No. 21-1195

# In The Supreme Court of the United States

ALEXANDRU BITTNER,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

**BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER SUPPORTING RESPONDENT**

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

National Whistleblower Center ("NWC") respectfully submits this brief as *amicus curiae*. *Amicus* asks the Court to accept this brief and urges the Supreme Court of the United States to rule in favor of the Respondent, United States of America, by upholding the U.S. Court of Appeals for the Fifth Circuit ruling finding that there is a separate violation for each individual account that was not properly reported, or the "per-account" approach. The case before the Court addresses a circuit split between the Fifth and Ninth Circuits and this *amicus* brief seeks to provide new and relevant arguments describing how this decision will impact whistleblowers.

NWC was founded in 1988 and has long been recognized as a leading voice for whistleblowers by policymakers in Washington, D.C. NWC and attorneys associated with NWC have supported whistleblowers in the courts and before Congress and achieved victories for environmental protection, government contract fraud, nuclear safety, and government and corporate accountability. NWC and associated attorneys regularly work with tax whistleblowers who have submitted information to the Internal Revenue Service (the "IRS") Whistleblower Program. As part of its core

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[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

mission, NWC files *amici* to help courts understand complex issues raised in whistleblower cases.[2]

## SUMMARY OF ARGUMENT

This *amicus* encourages the Court to view 31 U.S.C. §§ 5314, 5321 ("Section 5314" or "Section 5321") in light of the impact on whistleblower awards, practicalities, and incentives. Specifically, this brief will discuss the Congressional intent behind the tax laws in question and illustrate the negative ramifications of a ruling in favor of a "per-form" enforcement approach. By ruling in favor of a "per-account" enforcement regime, the Court will align the law with the Congressional intent to effectively track illegal tax activities with the support of whistleblower tips. Whistleblowers have proven to be a boon for tax enforcement efforts and a "per-account" approach will continue the success of the IRS Whistleblower Program, safeguarding billions of tax-dollars and deterring criminal activity.

[2] *E.g.*, briefs in *Doe v. Chao*, 540 U.S. 614 (2004), *EEOC v. Waffle House*, 534 U.S. 279 (2002), *Beck v. Prupis*, 529 U.S. 494 (2000), *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), *Haddle v. Garrison*, 525 U.S. 121 (1998), *English v. Gen. Elec.*, 496 U.S. 72 (1990), *Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *Mann v. Heckler & Koch Defense*, 630 F.3d 338 (4th Cir. 2010), *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009).

## ARGUMENT

### I. Whistleblowers are Critical to the Effective Enforcement of the Bank Secrecy Act

The Bank Secrecy Act ("BSA") is a crucial tool available to the U.S. government in its effort to combat and prosecute tax and regulatory fraud. The record-keeping and filing requirements of the BSA are "heavily used by law enforcement agencies . . . to identify, detect and deter money laundering whether it is in furtherance of a criminal enterprise, terrorism, tax evasion or other unlawful activity."[3]

The BSA, among other things, mandates the filing of a Report of Foreign Bank and Financial Accounts ("FBAR") by certain U.S. persons. The FBAR is intended to provide the U.S. government with a readily available and transparent snapshot of a U.S. taxpayer's foreign bank accounts on an annual basis. This information can be used to assist the U.S. government in identifying or tracing funds that are used for illicit purposes or in identifying unreported income held abroad.

Whistleblowers provide valuable information to the IRS, including reports of FBAR violations. Whistleblowers are individuals with important information about violations of law, rule, or regulation who voluntarily disclose this information to the government.

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[3] *See* Internal Revenue Serv., *Bank Secrecy Act*, IRS.GOV, https://www.irs.gov/businesses/small-businesses-self-employed/bank-secrecy-act (Apr. 05, 2022).

The IRS Whistleblower Office pays awards to whistleblowers in cases where original information leads to "detecting underpayments of tax or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving the same." 26 U.S.C. § 7623(a). The IRS whistleblower program has proved successful for both the IRS and whistleblowers: "From 2007 to 2020, the IRS Whistleblower Office collected more than $5.9 billion in sanctions and made awards in the amount of more than $1 billion."[4]

Reforms to the IRS whistleblower program requiring mandatory awards for claims meeting certain monetary thresholds "almost immediately" increased the number of whistleblower submissions.[5] In 2018, the U.S. Government Accountability Office reported the "former exclusion for FBAR . . . from whistleblower awards as a significant concern" for whistleblowers and their attorneys.[6] The report also cited whistleblowers as responsible for helping the U.S. government collect billions of dollars.

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[4] *See* Siri Nelson & Ben Falstein, *D.C. Circuit Could Finally Fix IRS Whistleblower Program*, BLOOMBERG TAX, May 25, 2022, https://news.bloombergtax.com/tax-insights-and-commentary/d-c-circuit-could-finally-fix-irs-whistleblower-program.

[5] *See* INTERNAL REVENUE SERV., IRS WHISTLEBLOWER PROGRAM: ANNUAL REPORT TO THE CONGRESS, PUB. 5241 (REV. 6-2012), § III(B) (June 24, 2008).

[6] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO 18-698, WHISTLEBLOWER PROGRAM: IRS NEEDS TO IMPROVE DATA CONTROLS FOR SOME AWARD DETERMINATIONS, 28 (2018).

Whistleblowers have proven to be a crucial and efficient piece of the enforcement framework at the IRS. John Hunman, Director of the IRS Whistleblower Office, explained in 2022 that: "Since the establishment of the Whistleblower Office, information from whistleblowers has resulted in over 900 criminal tax cases ranging from a licensed medical physician who underreported income to a large multi-national financial institution and its U.S. taxpayer clients who hid assets overseas."[7]

Several tax and whistleblower reforms, starting in 2003, have rendered the FBAR a more useful tool for the U.S. government and provided for a meaningful violation of U.S. laws. Reforms to the IRS whistleblower program requiring mandatory awards for claims meeting certain monetary thresholds "almost immediately" increased the number of whistleblower submissions.[8] In 2018, the U.S. Government Accountability Office reported the "former exclusion for FBAR . . . from whistleblower awards as a significant concern" for whistleblowers and their attorneys.[9] This same report

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[7] *See* John Hinman, *John Hinman, Director of the IRS Whistleblower Office, discusses how whistleblower information contributes to identifying noncompliance and reducing the tax gap*, IRS.GOV, July 21, 2022, https://www.irs.gov/about-irs/the-irs-whistleblower-office.

[8] *See* INTERNAL REVENUE SERV., *supra* note 5.

[9] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO 18-698, WHISTLEBLOWER PROGRAM: IRS NEEDS TO IMPROVE DATA CONTROLS FOR SOME AWARD DETERMINATIONS, 28 (2018). *See Whistleblower 21276-13W v. Comm'r*, *infra* note 20 and accompanying text.

cited whistleblowers as responsible for helping the U.S. government collect billions of dollars.

Fundamentally, for whistleblower award programs to be successful, the awards benefit *must* balance with or even outweigh the financial, social, and personal risks that whistleblowers face when reporting unlawful conduct to the U.S. government. Additionally, the penalty structures written by Congress give the Secretary of the Treasury authority and discretion to penalize violators in a manner that appropriately discourages absorbing penalties, which encourage compliance by U.S. persons. Together, these principles make for a robust compliance and enforcement framework that embraces the intent of the BSA. The IRS Whistleblower Program and the FBAR "per-account" regime are essential to these principles and efforts to identify, detect and deter money laundering.

## II. FBAR Rules Safeguard Tax Dollars

To allow law enforcement to achieve the fundamental goals of properly tracing funds that are used for illicit purposes, it is essential that FBAR submission non-compliance be reported, investigated, and penalized. Congress amended the FBAR statutes in late 2004 to include non-willful violations, 31 U.S.C. § 5321(a)(5)(B)(i), and change the penalties for willful violations, 31 U.S.C. §§ 5321(a)(5)(C)(i), (D)(ii), at that time Congress was fully aware of the concerns and

growing trends of U.S. persons hiding money in offshore accounts.[10]

As an example, "[i]n 2002, the IRS estimated that there might be as many as 1 million U.S. taxpayers who have signature authority or control a foreign bank account, [and] [i]n 2003, the IRS estimated that 500,000 U.S. taxpayers had offshore bank accounts and were accessing the funds with offshore credit cards."[11] Around the same time, former IRS Commissioner Charles O. Rossotti said in a Congressional hearing that he believed there were "several tens of billions of dollars of loss per year" to offshore tax schemes.[12]

Global tax enforcement efforts have been leveraged to address the establishment of sophisticated offshore structures (i.e., shell, shelf, and trust companies) a pivotal component of which are the establishment of offshore or foreign bank accounts. International bodies such as the Financial Action Task Force and the Organization of Economic Development have published

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[10] Jobs Creation Act of 2004 Provisions Related to Tax Shelters, Pub. L. No. 108-357, § 821, 118 Stat. 1575, 1586.

[11] INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP'T OF THE TREASURY, 2009-IE-R001, A COMBINATION OF LEGISLATIVE ACTIONS AND INCREASED IRS CAPABILITY AND CAPACITY ARE REQUIRED TO REDUCE THE MULTI-BILLION DOLLAR U.S. INTERNATIONAL TAX GAP, 8 (2009) (hereinafter "A COMBINATION OF LEGISLATIVE ACTIONS. . . .") .

[12] *See Schemes, Scams and Cons: The IRS Strikes Back*, 107th Cong. 2nd Sess. (2002); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO 13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION (2013).

numerous typologies and methodologies for countries to combat illicit financial flows as well as combat tax evasion. Now more than ever, the need for the increased transparency, interagency cooperation, and international collaboration is undeniable and duly recognized.[13]

Congress clearly recognized the prompt need for transparency to tackle the use of these opaque structures and accounts in 1970 with the passage of the BSA.[14] This ground breaking legislation was a major weapon to identify, disrupt, and combat "a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments."[15]

In tax years 2018, 2019, and 2020, between 1.2 and 1.4 million FBARs were filed each year.[16] However, there are approximately 8.7 million U.S. citizens living abroad.[17] Obviously, there is a significant delta of

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[13] *See generally* OECD, FIGHTING TAX CRIME – THE TEN GLOBAL PRINCIPLES (2nd ed. 2021), https://doi.org/10.1787/006a6512-en.

[14] Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970). In 1982, these sections were re-enacted without substantive change as 31 U.S.C. §§ 5311 to 5322, with applicable regulations at 31 C.F.R. § 103.11 *et seq*.

[15] *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 27 (1974).

[16] *FBAR Filing Data by Year*, AARO, Mar. 1, 2022, https://www.aaro.org/fbar-filing-data-by-year.

[17] *See 8.7 million Americans (excluding military) live in 160-plus countries*, AARO, https://www.aaro.org/about-aaro/8m-americans-abroad (last visited Oct. 3, 2022).

unreported foreign bank accounts, creating a serious area of non-compliance for the IRS. From a tax perspective, this missing piece is another slice of the overall burgeoning tax gap. Even a decade ago, "[t]he average gross tax gap was estimated at $441 billion per year." [18] In May 2021 Congressional testimony, Barry Johnson, Acting Chief of the IRS Office of Research in Applied Analytics, and Statistics, stated that "$3.7 trillion in reportable assets are held abroad, $2 trillion of which are located in countries known to be used by taxpayers for tax evasion."[19]

## III. FBAR Non-Compliance is a Matter of National Security

With the passage of the PATRIOT Act, Congress commissioned several studies on the filing of FBARs by U.S. taxpayers. USA PATRIOT Act, Pub. L. No. 107-56, § 361, 115 Stat. 272, 329–331 (2001). After extensive analysis, it was determined that there was a significantly low rate of compliance, which led to a legislative overhaul of Section 5321 and the enactment of the American Jobs Creation Act 2004. The most

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[18] *See* Internal Revenue Serv., *The Tax Gap: Tax Gap Estimates for Tax Years 2011-2013*, IRS.GOV (Sept. 29, 2022), https://www.irs.gov/newsroom/the-tax-gap.

[19] *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP'T OF THE TREASURY, 2022-30-019 ADDITIONAL ACTIONS ARE NEEDED TO ADDRESS NON-FILING AND NON-REPORTING COMPLIANCE UNDER THE FOREIGN ACCOUNT TAX COMPLIANCE ACT at 5 (Apr. 7, 2022) (hereinafter, "ADDITIONAL ACTIONS ARE NEEDED . . . ").

important change was the inclusion of a non-willful penalty provision, which dramatically increased the pool of non-compliant taxpayers that could be assessed a FBAR penalty.

The reports required by the PATRIOT Act discovered considerable non-compliance for FBAR filings and recognized that a significant number of taxpayers were intentionally failing to file FBARs in order to conceal income.[20] The PATRIOT Act indicated that FBARs could be an additional "national security arsenal" and useful in conducting activities to protect against international terrorism.[21]

Whistleblowers are essential to uncovering non-compliance. The IRS Whistleblower Program has assisted the IRS in collecting over $6 billion from non-compliant taxpayers. In 2018, Congress acted to clarify the inclusion of FBAR related penalties as part of potential IRS whistleblower payouts. This amendment has without question significantly increased the number of FBAR related whistleblower complaints and further assisted the IRS, resulting in millions of dollars returned to taxpayers.[22] The significance of effective

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[20] *See*, *e.g.*, SEC'Y OF THE TREASURY, A REPORT TO CONGRESS IN ACCORDANCE WITH § 361(B) OF THE USA PATRIOT ACT (2002), *available at* https://www.fincen.gov/sites/default/files/shared/ReportToCongress361.PDF.

[21] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[22] *See* Dean Zerbe, *IRS Reports Ten-Fold Increase in Tax Whistleblower Awards: $312 Million*, FORBES, Feb. 6, 2019,

FBAR enforcement is undeniable in terms of economic and national security issues in the United States.

## IV. Whistleblower Incentives Work

Within the past fifteen years, the IRS and U.S. Department of Justice have established several robust enforcement strategies to combat offshore tax evasion. Bradley Birkenfeld, a former banker, and wealth manager at UBS Group AG ("UBS"), was the first international banker to blow the whistle on illegal offshore accounts held in Switzerland by U.S. citizens in 2007. For his disclosures of IRS tax fraud by UBS, Birkenfeld was awarded $100 million, the largest award ever given to an individual in the twenty-five-year history of federal whistleblower award laws.[23] Birkenfeld's actions not only resulted in awards to him but also prompted a massive change in how Swiss bankers treat accounts that could be connected to U.S. persons. Birkenfeld's large award sent a signal to bankers throughout the world that the award for revealing illicit accounts far outweighs the benefits of creating them.

Birkenfeld's disclosures of foreign bank accounts have resulted in unprecedented recoveries for the U.S.

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https://www.forbes.com/sites/deanzerbe/2019/02/06/irs-reports-ten-fold-increase-in-tax-whistleblower-awards-312-million/?sh=7dc5be8637b8.

[23] *See Bradley Birkenfeld: Tax Fraud Whistleblower*, NATIONAL WHISTLEBLOWER CENTER, https://www.whistleblowers.org/whistleblowers/bradley-birkenfeld/ (last visited Oct. 3, 2022).

taxpayers. The recoveries include $780 million dollars in civil fines and penalties paid by UBS bank, and billons in collections from U.S. taxpayers who had illegally held "undeclared" offshore accounts in Switzerland and other countries.[24] The veil of Swiss bank secrecy was broken by a whistleblower and dramatically changed the global tax enforcement landscape. Since 2007, the IRS Whistleblower Program has paid out more than 2,500 awards to whistleblowers.[25]

Whistleblower insights save government resources and improve the detection of violations. Extensive research has concluded that random audits fall short of detecting the most sophisticated evasion and underestimate top tax evasion.[26] According to world-renowned tax economist, Gabriel Zucman and several other researchers:

> two key limitations of random audits which can account for . . . : tax evasion through foreign intermediaries (e.g., undeclared foreign bank accounts) and tax evasion via pass-through businesses (e.g., partnerships). First, we find that offshore tax evasion goes almost entirely undetected in random audits. To establish this result, we analyze the sample of U.S. taxpayers who disclosed hidden offshore assets in the context of specific enforcement

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[24] *Id.*

[25] *See* U.S. IRS, PUB. 5241, FISCAL YEAR 2021 ANNUAL REPORT: IRS WHISTLEBLOWER OFFICE.

[26] *See*, *e.g.*, John Guton et al., *Tax Evasion at the Top of the Income Distribution: Theory and Evidence* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28542, 2021).

> initiatives conducted in 2009–2012. A number of these taxpayers had been randomly audited just before this crackdown on offshore evasion. In over 90% of these audits, the audit had not uncovered any foreign asset reporting requirement, despite the fact that these taxpayers did own foreign assets. Second, we find that tax evasion occurring in pass-through businesses (whose ownership is often highly concentrated) is substantially under-detected in individual random audits. Examiners usually do not verify the degree to which pass-through businesses have duly reported their income, especially for the most complex businesses.[27]

The research team further espouses:

> Based on what we know about the information available to auditors and the audit process, there are at least two reasons to believe that the ratio of undetected to detected evasion may rise with income. First, interest, dividends, and capital gains accruing to offshore accounts were subject to limited information reporting during our sample period. Second, if a wealthy taxpayer owns a network of private business interests, the auditor faces a considerable challenge in trying to assess the compliance of every single entity in the network. Upon initial review, the auditor checks whether the income allocated to the individual taxpayer by these businesses is accurately reported on the individual tax return,

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[27] *Id.* at 2–3.

> and whether the taxpayer has an active or passive role in the businesses. Internal procedures, the materiality of risk, and the available tools and resources guide the extent to which the broader network is examined.[28]

These limitations coupled with a significantly underfunded IRS put the U.S. tax enforcement in an untenable position to continue robust enforcement strategy without the use of strong non-willful and willful penalties. Whistleblower incentives bolster the likelihood that whistleblowers will come forward with information and deter wrongdoing by increasing fear of detection.

Holding for the petitioner's "per-form" approach would take the teeth out of the concept of the FBAR and run counter to the statute's original intent. Not only are there practical problems with a "per-form" approach, but whistleblowers would also lose nearly all incentives to come forward with FBAR related claims because per-form sanctions do not rise to the required penalty thresholds to qualify a whistleblower for an award.

Whistleblower activity, especially a robust program like the IRS Whistleblower Program, helps deter illegal activities and encourages legal compliance.[29] The IRS risks losing opportunities to identify fraud

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[28] *Id.* at 12.

[29] *Accord* Note, Sharon Kaur, *Tax Tattletales Hit the Jackpot: Now What?*, 32 HASTINGS WOMEN'S L.J. 89, 93 (2020).

and abuse of U.S. tax laws if whistleblowers are discouraged or disincentivized from coming forward.

## V. The Ninth Circuit's Decision in *Boyd* is Not Practical, and, if Accepted, Will Deter Whistleblowers

The Fifth Circuit's ruling in *U.S. v. Bittner* makes more practical sense in application than does the Ninth Circuit's decision in *U.S. v. Boyd*, and the Fifth Circuit's ruling will continue to encourage whistleblowers to come forward to assist law enforcement. The Fifth Circuit's "per-account" approach is vital to the success and efficacy of the IRS Whistleblower Program.

The Fifth Circuit's ruling in *U.S. v. Bittner* maximizes the practical fundamentals of safeguarding against the threat of financial crimes, tax evasion, and other violations of U.S. law and maximizes opportunities to discover such unlawful conduct. The Fifth Circuit's ruling encourages whistleblowers to file tips on FBAR-related violations. Whistleblower tips help the U.S. government identify unlawful conduct and collect billions of dollars tied to such unlawful conduct. A whistleblower (or more accurately, the potential of being reported by whistleblowers) also motivates U.S. persons to comply with U.S. laws, including the FBAR filing obligations.

In contrast, the Ninth Circuit's decision in *U.S. v. Boyd* significantly decreases the ability of the Secretary of the Treasury to punish violators, thereby

disincentivizing whistleblowers to report violators and incentivizing U.S. taxpayers to skirt the rules. The Ninth Circuit decision lacks the practicality of an efficient and effective tool for law enforcement and would fall short of the intent of the BSA. Whistleblowers would be unwilling to assume the risks of coming forward given the low probability of receiving a whistleblower award. U.S. persons would be less likely to ensure compliance or otherwise alter behavior given insignificant fines and disenfranchised whistleblowers.

By better understanding the effectiveness of whistleblowers, one comes to better appreciate and understand that the practicality of the "per-form" approach falls short of the principle intention of deterring financial crimes, tax evasion, and other violations of U.S. law.

The reduced fines that would result from the "per-form" approach would make it difficult for whistleblowers to qualify for a mandatory award based on FBAR violations, as qualification is based in part on the amount of dollars in dispute.[30] The maximum penalty

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[30] To qualify under the mandatory award program, IRC Section 7623(b), the information must "relate to a tax noncompliance matter in which the tax, penalties, interest, additions to tax, and additional proceeds in dispute exceed $2,000,000." Under a "per-form" regime, wherein the penalty for a non-compliance is a maximum of $10,000 per year, no whistleblower could ever meet the threshold if they had information only on a taxpayer's FBAR non-compliance. *Whistleblower Office*, *What are the rules for getting an award?*, IRS.GOV, Sept. 30, 2022, https://www.irs.gov/compliance/whistleblower-office#rules.

for failing to disclose one account would be the same penalty for failing to disclose multiple accounts. As whistleblowers are deterred, the number of whistleblower submissions would in turn be reduced, and the flow of information from whistleblowers to law enforcement would be limited. This chilling effect would have significant impacts not only on whistleblowers, but also on investigations and the ability of law enforcement to detect, prevent, and punish financial crimes, tax evasion, and other violations.

A reversal in this case would take a meaningful tool away from the Secretary in the enforcement of full disclosure of U.S. persons' foreign bank accounts. The penalty for noncompliance would be set incredibly low and would no longer be a meaningful deterrent. This would upset the balance between risk and rewards generally available to whistleblowers who identify FBAR violations. Only with a "per-account" approach can the efforts of the U.S. government, together with the support of whistleblowers, have the impact intended under the BSA.

## VI. A "Per-Account" Regime is Not Harsh and would Encourage Whistleblowers

The Ninth Circuit "per-form" approach puts forth a civil penalty that is absurdly low. Civil penalties for FBAR violations are narrowly constructed to only apply to U.S. persons with foreign bank accounts that, in the aggregate and over a certain period of time, hold over $10,000. An additional and important feature of

this framework is that the Secretary has the *discretion* to fine non-willful violators as it sees fit. If a taxpayer's accounts meet the $10,000 minimum threshold and thus must be disclosed on the FBAR, the penalty does not suddenly become "harsh" simply because it is multiplied by each account. Congress clearly contemplated proportionality in its non-willful versus willful penalties.

Any time Congress enacts penalties wherein the government can fine up to a particular capped amount rather than a percentage of an asset, Congress allows for the potential that the agency *could* fine a taxpayer for all of what the asset is worth (in this case, the full amount in the account(s)). If Congress thought it necessary to avoid that reality, it could have capped the penalties at a percentage of asset. Congress also pointed to the significance of whistleblowers and FBAR penalties when it provided for the reporting of such penalties to both the IRS and the Financial Crimes Enforcement Network (FinCEN). Both agencies have statutes that authorize awards for recovery of FBAR penalties.

## CONCLUSION

Per-account evaluations are consistent with Congressional intent and advance U.S. interests by incentivizing whistleblowers. Congress intended to increase reporting of taxable accounts worldwide to safeguard U.S. economic and national security interests. Effective

FBAR enforcement is significantly improved by whistleblower participation in the IRS Whistleblower Program. Whistleblower awards have shown to correlate with an increase in whistleblower tips. The IRS program has been recognized by staff for bringing value to IRS enforcement efforts. Whistleblower awards are dependent on dollar amount thresholds to qualify for award eligibility. The "per-account" approach taken by the Fifth Circuit is the only way to ensure whistleblowers will be properly rewarded.

A ruling in favor of a "per-form" enforcement system would negate not just the intent of the relevant statute but would also hinder and disrupt the U.S. BSA enforcement regime as a whole. Reversing in favor of the Ninth Circuit "per-form" approach will discourage whistleblowers from coming forward with relevant information – a result that runs counter to the intent of the BSA.

As such, this *amicus* brief urges the Supreme Court to rule in favor of the Respondent, United States of America, by upholding the U.S. Court of Appeals for the Fifth Circuit finding that there is a separate

violation for each individual account that was not properly reported, or the "per-account" approach.

Respectfully submitted,

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