No. 21-1195

IN THE

Supreme Court of the United States

ALEXANDRU BITTNER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

CAROLINE D. CIRAOLO
Counsel of Record
MEGAN L. BRACKNEY
GARRETT L. BRODEUR
CAROLINE RULE
KOSTELANETZ & FINK, LLP
601 New Jersey Avenue, N.W.
Suite 260
Washington, DC 20001
(202) 875-8000
cciraolo@kflaw.com

Counsel for Amicus Curiae

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BRIEF OF THE 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 petitioner Alexandru Bittner.[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.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented in writing to its filing.

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 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 government reporting requirements require clear, unambiguous, and reasonable interpretations of penalty statutes, so that similarly situated individuals and entities across the country know the consequences for non-compliance. The College submits this *amicus* brief because it is concerned that inconsistent positions of the Internal Revenue Service ("IRS"), the federal agency charged with enforcement of the foreign account reporting requirements, have undermined the trust of those subject to penalties for non-willful failure to comply with such requirements, and in so doing, deterred voluntary compliance. The College is also concerned that the irreconcilable holdings of the Ninth and Fifth Circuits, as well as trial courts around the country, cause persons who have non-willfully failed to report their interest in foreign financial accounts to be assessed drastically different penalties, depending only on the jurisdiction in which they reside.[3]

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[2] Scott Michel, Regent of the College, 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] *See* 28 U.S.C. § 1345 (the district courts have original jurisdiction of all civil suits commenced by the United States); 28 U.S.C. §§ 1346(a)(2) and 1491(a) (authorizing claims against the United States for illegal exaction); 28 U.S.C. § 1395(a) (venue for

The College is well positioned to weigh in on this important issue. The enforcement of foreign account reporting requirements under the Bank Secrecy Act ("BSA")[4] is delegated to the IRS[5] and therefore, tax lawyers frequently represent clients in BSA matters involving penalties in connection with Reports of Foreign Bank and Financial Accounts ("FBAR"). Moreover, the College has long supported policies that enhance and encourage voluntary compliance, which, critically, include transparent, fair, and consistent penalty regimes.

SUMMARY OF ARGUMENT

This case presents an unsettled question that affects millions of individuals and entities who have an interest in or signature or other authority over foreign bank accounts that, in the aggregate, exceed $10,000 at any point during a calendar year.[6] That question is whether a non-willful failure to timely file an accurate

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recovery of a penalty is in the district where the penalty accrues or where the defendant is found).

[4] 31 U.S.C. § 5311, *et seq*.

[5] The statutes governing Reports of Foreign Bank and Financial Accounts are not part of the Internal Revenue Code but were enacted under Title 31 of the United States Code. In 2003, enforcement authority with respect to foreign bank account reporting requirements was delegated to the Commissioner of the IRS. *See* 68 Fed. Reg. 26489 (May 16, 2003); 31 C.F.R. § 103.56(g) (Apr. 14, 2010); 31 C.F.R. § 1010.810(g) (Mar. 1, 2011). The regulations were reorganized in 2011. *See* 31 C.F.R. §§ 1010.350(a), 1010.306(c).

[6] U.S. persons who have a financial interest in or signature or other authority over foreign financial accounts with an aggregate balance exceeding $10,000 at any point in a calendar year are required to file an FBAR. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350, 1010.306.

FBAR subjects a U.S. person[7] to a single non-willful FBAR penalty[8] for failure to file the FBAR (the per form approach), or to separate non-willful FBAR penalties for each failure to accurately report an account on the FBAR (the per account approach).[9]

The IRS has taken inconsistent positions regarding potential penalties for non-willful FBAR violations in its publications and administrative guidance. Penalties are meant to encourage compliance, but inequitably or inconsistently applied penalties have the opposite effect. Inconsistent application of penalties undermines confidence in, and therefore, compliance with, the system.

Moreover, the Fifth Circuit's adoption of the per account approach creates a clear and irreconcilable circuit split with the Ninth Circuit's per form approach in *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

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[7] Under the BSA, a U.S. person includes: (i) a citizen of the United States; (ii) a resident of the United States; and (iii) an entity created or organized in the United States or under the laws of the United States, including, but not limited to, a corporation, partnership, limited liability company, trust, or estate. 31 C.F.R. § 1010.350(b). A U.S. resident for purposes of the FBAR requirements is a resident alien as defined by 26 U.S.C. § 7701(b), but using the Title 31 definition of the "United States" found at 31 C.F.R. § 1010.100(hhh).

[8] Pursuant to 31 U.S.C. § 5321(a)(5)(B)(i), where a person commits or causes a non-willful violation of the FBAR requirements, the Secretary of the Treasury ("the Secretary") may impose a civil penalty "not to exceed $10,000." No penalty is imposed where such violation was due to reasonable cause. 31 U.S.C. § 5321(a)(5)(B)(ii).

[9] A separate statutory provision governs willful violations of the FBAR requirements. Pursuant to 31 U.S.C. § 5321(a)(5)(C), the Secretary may impose a civil penalty for a willful violation not to exceed "the greater of — (I) $100,000, or (II) 50 percent of the amount determined under subparagraph (D) [balance *in the account* at the time of the violation]." (emphasis added).

This split causes substantial uncertainty because it allows the IRS to impose exponentially greater penalties on U.S. persons who live outside of Alaska, Arizona, California, Guam, and Hawaii.[10] The split also leaves U.S. persons who reside in New Jersey and Connecticut in limbo because district courts in those states have adopted the per form approach.[11] The circuit split and disagreements among the district courts are not surprising given the inconsistent administrative guidance over the past decade. We have no reason to believe that additional circuit court consideration will clarify the legal issue in any meaningful way. If left unresolved, the mere passage of time will not bridge this gap.

The College encourages the Court to grant the Petition for a Writ of Certiorari ("Petition") because a definitive ruling from this Court is necessary to resolve the current inconsistent application of the non-willful FBAR penalty and to provide an effective, fair, and uniform enforcement regime.

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[10] *See, e.g.*, Order, *United States v. Hadley,* No. 21-cv-1357 (M.D. Fla. Mar. 28, 2022), Dkt. 23 (taking a per account approach where the IRS assessed non-willful FBAR penalties totaling $230,000 for 23 unreported accounts over a two-year period).

[11] *See United States v. Giraldi*, No. 20-cv-2830, 2021 WL 1016215 (D.N.J. Mar. 16, 2021) (taking a per form approach), and *United States v. Kaufman*, No. 18-cv-787, 2021 WL 83478 (D. Conn. Jan. 11, 2021) (same). U.S. persons residing in the Fourth Circuit – Maryland, North Carolina, South Carolina, Virginia, and West Virginia – are in a similar predicament. *See United States v. Horowitz*, 978 F.3d 80, 81 (4th Cir. 2020) (observing but not holding, in a case concerning willful violations, that "[a]ny person who fails to file an FBAR is subject to a maximum civil penalty of not more than $10,000") (citing 31 U.S.C. § 5321(a)(5)).

ARGUMENT

I. The Fifth Circuit's Interpretation of the Non-willful FBAR Penalty Conflicts with Positions Taken by the IRS and Other Authorities

Before 2019, federal authorities, including the IRS in its publications and guidance, largely took a per form approach to applying the non-willful FBAR penalty. The IRS's recent aggressive pursuit of the non-willful FBAR penalty on a per account basis, and the Fifth Circuit's adoption of this approach, represents a dramatic and unexpected departure from prior practice.

The BSA directs the Secretary to require U.S. persons to file reports when the person maintains a relation with a foreign financial agency. 31 U.S.C. § 5314. The Secretary delegated the authority to administer and enforce the BSA to the Director of the Financial Crimes Enforcement Network ("FinCEN"), a bureau of the Treasury Department.[12] FinCEN redelegated the authority to enforce the FBAR requirements to the IRS.[13]

FinCEN's FBAR instructions effective for 2011 and in place today provide: "A person who is required to file *an FBAR* and *fails to properly file* may be subject to a civil penalty not to exceed $10,000 *per violation*." Form TD F 90-22.1 (OMB No. 1545-2038 (Rev. Jan. 2012)) (emphases added); *BSA Electronic Filing Requirements For Report of Foreign Bank and Finan-*

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[12] *See* 31 U.S.C. § 310; Treasury Order 180-01; FinCEN, 67 Fed. Reg. 64697 (Oct. 21, 2002) (superseded Mar. 24, 2003, and July 1, 2014, reaffirmed Jan. 14, 2020).

[13] *See* note 5.

cial Accounts (FinCEN Form 114) (Rev. Jan. 2017).[14] The term "*violation*" refers back to the requirement "to file *an FBAR*," and not to individual accounts listed on the FBAR. *Id.*

Similarly, in 2009, the Staff of the Joint Committee on Taxation adopted a per form approach: "*Failure to file the FBAR* is subject to . . . civil penalties. Since 2004, the civil sanctions have included a penalty of up to $10,000 for *failures* that are not willful[.]"[15] A 2016 Report prepared by the Senate Finance Committee ("2016 Committee Report") also supports the view that one civil penalty of up to $10,000 per year is allowed for a non-willful violation of 31 U.S.C. § 5314:

> *Willful* failure to file *an FBAR* may be subject to penalties in amounts not to exceed the greater of $100,000 or 50 percent of the amount in the account at the time of *the violation*. A non-willful, but *negligent failure to file* is subject to a penalty of $10,000 for *each negligent violation*. The penalty may be waived if (1) there is reasonable cause for the failure to report and (2) the amount of the . . . balance in the account was properly reported.[16]

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[14] https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf (last visited Mar. 27, 2022); *see also FinCEN Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8844, 8854 (Feb. 26, 2010) ("A person who is required to file an FBAR and *fails to properly file* may be subject to a civil penalty not to exceed $10,000.").

[15] Staff of the Joint Comm. on Taxation, Description of Revenue Provisions Contained in the President's Fiscal Year 2010 Budget Proposal (Sept. 2009), JCS-4-09 No. 9, 2009 WL 2996021 (emphases added).

[16] S. Rep. No. 114-298, p. 23 (July 12, 2016) (emphases added).

As early as 2008, the IRS took inconsistent positions with respect to the non-willful FBAR penalty. For example, on June 17, 2008, the IRS issued guidance advising that "[c]ivil and criminal penalties for non-compliance with the *FBAR filing requirements* are severe. Civil penalties for a non-willful violation can range up to $10,000 per violation." *IRS Reminds Taxpayers to Report Certain Foreign Bank and Financial Accounts by June 30,* IR-2008-79 (emphasis added). Less than a month later, the IRS updated the Internal Revenue Manual ("IRM"),[17] taking the position that "FBAR penalties are determined per account, not per unfiled FBAR." IRM 4.26.16.4(7) (July 1, 2008).

In 2011, the IRS published the *IRS FBAR Reference Guide*[18] ("Guide") "to educate and assist U.S. persons who have the obligation to file the FBAR." *Id.* With regard to penalties, the Guide currently provides: "For those violations occurring on or before November 2, 2015, the IRS may assess a civil penalty not to exceed $10,000 per violation for non-willful violations that are not due to reasonable cause." *Id.* at *8. The Guide also includes a chart of inflation-adjusted penalties "that may be asserted for not complying with the FBAR reporting and recordkeeping

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[17] The IRM "govern[s] the internal affairs of the Internal Revenue Service." *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983); *United States v. Horowitz*, 361 F. Supp. 3d 511, 515 (D. Md. 2019). It is not binding on the IRS and may be used "on a limited basis, to provide guidance in interpreting terms in the regulations," *Horne*, 714 F.2d at 207; *Horowitz*, 361 F. Supp. 3d at 515.

[18] https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf (last visited Mar. 21, 2022). Although the IRS did not date the initial Guide or updated versions, the earliest reference appears to be in February 2011.

requirements" after November 2, 2015.[19] For a "Non-Willful Violation," the chart reflects a civil penalty "[u]p to $12,459 for *each negligent violation*." *Id.* (emphasis added).

Reason dictates that a non-willful "violation" refers to a failure to timely file an accurate FBAR, not to a failure to report every account or, taken to its extreme, to accurately complete every line item on an FBAR.[20] The IRS seems to acknowledge this point in its Fact Sheet, *Offshore Income and Filing Information for Taxpayers with Offshore Accounts*, FS-2014-7 (June 2014): "For the FBAR, the penalty may be up to $10,000 *if the failure to file* is non-willful." (emphasis added). The IRS took a similar view in *United States v. Shinday*, No. 18-cv-6891, 2018 WL 6330424, at *2 (C.D. Cal. Dec. 3, 2018) (IRS assessed a single non-willful FBAR penalty of $10,000 per form despite multiple unreported accounts in each year), and in *United States v. Marsteller*, No. 17-cv-441, 2018 WL 4604033, at *2 (W.D. Va. Sept. 25, 2018) (same).

Moreover, when the IRS proposes to assess FBAR penalties, it sends a standard Letter 3709, which was described by the Ninth Circuit as follows:

> The letter explained that the IRS was "proposing a penalty" and included two checked boxes. The first box explained that the IRS

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[19] *See* 31 C.F.R. § 1010.821 (noting that the maximum penalty amount for non-willful FBAR penalties assessed on or after January 24, 2022, is $14,489).

[20] Following the Fifth Circuit's ruling to its logical extreme, a "violation" of a "reporting requirement" could result in a $10,000 non-willful penalty for every one of the twenty-four items of information required for each account on an FBAR, not just per account. A filer who omitted a postal code or the address of a financial institution could theoretically be subject to a $10,000 penalty for each such item.

> was "proposing the assessment of a penalty under 31 U.S.C. § 5321(a)(5) for failing to meet the filing requirements of 31 U.S.C. § 5314. For each calendar year, any U.S. person having one or more foreign accounts with maximum balances aggregating over $10,000 is required to file [an FBAR] with the Internal Revenue Service by June 30th of the following year." The second box explained that "*[f]or the failure to file [an FBAR] due on or after June 30, 2005, the penalty cannot exceed $10,000.*"

Boyd, 991 F.3d 1077, 1085 n.11 (emphasis in original). The Ninth Circuit found the Letter 3709 to be "consistent with the 2014 Fact Sheet" and supporting the per form approach. *Id.* In short, where the conduct of a filer is non-willful, as described in the FBAR instructions, in descriptions by congressional committee members and other legislative staff, and in IRS publications, the number of unreported accounts and the aggregate balance of those accounts are irrelevant.

Despite the foregoing, in 2015, following the issuance of interim guidance for FBAR penalties,[21] the IRS once again took the position that a non-willful FBAR penalty can be applied on a per account basis, but specifically noted that this approach should only be taken in unusual cases:

> (1) After May 12, 2015, *in most cases*, examiners will recommend one penalty per open year, regardless of the number of unreported foreign accounts. The penalty for each year is limited to $10,000. Examiners should still use the mitigation guidelines and their discretion

[21] Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, SBSE-04-0515-0025 (May 13, 2015).

> in each case to determine whether a lesser penalty amount is appropriate.
>
> * * *
>
> (3) For other cases, the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting a separate non-willful penalty for each unreported foreign financial account, and for each year, is warranted . . . .

IRM 4.26.16.6.4.1 (Nov. 6, 2015) (emphasis added). The current version of the IRM references a "per violation" approach:

> (1) In ascertaining the penalty amount for non-willful violations (assuming the reasonable cause exception does not apply), first determine whether the mitigation criteria in *Exhibit 4.26.16-2* are met.
>
> (2) If the mitigation criteria are met, make a preliminary penalty calculation using the mitigation guidelines in *Exhibit 4.26.16-2*, except limit the total mitigated penalties for each year to the statutory maximum for a single non-willful violation. Allocate the total penalty amount for each year among all violations in that year for which a penalty is recommended. This is the penalty amount, unless, in the examiner's discretion as noted in *IRM 4.26.16.5.2.1*, the facts and circumstances of a case warrant a different penalty amount . . . . .
>
> * * *
>
> (4) If the mitigation criteria are not met, or are met but the facts and circumstances of a

> case warrant a different penalty amount than calculated in paragraph (2), examiners will consider, as appropriate:
>
> > (a) Asserting penalties, totaling (in each year for which non-willful violations are being penalized) no more than the statutory maximum penalty amount for a single violation, regardless of the number of non-willful violations. Since FBAR penalties are determined under the statute on a per-violation basis, the total penalty amount for each year should be allocated among all non-willful violations for which a penalty is recommended.

IRM 4.26.16.5.4.1 (June 24, 2021) (emphases in original).

Finally, on March 31, 2022, the IRS released a new Fact Sheet "to help filers prepare and file their FBAR**."** *Details on reporting foreign bank and financial accounts*, FS-2022-24 (Mar. 2022). Perhaps in recognition of the current inconsistent approach being taken with respect to the non-willful FBAR penalty, the IRS offered the following limited guidance to filers:

> **Penalties for failure to file an FBAR**
>
> Those who don't file an FBAR when required may be subject to significant civil and criminal penalties. Criminal violations of FBAR rules can result in a fine and/or five years in prison. The U.S. government adjusts the penalty amounts annually for inflation.
>
> The IRS will not penalize those who properly report a foreign financial account on a late-filed FBAR, and the IRS finds they have reasonable cause for late filing.

By naming this section of the Fact Sheet, "Penalties for failure to file *an FBAR*", the IRS once again suggests a per form approach. *Id.* (emphasis added). The IRS also issued an updated version of the FBAR Reference Guide, which provides in relevant part:

> **Non-Willful Violation**
>
> - **Civil Penalty Authority**: 31 USC 5321(a)(5)(B)
> - **Civil Penalty Amount**: Up to the amount in 31 CFR 1010.821
> - **Criminal Penalties**: N/A
> - **Comments**: Applies to all U.S. persons.
>
> * * *
>
> It's possible to assert civil penalties for FBAR violations in amounts that exceed the balance in the foreign financial account. Civil and criminal penalties may be imposed together. 31 USC Section 5321(d).
>
> Note regarding civil penalty assessment before August 1, 2016: For violations occurring on or before November 2, 2015, *the IRS may assess a civil penalty not to exceed $10,000 per violation for non-willful violations* that are not due to reasonable cause. For willful violations, the penalty may be the greater of $100,000 or 50% of the balance in the account at the time of the violation, for each violation.

IRS Pub. 5569 (3-2022), at *8-9 (emphasis added).

In considering the positions taken by the IRS, it is important to note that there are limits to the agency's

authority with respect to FBAR enforcement. Under the Delegation Order, the IRS has the authority to:[22]

- Investigate possible civil violations of the FBAR requirements;
- Issue, serve, and recommend enforcement of summonses;
- Prepare and file proofs of claims for FBAR penalties and to take any appropriate action to protect the government's interest in bankruptcy, state and federal receiverships, and other state and federal insolvency actions;
- Make referrals to the Department of Justice to institute proceedings for collection, including bankruptcy proceedings;
- Issue administrative rulings;
- Provide pre-assessment hearings and make final administrative determinations regarding the existence or amount of an FBAR penalty;
- Provide a hearing, receive and review evidence, and review the determination;
- Enter into and approve a written agreement with any person relating to the person's civil liability for an FBAR penalty; and
- Sign agreements extending the period of limitations on assessment or collection of civil FBAR penalties.

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[22] *See* IRM 1.2.2.14.13 (Apr. 11, 2012); *FinCEN Delegation of Enforcement Authority Regarding the Foreign Bank Account Report Requirements*, 68 Fed. Reg. 26489 (May 16, 2003); 31 C.F.R. § 1010.810(g); Treasury Delegation Order 25-13 (Mar. 8, 2022).

Under the delegation, the IRS does not have the authority to issue regulations interpreting the penalty provisions. *Id.*

Furthermore, while the language in the IRM ostensibly permits assessment of a separate non-willful FBAR penalty for each unreported account, before 2019, this approach found no support with the courts. For example, in 2016 the U.S. Tax Court noted that, "[a] person who *fails to file a required FBAR* may be assessed a civil monetary penalty . . . . The amount of the penalty is capped at $10,000 unless the failure was willful." *Whistleblower 22716–13W v. Commissioner*, 146 T.C. 84, 90 (2016) (emphasis added). The following year, the Court of Federal Claims wrote that the IRS may "impose a civil monetary penalty of not more than $10,000 for *failure to file* [a single FBAR]." *Jarnagin v. United States*, 134 Fed. Cl. 368, 370 (2017) (emphasis added).

The complaint in *Boyd,* filed on January 31, 2018, appears to be the first time the United States asserted in a court filing that multiple non-willful FBAR penalties apply to a single untimely, but accurate, FBAR. Complaint, *Boyd*, No. 18-cv-803 (C.D. Cal. Apr. 23, 2019), Dkt. 1. Following the Ninth Circuit's decision in *Boyd*, district courts adopted divergent views on the proper application of the non-willful FBAR penalty. At least two cases in the Fifth Circuit have been stayed pending this case. *See* Minute Entry, *United States v. Mireles*, No. 21-cv-138 (S.D. Tex. Mar. 7, 2022) (non-willful penalties of $790,000 covering a seven-year period); Order, *United States v. Gill,* No. 18-cv-4020 (S.D. Tex. Jul. 21, 2021), Dkt. 38 (non-willful penalties of $740,848 covering a six-year period).

II. This Court Should Resolve the Irreconcilable Circuit Split Because the Conflict Has a Substantial Impact on U.S. Persons Who are Entitled to Consistent and Fair Application of the Law

Uniform application of the penalty for non-willful failure to comply with the FBAR filing requirements is essential to voluntary compliance. This issue has a substantial impact on U.S. persons residing within and outside of the United States. For example, nearly nine million U.S. citizens live outside the United States, all of whom are entitled to clear and consistent guidance from the IRS and the courts with respect to foreign account reporting obligations and potential FBAR penalties.[23]

To encourage voluntary compliance, the IRS understands that it must assure those persons subject to filing and reporting requirements that they will be treated fairly. *See* IRM 20.1.1.2.1(10) (Nov. 25, 2011) ("Penalties best aid voluntary compliance if they support belief in the fairness and effectiveness of the tax system."); IRM 20.1.1.1.3(4) (Oct. 19, 2020) ("A wrong [penalty] decision, even though eventually corrected, has a negative impact on voluntary compliance."). Yet, in the FBAR context, the IRS has assessed exorbitant[24] penalties in cases in which it

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[23] U.S. Dep't of State, *Consular Affairs by the Numbers* (Jan. 2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (last visited Mar. 28, 2022). For calendar year 2018, only 1,273,579 FBARs were filed. *Agency Information Collection Activities*, 85 Fed. Reg. 73129, 73130 n.9 (Nov. 16, 2020).

[24] Here, the $2.7 million penalty represents a *54-fold* increase over the $50,000 penalty that would apply under the per form approach. In *United States v. Patel*, No. 19-cv-792 (C.D. Cal. Apr. 30, 2019) (dismissed following *Boyd*), the IRS assessed *non-willful* FBAR penalties on a per account basis, including for

agrees that the conduct at issue was unintentional and non-willful and, in some cases, where there was no monetary loss to the government.

CONCLUSION

The inconsistent guidance issued by the federal agency responsible for enforcement of the non-willful FBAR penalty, exacerbated by the circuit split and resulting inconsistent application of the non-willful FBAR penalty depending on a U.S. person's geography, is indefensible and certain to deter those seeking to come into compliance.[25] The lower courts have thoroughly analyzed this issue; waiting for further decisions will only add to the uncertainty. In light of the diametrically opposed and irreconcilable positions taken, there is a clear need for the Court to step into the fray.

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accounts that held maximum balances of $30, $50, $64, $83, $397, $433, and $816. *See id.,* Defendants' Motion for Summary Judgment, Exhibits F and G, Dkt. 15.

[25] *See* Andrew Velarde, *IRS Following Boyd FBAR Interpretation in Ninth Circuit Only,* Tax Notes Today Federal (Feb. 7, 2022).

The College respectfully requests that the Court grant the Petition.

Respectfully submitted,

CAROLINE D. CIRAOLO
Counsel of Record
MEGAN L. BRACKNEY
GARRETT L. BRODEUR
CAROLINE RULE
KOSTELANETZ & FINK, LLP
601 New Jersey Avenue, N.W.
Suite 260
Washington, DC 20001
(202) 875-8000
cciraolo@kflaw.com

Counsel for Amicus Curiae

April 1, 2022