d Cir. 1992), the district court found that the IRS assessment of the Code section 6700 penalty is entirely *ex parte*. App. A-5-7. This reliance does not appear to have been sound. As part of the administrative process preceding the imposition of the Code section 6700 penalty, the IRS typically allows the advisor an opportunity to submit an administrative protest to challenge the proposed penalty before the IRS Office of Appeals. I.R.M. 20.1.6.23.1 (Sept. 17, 2010). Groves filed such a protest on July 23, 2015. Appellant's Br. at 5. Because the administrative portion of the penalty imposition process is not entirely *ex parte*, and because the IRS issued its notice of penalty charge after Groves filed his administrative protest, it seems clear that the penalty was imposed in connection with an administrative proceeding of the type that the district court believes should be subject to § 2462.

At the very least, "the assessment is a prerequisite to, and thus part of, the measures for the enforcement of a civil penalty." *Mullikin v. United States*, 952 F.2d 920, 933 n.1 (6th Cir. 1991) (Boggs, J., dissenting). As Judge Boggs ably noted, "[i]t would seem quite odd to say that the very act that initiates the actions leading to the collection of the penalty, a stream of events that must at some point be a proceeding, is not itself part of the proceeding." *Id.* Such a narrow reading would "thwart[ ] the basic objective of repose underlying the very notion of a limitations period" and should be rejected. *Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (citation omitted).

B. A Penalty Assessment under Section 6700 is Commenced "for the enforcement of" of a Penalty

A penalty assessment under Code section 6700 is commenced "for the enforcement of" a penalty. In *3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), the court dealt with whether § 2462's statute of limitations applied to an analogous penalty assessment imposed by the Environmental Protection Agency. The Government argued that an assessment was distinguishable from an enforcement action "because 'enforcement' connotes an action to collect a penalty already imposed, whereas a proceeding under § 16(a)(2) merely assesses or imposes the penalty." *3M Co.*, 17 F.3d at 1457. The D.C. Circuit rejected this argument, reasoning that nothing in the text or legislative history of § 2462 "restricted its operation to actions seeking to collect penalties already imposed in other proceedings, and we can discern no reason why Congress would have thought such a restriction desirable." *Id.* at 1458.

The same rationale applies to penalties imposed under Code section 6700. In fact, the D.C. Circuit expressly criticized the contrary holding reached in *Capozzi*:

> The *Capozzi* court thought that "[p]rior to the assessment" there can be "no fine, penalty or forfeiture"; "[t]herefore, there is nothing to enforce until after the assessment is made." But if this is correct, if "enforcement" means only the collection of a previously assessed penalty and not the adjudication of liability for a civil penalty, then § 2462's five-year limitations period would not apply even to federal court actions to determine penalties. In view of the history of § 2462 and reasons why we have statutes of limitations, such a result is inconceivable.

3M Co., 17 F.3d at 1459 (quoting *Capozzi*, 890 F.2d at 875).

In the case of penalties imposed under Code section 6700, the support in the legislative history is even stronger. As the court explained in *United States v. Maillard*, 26 F. Cas. 1140 (S.D.N.Y. 1871), § 2462 (then codified as 5 Stat. 322) can trace its lineage to a series of limitation provisions enacted in 1799 and 1804. *See id.* at 1141. Both of these historic predecessor provisions imposed limitation periods for actions brought under the revenue laws. *See id.* (explaining that while "the act of 1799 was confined to prosecutions" that "relat[ed] to the importation or entry of goods, wares, or merchandise," the "act of 1804 embraced forfeitures under the revenue laws generally"). Although § 2462 grew to encompass "suits for forfeitures accruing under the laws of the United States generally [and] not merely the revenue laws[ ]," *id.* at 1141, actions brought under the revenue laws, such as penalties

assessed under Code section 6700, lie at the historic core of what Congress intended § 2462 and its predecessors to address.[7]

* * *

When Congress desires to except certain causes of action from a relevant limitations period, it makes that intent clear. Under 26 U.S.C. § 6501, for example, Congress expressly provided that "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." *Id.* § 6501(c)(1). Similarly, Congress expressly permitted penalties to be imposed "at any time" on a tax return preparer who either willfully or recklessly understated a taxpayer's liability. *Id.* § 6696(d)(1); *see also id.* § 6694(b).[8] Because Code section

[7] Although this case is concerned solely with penalties imposed under Code section 6700, the College believes § 2462 applies equally to other penalties enforced by the IRS under the tax code. *See, e.g.*, 26 U.S.C. §§ 6674, 6676, 6677, 6679, 6682, 6707A, and the other "assessable penalties" provided under Title 26. Similarly, a number of administrative decisions have confirmed that § 2462 applies to monetary penalties and other sanctions imposed by the IRS pursuant to Treasury Department Circular No. 230 (Rev. 6-2014), 31 C.F.R. Part 10, which was promulgated under 31 U.S.C. § 330. *See, e.g.*, *Dir., OPR v. Coston*, Complaint No. 2010-19, 2011 TNT 205-66 (ALJ, Feb. 4, 2011), *aff'd*, 2011 TNT 205-67 (Oct. 14, 2011) (Decision on Appeal); *Dir., OPR v. Hernandez*, Complaint No. 2010-09, 2011 TNT 116-21 (ALJ, June 15, 2010), *aff'd*, 2011 TNT 116-22 (May 26, 2011) (Decision on Appeal); *Dir., OPR v. Craft*, Complaint No. 2010-12, 2011 TNT 203-13 (ALJ, Jan. 13, 2011), *aff'd*, 2011 TNT 203-14 (Oct. 12, 2011) (Decision on Appeal); *Dir., OPR v. Baldwin*, Complaint No. 2010-08, 2011 TNT 116-19 (ALJ, June 15, 2010), *aff'd*, 2011 TNT 116-20 (June 2, 2011) (Decision on Appeal).

[8] Moreover, like the penalty imposed by the SEC in *Gabelli*, the penalty imposed under Code section 6700 is a conduct based penalty, meaning that the IRS has the ability to detect and address the misconduct from the date that the tax shelter promotion occurred. This stands in stark contrast to circumstances where Congress has decided that an unlimited statute of limitations is warranted, such as where the taxpayer fails to file an income tax return or international information return, because in those circumstances the failure to file ensures that the IRS does not have the information to begin an investigation.

6700 contains no analogous exception, Congress must have intended § 2462's catch-all statute of limitations to apply.[9]

II. Statutes of Limitation Have Long Been Favored In the Law for Many Important Policy Reasons

Statutes of limitation have been a fixture in Anglo-American law for nearly four hundred years.[10] They are so "vital to the welfare of society" and "favored in the law" that "[t]hey are found and approved in all systems of enlightened jurisprudence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

Many of this nation's greatest jurists have commented on the importance of statutes of limitation to the American legal system. Chief Justice John Marshall wrote that if actions for penalties could "be brought at any distance of time," the result "would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). Marshall's rationale is striking and pertinent: "[I]t could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Id.* Justice Story agreed, writing that statutes of limitation are "wise and beneficial law[s]" that "afford security against stale demands", "produce speedy settlements of accounts", and "suppress those prejudices which

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[9] Although 26 U.S.C. § 7806(a) provides that cross-references to other provisions of law have no legal effect, it should be noted that 26 U.S.C. § 6533(1) specifically references the § 2462 catch-all statute of limitations. Notwithstanding the Second Circuit's dismissal of this reference, Congress' decision to include a reference to § 2462 within the tax code must mean that some civil penalties imposed by the IRS are subject to § 2462. Except for assessable penalties such as Code section 6700, *see supra* note 7, the College is not aware of any civil penalties within Title 26 that do not have a specified limitations period.

[10] Modern statutes of limitation can be traced back to the English Limitation Act of 1623. *See* Charles C. Callahan, *Statutes of Limitation—Background*, 16 Ohio St. L.J. 130, 130 (1955).

may rise up at a distance of time." *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828). Justice Stone noted that statutes of limitation have "long been regarded . . . as a meritorious defense . . . serving a public interest," *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 136 (1938), and Justice Jackson described them as "practical and pragmatic devices." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Oliver Wendell Holmes, Jr. attributed the existence of statutes of limitation to "the deepest instincts of man," *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897). Courts have routinely noted that important policies justify their application. Of these many policy rationales,[11] two are particularly relevant in this context: (1) the deterioration of evidence, and (2) the need for repose. Both support the application of 28 U.S.C. § 2462 to civil penalties imposed under Code section 6700.

A. The deterioration of evidence supports a statute of limitations.

The deterioration of evidence with the passage of time strongly supports the application of a statute of limitations. As the Supreme Court has noted, "[s]tatutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost,

[11] Professor Tyler Ochoa and Judge Andrew Wistrich outline seven of the most common policies espoused by courts in favor of a statute of limitations: (1) to promote repose; (2) to minimize the deterioration of evidence; (3) to place defendants and plaintiffs on equal footing; (4) to promote cultural values of diligence; (5) to encourage prompt enforcement of substantive law; (6) to avoid retrospective application of contemporary standards; and (7) to reduce the volume of litigation. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L. J. 453 (1997).

memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944). This makes good sense. After all, "[t]he process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

Viewed in this light, application of the catch-all statute of limitations is vital to ensure that civil tax penalties are imposed only where reliable evidence is available. This is particularly true where imposing penalties requires examining the practitioner's state of mind, as is the case here. *See* 26 U.S.C. § 6700(a)(2)(A) (penalizing the making of statements that "the person knows or has reason to know is false or fraudulent as to any material matter"). Determining whether a practitioner held a penalizable mental state likely involves evidence outside the written record, leaving the practitioner to struggle with "memories [that] have faded, and witnesses [that] have disappeared." *Order of R.R. Telegraphers*, 321 U.S. at 349.

Even if a case for penalties could be made on the written record alone, should the prudent advisor be required to keep immaculate records of all professional guidance she provides in perpetuity? The Government does not hold even itself to that rigorous standard, permitting certain tax records stored by the IRS, such as an individual's Form 1040, to be destroyed within six years after the end of the processing year. *See* I.R.M. 1.15.2.3. Holding the Government and tax advisors to

disproportionate standards is "utterly repugnant to the genius of our laws." *Adams*, 6 U.S. at 342.

B. The need for repose supports a statute of limitations.

The need for repose also supports application of a statute of limitations. Statutes of limitation "protect the citizens from stale and vexatious claims, and . . . make an end to the possibility of litigation after the lapse of a reasonable time." *Guaranty Trust Co.*, 304 U.S. at 136. In so doing, they provide "security and stability to human affairs," *Wood*, 101 U.S. at 139, by respecting a defendant's "settled expectations that a substantive claim will be barred without respect to whether it is meritorious" due to the delay in bringing the claim. *Bd. of Regents*, 446 U.S. at 487. They appeal to the basic human principle that "even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

Under the Government's view, however, tax advisors, having once sinned, are irredeemable; they are not entitled to "the right to be free of stale claims." *Order of R.R. Telegraphers*, 321 U.S. at 349. Instead of repose, advisors must remain permanently subject to penalties arising from conduct that occurred years or even decades earlier. Like the Sword of Damocles, these "most oppressive charges" are to remain hanging above even the most prudent advisor in perpetuity. *Bell*, 26 U.S. at

360. This view "cannot have been within the contemplation of the legislative power" and must be rejected. *Campbell v. City of Haverhill*, 155 U.S. 610, 616 (1895).[12]

III. Applying 28 U.S.C. § 2462 To Penalties Imposed Under Code Section 6700 Is Consistent With The Supreme Court's Rejection Of Tax Exceptionalism

Applying the catch-all statute of limitations contained in 28 U.S.C. § 2462 to penalties imposed under Code section 6700 is also consistent with the Supreme Court's recent rejection of Tax Exceptionalism, an outdated doctrine that purported to exempt tax law from generally applicable legal principles.[13]

The Supreme Court firmly rejected the notion of Tax Exceptionalism in the context of administrative deference in *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011). In *Mayo*, the parties argued over whether Treasury Department regulations were entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or whether they were subject to the less deferential standard announced in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979). The

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[12] Some courts have suggested that a statute of limitations applies to the Code section 6700 penalty because the IRS's ability to collect the penalty is subject to the ten-year period specified in 26 U.S.C. § 6502. *See, e.g.*, *Capozzi*, 980 F.2d at 874–75. *Cf. 3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). This suggestion should be rejected for at least two reasons. First, 26 U.S.C. § 6502(a) specifically contemplates that the underlying assessment has to have "been made within the period of limitation properly applicable thereto," indicating that some period of limitation necessarily applies to the underlying assessment. Second, if no statute of limitations is imposed on the assessment, the IRS could assess a Code section 6700 penalty decades after the conduct at issue, and then would have yet another decade within which to collect the penalty so assessed. In other words, the penalty could be "brought at any distance of time," a notion that Chief Justice Marshall rejected over two hundred years ago. *Adams*, 6 U.S. at 342.

[13] The Senate Report accompanying 26 U.S.C. § 6533, which cross-references statutes of limitation including § 2462, *see supra* note 9, refers to these limitations provisions as "general provisions of law." S. Rep. No. 83-1622, at 588 (1954).

Court held that the *Chevron* standard applied and expressly rejected the view that Treasury Department regulations are owed "less deference" than other administrative agencies that are delegated the general authority to promulgate regulations. *Mayo*, 562 U.S. at 56 (citation omitted). "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[14] *Id.*

There is similarly no reason to exempt penalties imposed under Code section 6700 from the generally applicable statute of limitations contained in 28 U.S.C. § 2462. As Judge Boggs noted in his dissent in *Mullikin*, it stretches the boundaries of logic to conclude that "what is clearly a 'catchall' statute does not in fact catch a clearly relevant section." *Mullikin*, 952 F.2d at 933.

In recent years, the Supreme Court has made clear that it believes 28 U.S.C. § 2462 to be a broad, catch-all statute of limitations. In *Gabelli*, the Court rejected the Government's argument that a discovery rule should be read into § 2462 because "[i]t would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." 568 U.S. at 452. The Court explained that this would "thwart[ ] the basic objective of repose underlying the very notion of a limitations period." *Id.* (citation omitted). The Court broadened the scope of § 2462 even further in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017),

[14] In its most recent term, the Supreme Court again rejected Tax Exceptionalism in *Marinello v. United States*, 138 S. Ct. 1101 (2018). In *Marinello*, the Court held that felony obstruction of the IRS under the federal tax code carried the same nexus requirements as felony obstruction of justice under the federal penal code.

when it held that the five-year limitations period applied to disgorgement actions as well as traditional monetary penalties. The Court's reasoning was simple: because disgorgement "bears all the hallmarks of a penalty," § 2462's five-year statute of limitations applies. *Id.* at 1644.[15]

In each instance, the Court squarely rejected technical arguments that sought to exempt agency enforcement actions from the reach of § 2462. This Court should do the same here and hold that § 2462 applies to penalties imposed under Code section 6700.

CONCLUSION

The Supreme Court routinely reminds that public confidence in our laws counsels against broad interpretations of penal statutes that can be imposed unfairly, or at the discretion of the government. *See, e.g.*, *Marinello v. United States*, 138 S. Ct. 1101 (2018). Whether in the context of the tax code, the securities laws, or otherwise, the courts must ensure the congressional objective of providing protection against stale demands. Congress knows how to create an open statute of limitations, *see supra* Part I.B, but has not done so here. And if it does not like this statute of limitations result, it is free to amend Code section 6700 accordingly, as it has many times in the past. For the foregoing reasons, the College respectfully encourages this Court to reverse the judgment of the district court.

[15] Through its decisions in *Gabelli* and *Kokesh*, the Supreme Court has made clear that even government enforcement of penalties imposed for fraudulent acts are subject to the catch-all statute of limitations and are not subject to a discovery rule.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief of amicus curiae complies with the 7,000 word limit of Circuit Rule 29 because it contains 6026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief of amicus curiae complies with the typeface requirements of Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 12-point Century font.

Executed this 14th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on September 14, 2018.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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