No. _______

In The

Supreme Court of the United States

♦

ALICE KIMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

♦

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

♦

PETITION FOR WRIT OF CERTIORARI

♦

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QUESTIONS PRESENTED

1. Did the Court err in holding that Alice acted willfully, despite the lack of proof either that she had knowledge of the requirement to file an FBAR or of her intent to evade taxes?

2. Did the Court's finding of willfulness despite lack of proof of intent or knowledge improperly interpret the statute by rendering every failure to file willful, although the statute (31 U.S.C. §§5321) provides differing penalties for willful and non-willful violations?

3. Did the Court err in finding that the Respondent properly assessed the maximum penalty on the Petitioner's foreign bank account, in light of the substantial proof of the fact that the Respondent relied upon erroneous findings of fact, and that the assessment of the penalty was punitive?

4. Did the Court err in holding that Alice did not preserve her argument that the 50% penalty imposed upon her account was an Excessive Fine under the Eighth Amendment to the United States Constitution?

5. Was the penalty imposed upon Alice's account ($697,229) an Excessive Fine under the Eighth Amendment to the United States Constitution?

6. Did the Court err in finding that the amendments to the law [31 U.S.C. §5321(a)(5)(C)(i)] superseded IRS regulation [31 CFR §1010.820] regarding the maximum penalty that can be imposed by the IRS after a finding of a willful failure to file Foreign Bank Account Report ("FBAR")?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Alice Kimble and the United States of America.

STATEMENT OF RELATED CASES

None.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2021

ALICE KIMBLE

Petitioner

-against-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITATION TO DECISION

The decision below was entitled *Kimble v. United States*, 991 F.3d 1238 (Fed. Cir. 2021).

JURISDICTIONAL STATEMENT

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). The decision in the case was rendered on March 22, 2021. (Appendix "1a", *infra*).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES TO BE INCLUDED

31 U.S.C. § 5321 (Appendix 84a, *infra*); 31 C.F.R. § 1010.820 (Appendix 92a, *infra*).

STATEMENT OF THE CASE

This case involves two foreign bank accounts maintained by Alice Kimble ("Alice"), a large account at UBS in Switzerland, and a small account at HSBC in Paris, France. It is undisputed that, for the years 2003-2008, Alice did not disclose the existence of these accounts on her tax returns, nor did she pay taxes on any income derived from the accounts during that period. She did, thereafter, participate in the IRS's Offshore Voluntary Disclosure Program ("OVDP"). Her conduct was deemed to be non-willful with regard to the UBS account and willful regarding the HSBC account, but the IRS ultimately imposed the penalties backward. As a result, she opted out of the OVDP, as will be more fully set forth herein, whereupon her conduct was suddenly deemed willful as to both accounts.

Background

Alice Kimble ("Alice") is a United States citizen, born in New York in 1951. At all pertinent times, she resided in Great Neck, NY. Her parents, Harold ("Harold") and Frances Green, are both deceased. A number of Harold's family members died in the Holocaust. Harold's parents escaped from Poland.

Alice married Michael Kimble ("Michael") in 1983. They divorced in 2000. Michael has been employed in the financial services industry for his entire career. Alice has not been employed outside the home since the birth of her son, more than 20 years prior to the events hereof.

Alice was neither knowledgeable about, nor interested in, finances. During their marriage, Michael Kimble handled all of the couple's finances and prepared their tax returns. After their divorce, Michael continued to advise Alice regarding her finances, including the accounts that are the subject of this action. She followed his advice. In fact, he was given a Power of Attorney to manage the UBS account.

The UBS Account

The deaths of numerous family members in the Holocaust engendered a fear in Harold that the same events might occur in America. In order to prepare for that possibility, he opened a UBS Account in Switzerland, to be used only for the purpose of escape from the United States, should it be needed. That

account, in his and his wife's names, was opened at least 30 years ago. The only funds deposited into the account were derived from Harold's legitimate earnings as an attorney. All taxes were paid on the funds before they were deposited. Harold adamantly insisted upon strict secrecy regarding all aspects of the account. Thus, he opened and maintained it as a numbered account, and directed UBS to retain all documentation in Switzerland and not mail anything to him in the United States.

Sometime after Michael and Alice were married, Harold confided to Michael the existence and nature of the account. He emphasized the need for secrecy, and that the account was to be used only to fund a potential escape. Harold also informed Alice about the account, again strongly emphasizing that it was to be kept secret, and was not available for her use, unless needed to support an escape from the United States.

Harold came to rely upon Michael for advice for the management of the UBS account. Michael noticed that the account was managed very conservatively with the objective of preservation of principal rather than growth, and that there were very few transactions. In fact, the account was managed so conservatively that the high fees charged by UBS often consumed most of the growth.

At some point before he died, Harold added Alice as a nominal owner of the account, along with Alice's mother. Again, Harold emphasized the need for absolute secrecy regarding the existence of the account and forbade Alice to use the account for any

purpose other than as a safeguard against another catastrophe. Adhering to her father's directive, Alice maintained it as a numbered account, and did not deviate from Harold's instructions to UBS to retain the statements. Even after her father died, Alice maintained that the account did not belong to her. Rather, she maintained it as Harold had directed, for the benefit of her mother.

Neither Alice nor her mother had any knowledge of, or interest in, finances. Both were incapable of managing the account. Therefore, even after the divorce, Michael continued to manage the account, with Alice and her mother continuing to follow his advice. Michael and Alice met annually with UBS representatives who visited the United States to meet with numerous depositors. The representatives always made a pitch for Alice to invest in more risky vehicles with the prospect of higher yields (and higher fees for UBS), but she and Michael consistently refused to do so, especially since, like her father, Alice was not concerned about the amount of the returns from the account, as long as the funds were secure. Instead, Michael conservatively managed the account to protect it. The account had few transactions, mostly consisting of rolling over maturing bonds into new bonds, based upon Michael's advice that the funds should not be left in cash. The largest change in the account occurred in 2007, when Michael advised Alice that the overconcentration in Pounds Sterling was not a good strategy. At his urging, she converted the money to Swiss Francs.

During the relevant period, Alice neither made deposits to nor withdrawals from the UBS account,

maintaining the account exactly as her father had repeatedly directed. Although Alice traveled extensively in Europe, where she maintained a residence, she never touched the funds in the UBS Account. Thus, although there were "paper" gains in the account, these were the product of the realization of income when bonds matured, or when one currency was exchanged for another.

In 2005, Alice added her son, David, to the account. When she did so, she told him that the existence of the account was to be kept strictly secret, and was not to be used by him for any purpose other than security to facilitate an escape from the United States, if needed.

When Alice and Michael divorced, the funds in the account were not distributed as part of the marital estate or even mentioned as part of the marital assets in the divorce. Both Michael and Alice continued to maintain secrecy out of respect for Harold's wishes.

The HSBC Account

Unlike the UBS Account, which Alice essentially inherited, the HSBC account was opened by Alice and Michael during their marriage. This small account was used for their convenience to pay bills relating to an apartment purchased by them in Paris, France. All deposits were made from Michael's after-tax earnings. This account was neither numbered nor secret, and was used openly and regularly by the parties. When David was working in England, he also used the account. It was closed

when Alice sold the Paris apartment, as there was no longer any need to maintain it.

Tax Returns

During their marriage, Michael annually prepared the couple's joint tax returns. He elected not to disclose the existence of either account or to report any earnings therefrom, (incorrectly) seeing no obligation to do so. Alice routinely signed the returns without reading them. After the divorce, Alice hired Steven Weinstein, C.P.A., to prepare her tax returns. Mr. Weinstein did not provide her with a tax organizer or any other forms to fill out in connection with the return preparation, and did not ask Alice if she had any foreign accounts. Alice was not aware that she was obligated to pay tax on any gain from foreign accounts. Alice did not read her tax returns; she simply signed them and paid all taxes shown as due.

However, at about the time that UBS entered into a well-publicized plea agreement with the Justice Department, Alice read an article in the New York Times regarding the obligation of United States residents to declare foreign income and to pay taxes on any earnings derived from foreign accounts. This was when she first learned that she was obligated to disclose the existence of the accounts on her tax return, and to pay United States Income Tax on any gains. This information led her to retain an attorney to rectify her omissions. She thereafter, in conjunction with the OVDP, filed amended returns that declared all income from the two foreign

accounts, on which she paid all taxes and interest due[1].

Following this, the remaining question was that of the imposition of penalties. The IRS representative initially informed Alice's counsel that the "passive" UBS account was eligible for a 5% penalty, whereas the "active" HSBC account warranted a 20% penalty. However, she stated IRS policy required that the penalty be uniform, and that the higher penalty must be imposed on all accounts. Later, the examiner conceded that the penalties were divisible, but she mistakenly imposed the higher (20%) penalty on the "innocent" UBS Account. Because of this ruling, and the examiner's steadfast refusal to respond to requests by Alice's attorney to correct the obvious error, Alice opted out of the OVDP, reasonably assuming that the blatant errors by the examiner would be corrected.

The IRS examiner assigned after Alice opted out decided, for the first time, that the failure to declare the accounts was willful because Alice owned the accounts, managed them, did not disclose them, kept the Swiss account secret, and allegedly had no business relationship to either France or Switzerland. The findings of the IRS contained serious factual errors. For example, the examiner incorrectly found that "Mrs. Kimble was always the joint owner of the account with her father and became the sole owner of the account in 1997 after his passing." She further

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[1] Apparently, in some of the returns, the question about whether she had foreign accounts was still answered "no." Nonetheless, these returns included the income from the accounts, and FBARs were filed therewith.

erroneously determined that that Alice had added her mother's and son's names on the account. To the contrary, Mrs. Green had been an owner of the account since its inception and owned the account until her death in 2016. Similarly, the IRS examiner found that the Kimbles had "no business or personal connection to the countries where the accounts were opened." This, too, was incorrect. Alice inherited the UBS account, which was opened and maintained in Switzerland by her father. The reasons for this were previously explained herein. As to the HSBC account, the Kimbles purchased an apartment in France prior to opening the account and used the account to pay local bills. This certainly constitutes connections to both countries.

Regarding mitigation, the only factor that was considered by the IRS was the size of the accounts. Without explanation, they arbitrarily declined to consider any other mitigating factors, despite their acknowledgment that the UBS account qualified for mitigation.

REASONS FOR GRANTING THE WRIT

This case involves issues of first impression in this Court regarding the proper interpretation of the willfulness requirement under 31 U.S.C. § 5321(a)(5). In addition, it involves issues of the requirement for mitigation, whether the 50% penalty is an excessive fine, and whether the IRS is precluded from collecting the 50% penalty by its failure to amend the controlling regulations.

The Court Interpreted the Statute so As to Render a Portion of it Meaningless

The Federal Circuit relied upon only one factor in determining that Alice Kimble's failure to disclose her foreign account was willful: that her tax return did not include a disclosure of her foreign accounts. In doing so, the Court misinterpreted the statute an rendered the non-willfulness penalty meaningless.

The applicable penalty for failure to file and FBAR covering foreign bank accounts is set forth in 31 U.S.C. §§ 5321(a)(5)(B) and (C). The penalty provided in 31 U.S.C. § 5321(a)(5)(B) is an amount to be set by the IRS, up to $10,000. However, for violations that are "willful," the statute provides that the penalty is the greater of $100,000 or 50% of the account. 31 U.S.C. § 5321(a)(5)(C)[2]. Willfulness is a voluntary, intentional violation of a known legal duty. *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1992). Negligence is not synonymous with willfulness. *Verret v. United States*, 542 F. Supp. 2d 526 (E.D. Tx. 2008). In finding Alice's action to be willful, the Court relied upon the following: that the failure to file the FBAR was not accidental; that Alice signed a tax return that did not disclose the account; that she did not disclose the existence of the account to her accountant; that she never asked her accountant how to properly report foreign interest income; that she did not review her returns for accuracy; and that she answered "no" to the question on her tax return regarding whether she had a foreign

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[2] The regulations under which the penalty was imposed do not permit the imposition of a penalty in excess of $100,000, which is another reason this penalty must be reduced. *See infra.*

account. If this fits the definition of willfulness, it is difficult to conceive of a violation that would not be willful. The very essence of the OVDP program was to provide amnesty and reasonable penalty relief to those who met all of these criteria. Those whose conduct was entirely blameless did not need the benefits of the OVDP. The interpretation by the court renders the word "willfully" meaningless. In interpreting a statute, a Court should avoid a construction that renders some of the words meaningless or superfluous. Rather, the Court should give effect to every word that Congress used. *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018); *Clark v. Rameker*, 134 S. Ct. 2242 (2014).

The Federal Circuit found that, by failing to check the box acknowledging that she had a foreign bank account, or by failing to read her tax return and realize that she had to check the box indicating she had a foreign bank account, Alice acted willfully. As argued above, this makes every such violation willful. The only case in which such conduct was found to be sufficient for a finding of willfulness, without any other factors, was this one. Rather, and as the cases cited by DOJ Counsel below show, conduct properly characterized as willful must meet a higher standard than a mere failure to check the box on the tax return showing the existence of a foreign account, pay taxes on the income and file an FBAR.

For example, in *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012), defendant owned a company that had experienced a large increase in revenue that defendant sought to conceal from

taxation. To accomplish this, he set up "shell companies" to disguise the ownership of the assets. He personally understood, and was later advised by his accountant, that the course he was following constituted tax evasion. Nonetheless, he continued to employ this illegal strategy. He also failed to cooperate with the IRS when he was under investigation. His actions allowed him to evade taxes both on the revenue deposited in the offshore accounts, and on the income derived from those accounts. That egregious conduct was clearly and indisputably willful, and rose to a much higher level than that of Alice.

Similarly, in *United States v. Williams*, 489 Fed. Appx 655 (4th Cir. 2012), the defendant filled out a tax organizer for his accountant, in which he affirmatively concealed his ownership of $7,000,000 held in his offshore account, on which he earned $800,000 in income. The finding of willfulness was made in conjunction with defendant's guilty plea to criminal tax evasion, wherein he admitted that he was aware of the obligation to disclose the account and that he failed to do so in order to avoid paying taxes. Again, Alice's non-criminal conduct did not approach that of the defendant in *Williams.*

In each of those cases, the Courts appropriately sustained findings of willfulness for conduct significantly more egregious than that evidenced here. As the Court stated in *DiStasio v. United States*, 22 Cl. Ct., 36, 47 (N.D. Ohio 1990), Congress' inclusion of the "willfulness" standard is strong evidence that it did not intend to impose liability without personal fault. In cases involving "fault"

closer to the actions of Alice Kimble, the Courts have nevertheless refused to find the violations to be willful.

In *Jarnagan v. United States*, 2017 WL 5897808 (Ct. of Federal Claims, November 30, 2017), the plaintiffs were sophisticated business persons who operated a number of businesses that included investments in real estate and oil and gas leases. They maintained several accounts in Canada and the United States, as well as retaining accountants in both countries. They deposited millions of dollars into their Canadian account, concealing that income from their United States accountant. The Court found this to be a non-willful violation.

Moore v. United States, 2015 WL 1510007 (W.D. Wash. April 1, 2015), presents a case in which conduct significantly more serious than Alice's resulted in a declaration that the violation was non-willful as a matter of law. Mr. Moore deposited money into an account in the Bahamas, then transferred it to the Bahamian branch of a Swiss bank, from where he transferred it to Switzerland. He personally managed the account throughout its existence. He filed no FBARS. He informed the IRS that he had consulted an attorney about the tax implications of the account, but later conceded that he had no good faith basis to believe that the gains were not taxable. Mr. Moore personally prepared his own tax returns for some years, not responding to the question about the existence of foreign accounts and certainly not filing an FBAR. For others, he hired a tax preparer who gave him a tax organizer. In response to the question regarding his ownership or interest in a

foreign account, he denied that he had such an account. The IRS assessed the maximum non-willfulness penalty of $10,000 per year for 4 years on an account worth between $300,000 and $500,000 (approximately 8%). In spite of this myriad evidence of intent, both the IRS and the Court held this to be a non-willful violation of the requirements. The contrast between this case and *Moore*, *supra*, could not be more stark. Alice did not establish or open the account, and had no knowledge or notice of the reporting requirements, nor did she lie about the existence of the account. Surely, if Mr. Moore's conduct was not willful, neither was Alice's, and there is no explanation for the disparate treatment by either the IRS or the Court herein.

The Federal Circuit found that any failure to disclose a foreign account, for any reason, is willful because the taxpayer is charged with knowledge of the obligation to respond to a specific question on the Form 1040. As shown above, that argument renders the requirement of willful conduct meaningless, because it applies in every case in which FBARs were not filed. A fair reading of the statute, however, makes it clear that acting "willfully" requires the defendant to prove that the taxpayer had actual knowledge of the obligation to file an FBAR. The uncontroverted evidence here shows that Alice never read her tax returns and did not understand that income earned in the overseas bank accounts must be declared in the United States. In the cases relied upon by the Court each taxpayer had <u>actual</u> knowledge of the legal requirements as well as actual intent to evade taxes on both the underlying pre-tax income deposited into the accounts and the income

earned on the untaxed money. Here, all money emanated from post-tax funds that were deposited by Alice's father, who lacked intent to evade the taxes. Her negligence should not be equated with willfulness. *Verret v. United States*, *supra*.

Additionally, a reading of the IRS manual shows that the IRS also interprets the willfulness requirement as calling for more than simple failure to check the proper box on a tax return and file an FBAR.

For example, IRS Manual § 4.26.16.6.5.1(4) states that willfulness is shown by a person's "knowledge of the reporting requirements and conscious choice not to comply." In IRS Manual § 4.26.16.6.5.1(5), "willful blindness" is defined as knowing that a filed tax return asks a question about foreign bank accounts and failing to answer it. However, the Manual notes that "The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, in itself, to establish that the FBAR violation was attributable to willful blindness." (Emphasis supplied).

IRS Manual § 4.26.16.6.5.1(6) provides examples of conduct that would constitute willfulness. The conduct of a person who omits one of three accounts on a tax return and fails to file an FBAR, where the information does not disclose anything "suspicious" about the accounts, would not constitute willfulness, without additional evidence showing intent. Even a failure to file an FBAR after being warned that one is required by the IRS is not

conclusive evidence of willfulness, although such a finding might be appropriate.

Alice's conduct simply does not meet the standard of willfulness set forth in the Manual. Aside from the fact that she failed to disclose the accounts, a fact that is present in every single case where FBARS are not filed, DOJ counsel point only to the fact that the account was kept secret. This is adequately explained by Alice's adherence to her father's directives, at a time when her mother, the co-owner and co-establisher of the account, was alive. Alice not only observed this stricture, but also declined to use the funds for any purpose whatsoever, just as her father had dictated. She explained that she did not understand that the gains were taxable in the United States, and that she entered the OVDP as soon as she learned that they were. The evidence disclosed that her accountant did not even ask her about overseas accounts, and that she had no idea she needed to disclose them. This falls far short of evidence eliminating any issue of fact regarding whether Alice acted with the intent necessary to warrant an enhanced penalty, and actually demonstrates that her conduct was not willful. Contrast this with the "non-willful" conduct of the taxpayer in *Moore*, *supra*. Mr. Moore kept his Bahamian and Swiss accounts secret, lied about it, and was caught. He never even applied for the OVDP, yet he ended up with an 8% penalty for his egregious conduct.

In addition, the IRS Manual, § 4.26.16.6.5.2(2) lists documents that would be "helpful" in establishing willfulness. These include documents

showing criminal activity related to the account, documents showing that the account holder used the account for day to day expenses in a manner that concealed its source, and copies of warning letters from the IRS. There, documents are sought to prove that the taxpayer had a higher degree of knowledge and intent, which, according to the IRS Manual, is necessary to impose a willfulness penalty. These elements are not present in this case. For example, it is not alleged that the source of the funds was illegal, or that the sources of the income were concealed by Alice; nor is it alleged that she regularly accessed the funds that were in her account. To the contrary, the funds remained untouched until they were used, in part, to pay the penalties imposed.

It should be noted that Alice does not contend that the criteria set forth in the Internal Revenue Manual are binding on the Court, but only that they should be persuasive. At the very least, they provide guidance to a Court regarding the meaning of the statute set forth by the agency charged with enforcing the law. They also indicate that the simple failure to disclose an account and file an FBAR, without more, is an insufficient basis on which to support a determination of willfulness.

Indeed, this case fits squarely within the criticism of the IRS and the OVDP contained in the 2014 Annual Report to Congress by the National Taxpayer Advocate Service. The report states that the 50% penalty for failure to file an FBAR was aimed at "criminals and other bad actors." The harsh penalties were enacted after hearing testimony that foreign accounts were being used by criminals for

illegal purposes such as tax evasion, securities manipulation, insider trading, evasion of Federal Reserve margins, and other financial crimes. The Taxpayer Advocate also criticized the IRS for relying upon failure to acknowledge the existence of a foreign account in the checkbox on Schedule B of a tax return as conclusive evidence of willfulness. This is the very conduct that DOJ Counsel improperly relies on in this case to prove willfulness. The Taxpayer Advocate stated that the IRS should only pursue such penalties against those engaged in tax shelters, tax evasion or criminal conduct, not against "benign" actors such as Alice. There is no allegation herein that Alice's omission of her account on her tax returns was based upon anything other than ignorance of the requirements. Surely, a penalty of $697,229 for her negligence is incredibly excessive and unreasonably punitive.

The Court Below Improperly Failed to Require Mitigation of the Penalty

Even if the Court had correctly found that Alice's failure to file FBARs pertaining to the UBS Account was willful, it should still have reduced the penalty imposed by the IRS. The Trial Court's failure to mitigate the penalty was an abuse of discretion, which should have been reversed by the Federal Circuit.

The standard of review is whether the lower Court's determination constituted an abuse of discretion, which is defined as an action that is arbitrary and capricious and not in accordance with the law. Although the Court should not substitute its

judgment for that of the Agency, it must ensure that the Agency engaged in reasoned decision making. *Altera Corp. and Subsidiaries v. Commissioner of Internal Revenue*, 145 T.C. 91 (2015). The Agency, to be entitled to deference, must consider all of the relevant facts and articulate a rational connection between the facts found and the choices made. *Peck v. Thomas*, 697 F.3d 767 (9th Cir. 2012).

In reviewing the exercise of discretion, the Court must take into account the background of this case. Alice first applied to the OVDP, and supplied all required information to the IRS. However, although conceding that Alice's failure to disclose the UBS account was not willful, the examiner insisted that the penalty imposed had to match that imposed on the HSBC account in Paris, on which a determination of willfulness was made. When the IRS conceded that the penalties could be different, it erroneously imposed the higher penalty on the UBS account. After she tried unsuccessfully to convince the IRS agent of the error, Alice opted out. Then, for the first time, and apparently for punitive reasons, the examiner determined that Alice should be assessed a willfulness penalty, not only for the HSBC account, but also for the UBS account.

After (erroneously) concluding that Alice's actions were willful, the IRS found that the account qualified for mitigation because Alice had no history of past FBAR penalty assessments; none of the funds in the foreign account was derived from illegal sources, and she cooperated. Additionally, no civil penalties were assessed by the IRS for failure to pay taxes. Nevertheless, aside from mitigation related to

the size of the account, the IRS arbitrarily failed to apply any other mitigation, and failed to provide an explanation for the failure to mitigate the penalty. In addition, and of greater concern, the IRS and the Court relied upon erroneous findings and fictions in making its determinations.

First, the IRS incorrectly determined that Alice was the sole beneficiary on the account at her father's death, and that she "added" her mother, as well as her son. In fact, Alice's mother had been an owner of the account since its inception, and was not added by Alice. It appears that the examiner may have been confused about the source of the funds, and the fact that Alice did not make any deposits, or control the account in any way when her father was alive. The Court did not make a finding about whether she was the owner, relying upon her statement that she was the beneficial owner in 2015. Second, the examiner stated that Alice had "no business or personal connection" with the countries in which her two accounts were located. Again, this clearly erroneous determination is contrary to the uncontroverted evidence. The HSBC account (which the Federal Circuit entirely disregarded) was opened at the time of the purchase of an apartment in Paris, thereby establishing a connection with France. The HSBC funds were used to pay bills incurred in connection with that apartment. The UBS account was not opened by Alice. Her connection to Switzerland is established by the fact that she inherited an account domiciled there. Also, the findings that Alice "actively managed" the UBS account, which the Court below adopted, fail to recognize that she was not involved in the management of the account, but that she deferred

to her ex-husband, as had her father. As Michael explained, the UBS representatives annually made unsuccessful efforts to persuade Michael and Alice to more actively manage the account for gain. Michael explained further that the transactions in the account consisted mostly of rolling over matured bonds. The largest change in the account occurred in 2007, when currencies were exchanged, leading to a "paper gain," because Alice used none of the money therein for any purpose. The IRS also failed to take into account the instructions of Alice's father, who had established the account for a specific purpose that is common to many survivors or family members of survivors of the Holocaust. In discussing the application of the mitigation guidelines, the IRS cautioned that the penalty should be "commensurate with the harm caused by the violation." The examiner here, without explanation, failed to consider whether, in this case, a penalty less than the maximum penalty exposed would be proper, and the Court agreed.

Although the Courts generally afford deference to the decision of an agency, they have not abrogated their function in reviewing agency action and have set aside decisions such as this that constitute an abuse of discretion. In *Moore v. United States*, *supra* at *9, the Court described that standard as follows:

> To determine if an agency acted arbitrarily or capriciously or in abuse of its discretion, the court conducts a "thorough, probing, in-depth review." *Volpe*, 401 U.S. at 415. The court presumes that the agency acted correctly, and is not permitted to substitute its judgment for the agency's. *Id.* at 415, 417. The court must

> nonetheless be certain that the agency acted within the scope of its authority, and its must determine whether the "decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Id.* at 415–16; *see also Ocean Advocates v. Army Corps of Engineers*, 361 F.3d 1108, 1118 (9th Cir. 2004) (explaining review under § 706(2)(A) of the APA).

In *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Court set aside new regulations upon the ground that the agency had acted in an arbitrary and capricious manner. Among other things, the Court found that there must be a "rational connection" between the facts found and the choices made, and that the Court should review whether there has been a clear error of judgment. The Court considered, for example, whether the agency's explanation for a decision ran counter to the evidence before the agency. *Id.* at 42-43. For example, in *Angeles v. Johnson*, 121 F. Supp. 3d 997 (S.D. Calif. 2015), the Court set aside, as an abuse of discretion, an agency's refusal to change plaintiff's immigration status, holding that an agency action was arbitrary and capricious when the agency failed to consider important aspects of the problem, offered an explanation that ran counter to the evidence before it, or made a decision that was so implausible that it could not be ascribed to agency expertise. *Id.* at 1001. In *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), the Court similarly found the decision to end DACA to have been arbitrary and capricious. The Court held that it was obligated to

review the agency's own rationale for its decision and could not supply a rationale in support of the decision that the agency did not use, or uphold the decision based upon a *post hoc* rationalization. *Id.* at 407-408. In *Moore*, *supra* the Court ultimately found that the imposition of penalties was not arbitrary and capricious because "the guidelines for determining the amount of FBAR penalties contained in the Internal Revenue Manual are not arbitrary and capricious…." *Moore v. United States*, Case Number C13-2063 (W.D. Wash. July 24, 2015). Those are the very standards that both the IRS and the Court below distained to apply to Alices' case.

Here, the IRS gave no reason for its failure to consider mitigation of the penalty on the UBS account, regardless of the fact that the account qualified for such mitigation. It is clear that Alice is an innocent actor, not one of the criminals to whom the maximum penalties are intended to apply. The Court should have reduced the penalty, even if it sustained the finding of willfulness.

The 50% Penalty was an Excessive Fine

Even if Alice's conduct fit within the definition of willfulness, the penalty is still improper because it constitutes an excessive fine under the Eighth Amendment.

The Court did not reach this issue because it was not specifically pled in Alice's complaint, although it was specifically raised in the Court below. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995), the appellant not only failed to

raise a particular argument in the Court below, but "expressly disavowed" it. Nevertheless, this Court considered it, stating that, once a Federal claim is presented, a party can make any argument in support of it. *See also Baird v. General Services Administration*, 285 Fed. Appx. 746 (Fed. Cir. 2008). Alice clearly raised the excessiveness claim regarding the fine, and is, therefore, free to make this argument.

If the Court reaches this issue, it should find that the 50% forfeiture imposed upon Alice was excessive under the Constitution. DOJ Counsel contended that the penalty cannot be excessive under the Eighth Amendment because of the long-standing precedent that civil tax penalties are remedial, citing *Helvering v. Mitchell*, 303 U.S. 391 (1938). Alice does not contest that proposition; indeed, she paid back taxes, interest and penalties, which she is not here contesting. Rather, she contests the 50% penalty imposed upon her over and above the taxes and penalties, after she opted out of the OVDP. Moreover, Alice is not contesting the constitutionality of the statute that allows a 50% penalty to be imposed upon those with undisclosed foreign accounts. Rather, it is her contention that, in her particular case, that penalty is unconstitutionally excessive.

It appears that the 50% penalty is now imposed indiscriminately by the IRS in every situation, regardless of whether the account contained money that was legally earned, gifted or inherited, no matter whether the taxes had been paid on the money before it was deposited, which is the case here. Alice paid the same percentage of penalty as an individual who hid $1,000,000 of drug money in a Swiss account.

This is at the heart of the proportionality issue. As is set forth *supra*, Alice's conduct cannot fairly be characterized as among the most serious possible violations under the law. Thus, her penalty should also not be the most severe possible.

Another rationale advanced by DOJ Counsel is that the forfeiture is not excessive because it compensates the IRS for the trouble and expense of investigations. In this case, there was no necessary investigation; Alice voluntarily came forward, revealed the existence of her accounts, and undertook the required steps to bring herself in compliance with the law. In any event, this Court found this rationale to be inadequate to render a forfeiture remedial rather than punitive. *Austin v. United States*, 509 U.S. 602, 620-622 (1993).

The Willfulness Penalty Must be Limited to $100,000 Under IRS Regulations

Even if Alice's actions were willful, the penalty should have been reduced to $100,000, the maximum allowed by IRS regulation.

In *United States v. Colliot*, 2018 WL 2271381 (W.D. Texas May 16, 2018), the Court reasoned that the failure of the IRS to draft regulations increasing the penalty from a maximum of $100,000 to the greater of $100,000 or 50% of the account value, following the amendment of the statute, limited the IRS's ability to impose such penalties to the $100,000 set forth in the regulation. That case was followed by *United States v. Wahdan*, 2018 WL 3454973 (D. Colorado July 18, 2018) but rejected by the Federal

Court below, both in this case and in *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 2020). In fact, in apparent reliance on *Norman*, the Federal Circuit did not reach the issue, although it was before them. We submit that the *Colliot*, *supra* and *Wahdan*, *supra* analyses were correct.

The Courts have held that the IRS regulation under which fines were assessed, 31 C.F.R., § 1010.820, which limited willfulness penalties to $100,000, conflicted with 31 U.S.C. § 5321(a)(5)(C)(i) as amended, and was, therefore, no longer valid. Alice submits that this was based upon a misreading of both the statute and the applicable law. The relevant portion of 31 U.S.C. § 5321(a)(5) provides:

> (5) Foreign financial agency transaction violation.—
>
> (A) Penalty authorized**.**--The Secretary of the Treasury <u>may</u> impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.
>
> (B) Amount of penalty**.**--
> (i) In general**.**--Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.
>
> (ii) Reasonable cause exception**.**--No penalty shall be imposed under subparagraph (A) with respect to any violation if—

> (I) such violation was due to reasonable cause, and
> (II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.
>
> (C) Willful violations.--In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314--
> (i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—
>
> (I) $100,000, or
>
> (II) 50 percent of the amount determined under subparagraph (D), and
>
> (ii) subparagraph (B)(ii) shall not apply.

(Emphasis supplied).

Thus, the statute authorizes the Secretary to determine the amount of the penalty, within the strictures set forth by Congress. For a non-willful violation, the penalty shall not exceed $10,000. For a willful violation, the authorized maximum penalty shall be increased to the greater of $100,000 or 50% of the account value. However, the statute should not be seen, as the Court below did, as mandating the minimum penalty that the Secretary can impose; rather, it limits only the maximum possible penalty. The amount of the penalty is left to the discretion of the Secretary.

In making its determination that the regulation was invalid, the trial Court relied upon the Federal Court's decision in *Barseback Kraft AB v. Nuclear Reg. Rep. P.*, 121 F.3d 1475 (Fed. Cir. 1997). That case is inapposite. In *Barseback*, this Court dealt with the meaning of a contract between the Department of Energy and a purchaser regarding pricing for nuclear fuel. The contract contained a specific pricing term, based upon Department of Energy rules. At some later point, Congress stripped the Department of Energy of its jurisdiction over the sale of nuclear fuel, transferring it to a new agency. The Court held that the Department of Energy pricing was no longer in effect because its right to sell the material had been abrogated, and that the contract therefore had to be interpreted in accordance with the existing law. Here, Congress did not strip the IRS of its authority, but simply gave it authority to increase penalties, which it did not choose to do. The regulations still exist and should be enforced as written.

There are additional reasons supporting the thesis that the regulation, and not the statute, controls. In *United States v. Wahdan*, *supra*, the Court noted that the regulation in question had been modified regularly over the course of the 14 years since the amendment of the statute, without a modification to the maximum available penalty. This constitutes a strong indication that the retention of the limit of $100,000 was intentional.

In fact, the IRS recently revisited the provisions governing penalties for both willful and non-willful violations. In 31 C.F.R. § 1010.821, the

IRS adjusted for inflation the penalties under 31 U.S.C. § 5321(a)(5), increasing the maximum penalty for a non-willful violation to $12,459 if assessed after August 1, 2016 but prior to January 16, 2017, and $12,663 if assessed after January 16, 2017. Similarly, the maximum penalty for a willful violation incurred between August 1, 2016 and January 16, 2017 was increased to $124,588, and $126,626 thereafter. DOJ Counsel failed to call the Court's attention to this important indication that the failure to amend the regulation was not accidental, but intentional.

Additionally, in *United States v. Colliot*, *supra*, the Court stated that 31 C.F.R. § 1010.820 was a legislative regulation, issued after notice and comment, and can, therefore, be modified only after notice and comment. *See also Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1203-1204 (2015). These regulations have the status of law, as opposed to interpretative rules, which advise the public of the agency's construction of a statute and are entitled to less deference. *Id.* In this case, the Court should not invalidate this regulation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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