No. 21-490

In the Supreme Court of the United States

JUDITH S. COFFEY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The limitations period for assessment of a taxpayer's federal tax liability does not begin to run until the taxpayer has filed the required tax return. See 26 U.S.C. 6501(a) and (c)(3). Section 932 of the Internal Revenue Code sets out the filing requirements for taxpayers who receive income from the U.S. Virgin Islands: taxpayers who are not bona fide residents of the U.S. Virgin Islands must file an income tax return with both the Internal Revenue Service and the U.S. Virgin Islands taxing authority, 26 U.S.C. 932(a)(2); and taxpayers who are bona fide residents of the U.S. Virgin Islands need file a return with only the U.S. Virgin Islands taxing authority, 26 U.S.C. 932(c)(2). The individual petitioners failed to file federal income-tax returns with the Internal Revenue Service during the tax years at issue, and, for purposes of their appeal, are assumed to be nonresidents of the U.S. Virgin Islands. The question presented is as follows:

Whether the limitations period on federal tax assessment began to run when the individual petitioners filed returns with the U.S. Virgin Islands taxing authority.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (8th Cir.):

Coffey v. *Commissioner of Internal Revenue*, No. 11-1362 (Dec. 2, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 987 F.3d 808. Prior opinions of the court of appeals are reported at 663 F.3d 947 and 982 F.3d 1127. The opinion of the Tax Court (Pet. App. 47a-115a) is reported at 150 T.C. 60. Subsequent orders and decisions of the Tax Court (Pet. App. 13a-26a, 27a-29a, 30a-43a, 44a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2021. Petitions for rehearing were denied on May 3, 2021 (Pet. App. 116a-117a). The petition for a writ of certiorari was filed on September 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In general, all U.S. citizens who meet a certain minimum income threshold must file federal income-tax returns with the Internal Revenue Service (IRS). 26 U.S.C. 6011 (2018 & Supp. I 2019); 26 U.S.C. 6012. "[T]he place for the filing of any return" is prescribed by statute or, "[w]hen not otherwise provided for by" statute, in regulations adopted by the Secretary of the Treasury that "prescribe the place for the filing of any return." 26 U.S.C. 6091(a); see 26 C.F.R. 1.6091-2. The IRS has three years from the filing of that return to assess a tax (subject to certain exceptions). 26 U.S.C. 6501(a). The limitations period on tax assessment does not begin to run until the taxpayer has complied with all statutory and regulatory filing requirements. See *Badaracco* v. *Commissioner*, 464 U.S. 386, 391-392 (1984); *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930). For taxpayers who fail to meet those filing requirements, Congress has expressly abrogated the limitations period, such that "the tax may be assessed * * * at any time." 26 U.S.C. 6501(c)(3).

b. This case involves a U.S. citizen who claimed to be a resident of the U.S. Virgin Islands (USVI) during tax years 2003 and 2004. "[T]he United States and the [USVI] are distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each." *Dudley* v. *Commissioner*, 258 F.2d 182, 185 (3d Cir. 1958); see generally Staff of the Joint Comm. on Taxation, 112th Cong., *Federal Tax Law and Issues Related to the United States Territories*, JCX-41-12 (Comm. Print 2012). That arrangement originated in 1922 when, shortly after the United States acquired the Territory, Congress created an income tax system for the USVI that was designed to make it self-

supporting by providing that the federal income-tax laws applied in the USVI, except that "Virgin Islands" would be substituted for "United States," thus allowing the USVI to collect the income tax that would otherwise be due the United States. See 48 U.S.C. 1397. Pursuant to that "mirror code," the USVI taxing authority (the Virgin Islands Bureau of Internal Revenue (VIBIR)) administers and collects the mirror code income taxes, but the IRS "retains audit and assessment powers." 663 F.3d 947, 949.

As a general rule, U.S. citizens are subject to federal reporting requirements and taxation on their worldwide income, regardless of residence. See *Cook* v. *Tait*, 265 U.S. 47, 54-55 (1924). An exception exists, however, for bona fide USVI residents who satisfy certain requirements. See 26 U.S.C. 932(c)(4). Section 932 coordinates U.S. and USVI mirror-code income taxes, and sets up two different reporting and taxing regimes for individuals who receive income related to the USVI—one for bona fide USVI residents (26 U.S.C. 932(c)) and one for those who are not bona fide USVI residents (26 U.S.C. 932(a)).

Under Section 932(c), bona fide USVI residents may be exempt from federal income-tax reporting requirements. That provision states:

> (c) Treatment of Virgin Islands residents
>
> (1) Application of subsection
>
> This subsection shall apply to an individual for the taxable year if—
>
> (A) such individual is a bona fide resident of the Virgin Islands during the entire taxable year, or

> (B) such individual files a joint return for the taxable year with an individual described in subparagraph (A).
>
> (2) Filing requirement
>
> Each individual to whom this subsection applies for the taxable year shall file an income tax return for the taxable year with the Virgin Islands.
>
> * * * * *
>
> (4) Residents of the Virgin Islands
>
> In the case of an individual—
>
> (A) who is a bona fide resident of the Virgin Islands during the entire taxable year,
>
> (B) who, on his return of income tax to the Virgin Islands, reports income from all sources and identifies the source of each item shown on such return, and
>
> (C) who fully pays his tax liability referred to in section 934(a) to the Virgin Islands with respect to such income,
>
> for purposes of calculating income tax liability to the United States, gross income shall not include any amount included in gross income on such return, and allocable deductions and credits shall not be taken into account.

26 U.S.C. 932(c) (emphases omitted). Thus, under Section 932(c), "bona fide [USVI] residents satisfy both their United States and [USVI] tax obligations by filing a return with the [VIBIR] * * * and paying taxes on their worldwide income to the [USVI]." *Huff* v. *Commissioner*, 743 F.3d 790, 793 (11th Cir. 2014).

If an individual is not a bona fide USVI resident, and has income derived from USVI sources, then that individual is subject to 26 U.S.C. 932(a). Under that subsection, a taxpayer who is not a bona fide USVI resident "shall file his income tax return for the taxable year with both the United States and the Virgin Islands." 26 U.S.C. 932(a)(2). Section 932(a) requires such taxpayers to file two tax returns because they "pay taxes to the Virgin Islands on their Virgin Islands income and taxes to the United States on the rest." *Huff*, 743 F.3d at 793 n.3.

In 2007, the U.S. Department of the Treasury took steps to simplify the filing requirements under Section 932 and entered into a "new working arrangement" for the "automatic exchange of information" between the IRS and the VIBIR. IRS Notice 2007-31, 2007-1 C.B. 971. In light of that "new working arrangement," the Department announced "new interim rules" (promulgated as regulations in 2008) providing, on a prospective basis, that returns filed with the VIBIR by taxpayers claiming USVI residency would trigger the federal limitations period. *Ibid.*; 26 C.F.R. 1.932-1(c)(2)(ii). In promulgating the 2008 regulations, the Department exercised its discretion under 26 U.S.C. 6091(a) and 7654(e) to coordinate federal and territorial taxation by designating the filing place for taxpayers claiming USVI residency. As long as the working arrangement entered into in 2007 is in place, such taxpayers may satisfy their obligation to file returns with the IRS by filing returns with the VIBIR. 26 C.F.R. 1.932-1(c)(2)(ii). Those regulations are prospective only, and do not apply to tax years preceding their adoption (including the 2003 and 2004 tax years at issue in this case). See 663 F.3d at 949 n.1.

c. Standing alone, the federal tax exclusion provided by 26 U.S.C. 932(c)(4) does not provide an incentive for U.S. residents to feign USVI residency because the tax rates on income earned from U.S. sources are the same under the Internal Revenue Code and the USVI mirror code. 26 U.S.C. 934(a). The USVI is permitted, however, to reduce the mirror-code income tax on income *from USVI sources* for bona fide USVI residents. 26 U.S.C. 934(b). Since Section 934 was enacted, the USVI has exercised that authority and established an Economic Development Program to "promote local economic activity" by offering certain tax incentives to bona fide USVI residents. See *Vento* v. *Director of Virgin Islands Bureau of Internal Revenue*, 715 F.3d 455, 465 (3d Cir. 2013). Under the USVI's Economic Development Program in place during 2003 and 2004, bona fide USVI residents were entitled to a 90% reduction on certain qualified USVI-source income. *Ibid.*

The tax reduction permitted by Section 934 was not intended to be manipulated so that taxpayers could reduce tax on U.S.-source income. See 26 U.S.C. 934; S. Rep. No. 1767, 86th Cong., 2d Sess. 4 (1960) ("[I]n no case should [encouraging economic development in the USVI] be attained by granting windfall gains to taxpayers with respect to income derived from investments in corporations in the continental United States, or with respect to income in any other manner derived from sources outside of the Virgin Islands."). But by 2004, it had come to the IRS's attention that certain tax-shelter promoters had been marketing a tax-avoidance scheme that manipulated the USVI's Economic Development Program so that U.S. taxpayers could attempt to avoid the tax due on their U.S.-source income. See IRS Notice 2004-45, 2004-2 C.B. 33 (Notice 2004-45). To imple-

ment that scheme, promoters advised U.S. taxpayers residing outside of the USVI to (i) purport to become a USVI resident by establishing certain minimal contacts with the USVI, and (ii) enter into an arrangement designed to disguise U.S.-source income as USVI-source income. *Ibid.* At the second step, the taxpayer typically became a partner in a USVI partnership, and the USVI partnership then entered into a contract with the taxpayer's U.S.-based company to provide that company with substantially the same services that had been provided by the taxpayer prior to the creation of this arrangement. *Ibid.* The taxpayer continued to provide the U.S. company the same services, but the U.S. company paid the USVI partnership, rather than the taxpayer directly, for those services, and the taxpayer received her income for those services from the USVI partnership rather than from the U.S. company. *Ibid.* The USVI partnership secured a 90% reduction of USVI tax liability on the income received from the U.S. company, a small portion of which was retained by the promoters as their fee and the bulk of which was passed along to the taxpayer. *Ibid.* By claiming to be a bona fide USVI resident and that the income earned from the U.S. company was USVI-source income, a taxpayer employing the scheme would claim to owe no federal income tax and to owe a greatly reduced amount of tax to the USVI (of approximately 10% of the U.S. income tax that otherwise would have been due on the taxpayer's income from the U.S. company). *Ibid.*

After it learned of that marketed tax-avoidance scheme, the IRS issued a Notice advising taxpayers that it would challenge and penalize meritless USVI-residency filings based on 26 U.S.C. 932(c) and 934(b). See Notice 2004-45, at 33. Congress, too, became con-

cerned about the scheme, and took steps to eliminate the shelter prospectively by enacting 26 U.S.C. 937, which tightened the rules for determining who is a "bona fide resident" of the USVI and other U.S. Territories and for determining whether income is from sources within a U.S. Territory or effectively connected with the conduct of a trade or business within a U.S. Territory. 26 U.S.C. 937(a) and (b).

2. a. In 1985, petitioners Judith and James Coffey established Rainbow Educational Concepts, Inc., a U.S. corporation located in Arkansas that developed and produced educational materials for children. Pet. App. 49a; C.A. App. 8.[1] Judith Coffey served as Rainbow's president until 2003, when she began to provide "management consulting services" to the U.S. corporation through a USVI partnership (StoneTree) that she joined that same year. Pet. App. 50a; C.A. App. 8, 11, 15, 71. Rainbow paid the USVI partnership $1,175,091 in 2003 and $1,619,389 in 2004 for those services (Pet. App. 52a), and Judith Coffey received partnership distributions of $1,121,469 in 2003 and $1,425,483 in 2004 (C.A. Sealed App. 88, 111). For tax purposes, she claimed that those funds were USVI-source income from the USVI partnership, not U.S.-source income from petitioners' U.S. corporation. Pet. App. 52a; C.A. App. 266, 277.

In 2003 and 2004, petitioners jointly filed income-tax returns with the VIBIR in which they claimed that Judith Coffey (but not her husband, James Coffey) was a

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[1] The USVI is also listed as a petitioner in this case. See Pet ii. For simplicity, this brief refers to the Coffeys, collectively, as "petitioners," refers to Judith Coffey or James Coffey individually where appropriate, and refers to the USVI as "USVI."

USVI resident. Pet. App. 3a, 51a.[2] The VIBIR requires USVI residents to use the identical Form 1040 that the IRS issues, so petitioners' returns were on that form. *Id.* at 12a, 51a, 53a. Petitioners treated Judith Coffey's income from the USVI partnership as USVI-source income and accordingly claimed Economic Development Credits of $322,081 in 2003 and $402,170 in 2004. *Id.* at 52a; C.A. App. 266, 270. Petitioners did not prepare any return for, or send any return to, the IRS for either year. Pet. App. 3a-4a, 53a.

Roughly six months after it received petitioners' returns, the VIBIR transmitted the first two pages of the returns, along with petitioners' W-2 forms, to the IRS's Philadelphia Service Center to request so-called cover-over funds. Pet. App. 54a. Under 26 U.S.C. 7654, taxes that the IRS has collected (such as through withholding) from a bona fide resident of a U.S. Territory must be "covered over" (*i.e.*, paid to) the Territory's treasury. As part of the cover-over process, the VIBIR sends the IRS "taxpayer identification information," the amounts to be paid to the USVI, and—"in some cases"—"tax return[s]." IRS, *Internal Revenue Manual* 21.8.1.7.4(5) (Oct. 1, 2021) (I.R.M.).

b. After receiving the VIBIR's cover-over requests about petitioners, the IRS opened an audit of petitioners as taxpayers who had failed to file federal income-tax returns with the IRS. See Pet. App. 4a; C.A. App. 39, 98, 255, 560. In September 2009, following the audit, the IRS sent petitioners notices of deficiency for tax years 2003 and 2004. Pet. App. 59a-60a. The IRS de-

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[2] When spouses file a joint return, the rules in Section 932 are applied based on "the residence of the spouse who has the greater adjusted gross income." 26 U.S.C. 932(d). For petitioners' 2003 and 2004 tax years, that spouse was Judith Coffey.

termined that Judith Coffey was not a bona fide resident of the USVI in 2003 or 2004 and that petitioners had "participated in a tax avoidance scheme similar to that described in Notice 2004-45." C.A. App. 39, 98. The IRS also determined that all transactions between the petitioners' U.S. corporation and the USVI partnership should be disregarded for tax purposes because they lacked economic substance and were entered into solely for tax-avoidance purposes (which had the effect of increasing petitioners' federal tax liability). *Ibid.* "Based upon these determinations," the IRS concluded that petitioners "were required to file" income-tax returns with the IRS for 2003 and 2004 but had "failed to do so." *Ibid.*

3. a. Petitioners sought review of the Commissioner's determinations in the Tax Court. Pet. App. 60a. The USVI intervened, and, together with petitioners, moved for summary judgment on the ground that the statute of limitations had expired for petitioners' 2003 and 2004 tax years. *Ibid.*

The Tax Court denied the motions. C.A. Addendum 3-5. The court held that if Judith Coffey was not a bona fide resident of the USVI, petitioners were required to file federal income-tax returns with the IRS under 26 U.S.C. 932(a) and had not done so, which meant the limitations period had not started to run. C.A. Addendum 4. The court determined that a trial on Judith Coffey's residency was needed to resolve the limitations issue. *Id.* at 5.

b. After petitioners moved for reconsideration, the Tax Court issued a reviewed—*i.e.*, en banc—opinion in which the divided court held that the limitations period on assessment had expired, but no rationale commanded a majority. See Pet. App. 47a-100a (lead opin-

ion); *id.* at 101a-110a (concurring opinion); *id.* at 111a-115a (dissenting opinion). The lead opinion assumed that Judith Coffey was not a bona fide resident of the USVI in 2003 and 2004 and, thus, that petitioners were required to file returns with the IRS for those years under 26 U.S.C. 932(a)(2). Pet. App. 48a. It concluded, however, that "the VIBIR's sharing of information with the IRS [in the cover-over transmittals] amount[ed] to the filing of a return" and that the statute of limitations began to run when the IRS received information about petitioners from the VIBIR. *Id.* at 48a, 99a-100a. A concurring opinion took the view that the statute of limitations began to run when petitioners filed USVI returns with the VIBIR claiming to be bona fide residents of the USVI, even if petitioners "were not bona fide residents" of the USVI. *Id.* at 101a.

A dissenting opinion rejected the conclusion that the VIBIR's cover-over transmittal under 26 U.S.C. 7654 could satisfy petitioners' filing requirements under 26 U.S.C. 932(a). Pet. App. 111a. The dissenting judges stated that petitioners "simply did not file a Federal income tax return" with the IRS as Sections 932(a)(2) and 6501(a) require. *Id.* at 113a. Rather, they filed a return only with the VIBIR, and although "the VIBIR then transmitted a portion of" that return to the IRS, "the record contains no evidence that the VIBIR was authorized to act as petitioners' agent" or even that they knew "that any portion of the" VIBIR returns would be "transmitted to the IRS." *Id.* at 112a. In short, the dissenting judges concluded, "[f]iling a valid Federal income tax return with the IRS for purposes of section 6501(a) requires an intentional act by the taxpayer, and there was none here." *Id.* at 115a.

The Tax Court denied a motion for reconsideration. Pet. App. 13a-26a.

4. The court of appeals reversed and remanded the case so that the Tax Court could determine whether Judith Coffey was in fact a bona fide resident of the USVI during the tax years at issue. Pet. App. 1a-12a.

The court of appeals observed that before Section 6501(a)'s limitations period begins to run against the Commissioner, a "taxpayer must show 'meticulous compliance' with all filing requirements in the Internal Revenue Code or IRS regulations." Pet. App. 7a (quoting *Pilliod Lumber*, 281 U.S. at 249, and citing *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944)). The court further observed that "[r]eturns are 'filed' if 'delivered, in the appropriate form, to the specific individual or individuals identified in the Code or Regulations.'" *Ibid.* (quoting *Commissioner* v. *Estate of Sanders*, 834 F.3d 1269, 1274 (11th Cir. 2016)).

The court of appeals held that petitioners "did not meticulously comply" with all federal filing requirements (Pet. App. 9a) because (i) petitioners were assumed (for summary-judgment purposes) to be nonresidents of the USVI; (ii) Section 932(a)(2) requires nonresidents to file returns with the IRS; and (iii) petitioners had not done so. See *id.* at 5a-7a. Relying on the text of the statute, as well as precedent from this Court, the court of appeals rejected the Tax Court's alternative rationales for ruling to the contrary. *Id.* at 7a-12a.

The court of appeals first rejected the rationale of the Tax Court's lead opinion that Section 932(a)(2)'s filing requirements could be satisfied by the VIBIR's request for cover-over funds from the IRS under 26 U.S.C. 7654. Pet. App. 7a-9a. The court of appeals determined that "the statute of limitations in [S]ection

6501(a) does not begin when the IRS received the information" about petitioners from the VIBIR because Section 6501(a)'s "three-year statute of limitations begins only after the taxpayer's 'return was filed'" and the "IRS's actual knowledge [about a taxpayer's tax information] is not a filing." *Id.* at 8a (quoting *Heckman* v. *Commissioner*, 788 F.3d 845, 847 (8th Cir. 2015)). The court explained that it was undisputed that petitioners did not intend to file returns with the IRS or authorize the VIBIR to file returns on their behalf, and that the "VIBIR did not file returns when it sent [petitioners'] documents to the IRS." *Id.* at 8a-9a.

The court of appeals next rejected the alternative argument that filing a return solely with the VIBIR begins Section 6501(a)'s three-year limitations period for federal tax purposes. Pet. App. 10a-12a. The court explained that the IRS and the VIBIR are separate taxing authorities, such that a filing with one does not constitute a filing with the other, and Section 932(a)(2) expressly requires that nonresidents file returns with both of them. *Id.* at 11a-12a (citing *Estate of Sanders*, 834 F.3d at 1277-1279). The court distinguished precedent holding that imperfect returns that had actually been "filed with the IRS" could trigger the limitations period, explaining that those cases were limited to situations where the return was "filed with the correct individual." *Id.* at 10a (citing *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934) and *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304, 310 (1940)). The court stated that "[t]he honesty and genuineness of [petitioners'] returns does not affect whether they were filed" in the correct place. *Id.* at 11a. The court further observed that "[u]nder the Internal Revenue Code, a taxpayer *either* 'is a bona fide resident of the Virgin Is-

lands,' *or* 'is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands).'" *Ibid.* (quoting 26 U.S.C. 932(c)(1)(A) and (a)(1)(A)(i)). The court concluded that taxpayers in the latter category must file returns with both the IRS and the VIBIR before their limitations period can begin to run. *Id.* at 11a-12a. Citing the only other appellate court to address Section 932's filing requirements, the court observed that Section 932 "does not create an exception for a taxpayer's mistaken position about residency." *Ibid.* (citing *Estate of Sanders*, 834 F.3d at 1277).

The court of appeals denied petitions for rehearing without noted dissent. Pet. App. 116a-117a.

ARGUMENT

The court of appeals held that, under 26 U.S.C. 932(a)(2), a taxpayer who is not a bona fide resident of the USVI must file a return with the IRS, and that the limitations period for assessment of that taxpayer's federal income taxes does not begin until the return is so filed. That statute-specific holding is correct, and does not conflict with any decision of this Court or another court of appeals. Moreover, in light of the Department of the Treasury's 2008 regulations—which changed the filing rules under Section 932 and specify that returns filed with the VIBIR claiming USVI residency trigger the federal limitations period—the question whether similar returns filed under pre-2008 law could trigger the federal limitations period lacks prospective importance. Further review is not warranted.

1. The court of appeals correctly held that Section 932(a)(2) requires any taxpayer who is a nonresident of the USVI and receives USVI-source income to file a return with both the IRS and the VIBIR, and that the federal limitations period remains open where (as here) a

return is not filed with the IRS. See Pet. App. 6a-12a. That conclusion is supported by the text and structure of Section 932 as well as the relevant case law, including the only other court of appeals decision to address the issue.

a. The limitations period on tax assessment does not begin to run until the taxpayer has "meticulous[ly] compli[ed]" with all statutory and regulatory filing requirements. *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930); see 26 U.S.C. 6501(a); *Badaracco* v. *Commissioner*, 464 U.S. 386, 391-392 (1984). For taxpayers who fail to meet those filing requirements, Congress has expressly provided that "the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." 26 U.S.C. 6501(c)(3).

Whether petitioners complied with all filing requirements during the years at issue (2003 and 2004) depends on the threshold question whether Judith Coffey was in fact a USVI resident. As relevant here, Section 932 establishes two distinct filing regimes for U.S. taxpayers who receive USVI-source income: one that applies to USVI residents (26 U.S.C. 932(c)(1)) and one that applies to nonresidents of the USVI (26 U.S.C. 932(a)(1)). The text and structure of Section 932 demonstrate that taxpayers who are not bona fide USVI residents must file returns with the IRS to begin their federal limitations period.

Section 932(c) provides that "if [an] individual is a bona fide resident of the [USVI]," then she "shall file an income tax return for the taxable year with the [USVI]." 26 U.S.C. 932(c)(1) and (2). By its plain terms, that single-filing rule applies "if"—and only "if"—the "individual is a bona fide resident of the [USVI]." 26 U.S.C.

932(c)(1). Contrary to petitioners' contention (Pet. 22-24), it does not apply to an individual who claims to be, but is not in fact, a bona fide resident.[3]

Section 932(a), meanwhile, governs individuals who are not bona fide USVI residents but have USVI-source income. Section 932(a)(2) provides that such an individual "shall file his income tax return for the taxable year with both the United States and the [USVI]." 26 U.S.C. 932(a)(2). That language is clear and unequivocal: individuals within the provision's scope "*shall* file" a return with the "United States *and* the [USVI]." *Ibid.* (emphases added). And an individual is within the provision's scope if she "is a citizen or resident of the United States (other than a bona fide resident of the [USVI])." 26 U.S.C. 932(a)(1).

The structure of Section 932 further supports the court of appeals' decision. Section 932 divides taxpayers receiving USVI-source income into two categories: a taxpayer either "is" a bona fide resident (26 U.S.C. 932(c)(1)) or is "other than" a bona fide resident (26 U.S.C. 932(a)(1)). There is no third category for non-USVI residents "reporting USVI residency" (Pet. 7). Petitioners complain (Pet. 16) that they could not have filed "both" as nonresidents of the USVI under Section 932(a)(2) and as residents of the USVI under Section 932(c)(2), but that is simply the result of the binary filing structure Congress enacted in Section 932.

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[3] The question presented in the petition is limited to whether the limitations period begins to run when a taxpayer claiming USVI residency files a return with the VIBIR. See Pet. i. It does not encompass the alternative argument pressed by petitioners below that the limitations period begins to run if the VIBIR submits a cover-over request to the IRS pursuant to Section 7654. See *ibid.*

b. The decision below is consistent with this Court's precedent. The Court has long held that provisions related to federal limitations periods "'must receive a strict construction in favor of the Government.'" *Badaracco*, 464 U.S. at 391-392 (citation omitted). "Under the established general rule a statute of limitation runs against the United States only when [it] assent[s] and upon the conditions prescribed." *Pilliod Lumber*, 281 U.S. at 249. In *Pilliod Lumber*, for example, the taxpayer failed to satisfy the filing requirement of having its tax return signed under "oath." *Ibid.* This Court observed that "meticulous compliance" with "all named conditions" for filing is required before the limitations period begins to run, and it held that the failure to sign the return under oath meant that the limitations period remained open. *Ibid.*

Here, petitioners did not comply—meticulously or otherwise—"with federal filing requirements for USVI nonresidents." Pet. App. 9a. As discussed above, Section 932(a)(2) requires taxpayers who are not USVI residents to file returns with both the United States and the USVI. And during the years at issue, Treasury's filing instructions directed such taxpayers to file their federal returns in Philadelphia, Pennsylvania. C.A. App. 423, 426.[4] Petitioners' failure to comply with those

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[4] The applicable IRS instructions (for Form 1040) during the 2003 and 2004 tax years informed nonresidents of the USVI that they had to file their federal income-tax returns with the IRS. C.A. App. 423, 426. The instructions also advised taxpayers "who lived in or had income from a U.S. possession" to review Publication 570 ("Tax Guide for Individuals with Income from U.S. Possessions") for their federal-filing instructions. IRS, Dep't of the Treas., Instructions Form 1040, at 15 (2003); *id.* at 12 (2004). Consistent with Form 1040's instructions, Publication 570 (as in effect for 2003 and 2004) advised taxpayers that, "[i]f you *are not* a bona fide resident of the

requirements, like the taxpayer's failure in *Pilliod Lumber* to have its tax return signed under oath, means that they cannot invoke the limitations period applicable to taxpayers who *did* meticulously comply with relevant requirements. Pet. App. 6a.

c. Petitioners' contrary arguments lack merit.

Petitioners contend (*e.g.*, Pet. 22-24) that their filing was proper because it complied with the requirement established in Section 932(c)(2) for bona fide USVI residents. But as discussed above, Section 932(c)(2) does not "apply" unless a taxpayer actually "is" a bona fide USVI resident, 26 U.S.C. 932(c)(1)(A). At this stage of the case (*i.e.*, summary judgment), it must be assumed that Judith Coffey is not a bona fide USVI resident. Section 932(c) accordingly does not apply to her; Section 932(a) applies instead.

Petitioners correctly state (Pet. 7-8, 16, 22) that returns filed with the VIBIR under Section 932(c) are required by federal law and are subject to IRS examination, but those facts do not further petitioners' cause. Section 932 treats the IRS and the VIBIR as coordinated but separate taxing authorities and—notwithstanding their ability to coordinate—it ex-

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[USVI]," but had income from the USVI, then "you *must* file identical tax returns with the United States and the [USVI]." C.A. App. 440, 457 (emphases added). Publication 570 further advised that generally "[y]ou do not have to file with the IRS for any tax year in which you *are* a bona fide resident of the [USVI]." *Ibid.* (emphasis added). Nowhere did the IRS suggest that the sufficiency of the filing turned on the taxpayer's belief that she had self-selected her correct residency "position[]," as petitioners suggest (Pet. 12). To the contrary, the example provided in Publication 570 described taxpayers who actually "*qualified* as bona fide residents" (C.A. App. 440 (emphasis added)), not taxpayers who merely took a position in that regard.

pressly requires nonresidents of the USVI to file a return with "both" of those authorities. 26 U.S.C. 932(a)(2). As a result, a USVI nonresident's compliance with the filing requirement for bona fide USVI residents cannot substitute for compliance with the "nonresident filing requirements" that Congress provided in Section 932(a). Pet. App. 11a. The court of appeals correctly declined to read Section 932(a)(2) out of the Code.

Petitioners suggest (Pet. 6, 14) that giving them the benefit of the limitations period based on their submission to VIBIR would further "Congress's intent to create a unified tax obligation" for all taxpayers with USVI-source income and would be consistent with "Congress's design for the USVI tax regime." But the clearest expression of congressional intent and design is the text of the statute itself, see *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2073 (2018), and for the reasons discussed above, the statutory text does not entitle petitioners to ignore Section 932(a). Moreover, petitioners ignore Congress's longstanding concern about the USVI and other Territories being "used as tax havens." S. Rep. No. 313, 99th Cong., 2d Sess. 478-479 (1986). Indeed, concern that taxpayers "were improperly claiming residence in the U.S. Virgin Islands" prompted "legislative changes in 2004" designed to eliminate that abuse. Staff of the Joint Committee on Tax'n, 112th Cong., *Federal Tax Law and Issues Related to the U.S. Territories*, JCX-41-12, at 28-29 (2012) (citing Notice 2004-45). And in 2007, when the Ranking Member of the Senate Finance Committee inquired about IRS enforcement regarding Notice 2004-45 transactions, he recognized that taxpayers who filed returns with the VIBIR had "not fil[ed] a U.S. tax return," as

Section 932(a)(2) requires. C.A. App. 391 (emphasis omitted).

Petitioners additionally contend (Pet. 14-18) that the court of appeals' decision conflicts with this Court's decision in *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304, 309-310 (1940). *Germantown Trust*, however, did not address Section 932 or any comparable provision in the Internal Revenue Code. Instead, the Court addressed whether a document actually filed with the IRS qualified as a "return" for limitations purposes even though the "return may have been incomplete." *Germantown Trust*, 309 U.S. at 310. The taxpayer at issue there had filed a return applicable to trusts (Form 1041) rather than the return applicable to corporations (Form 1120). The IRS determined that the taxpayer should have filed the Form 1120 and therefore treated the taxpayer as filing "no return" at all for purposes of the limitations period. *Id.* at 307. This Court disagreed, holding that a return filed with the IRS that used the wrong form was nonetheless a "return." *Ibid.* The case thus addressed return requirements, not filing requirements.

Petitioners nevertheless contend (Pet. 14) that *Germantown Trust* concerned a situation where the taxpayer "failed to file" with the "correct individual" or "IRS office." That is incorrect. The Court in *Germantown Trust* did not address whether the returns were filed with the correct individual or IRS office. Indeed, the instructions to the returns at issue—both the Form 1041 actually filed by the taxpayer and the Form 1120 that the IRS determined the taxpayer should have filed—directed taxpayers to file their return in the same place: with the Collector of Internal Revenue for the district in which the entity resided. See IRS, Dep't

of the Treas., *Form 1120: Corporation Income Tax Return: For Calendar Year 1932*, at 1 (1932), https://www.irs.gov/pub/irs-prior/f1120--1932.pdf ("File This Return with the Collector of Internal Revenue for Your District"); IRS, Dep't of the Treas., *Fiduciary Return of Income: For Calendar Year 1932*, Instructions ¶ 25 (1932), https://www.irs.gov/pub/irs-prior/f1041--1932.pdf ("file [the return] with the collector of internal revenue for the district in which the fiduciary resides or has his principal place of business"). Accordingly, subsequent decisions of both this Court and the lower courts have consistently recognized that *Germantown Trust* addressed the status of incorrect returns that were actually filed with the IRS, not the requirements for a proper filing. *E.g.*, *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 222-224 (1944) (distinguishing *Germantown Trust*, where the taxpayer "filed a return on a wrong form," from the case at hand, where the taxpayer was "under an obligation to file two returns" with the IRS but filed only "one return"); *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836, 839 (8th Cir. 2006) (observing that *Germantown Trust* addressed the "appropriate criteria for determining whether a document is a return"); *Huff* v. *Commissioner*, 138 T.C. 258, 267-268 (2012) (distinguishing *Germantown Trust* because the "underlying issue therein was whether the return filed with the IRS constituted a valid return. Such is not the case here. The issue here is whether the filing of a return with the [VIBIR] constitutes the filing of a return with the IRS"). And as discussed above, see pp. 17-18, *supra*, this Court has consistently recognized that *filing* requirements must be complied with "meticulous[ly]." *Pilliod Lumber*, 281 U.S. at 249.

The issue here is not whether the returns that petitioners filed with the VIBIR were valid returns. Indeed, the government assumed below that they were. See Pet. 22 (citing Gov't C.A. Resp. to Mot. 5 (Oct. 16, 2020)). The relevant deficiency, instead, is that petitioners failed to file returns with the IRS, as Section 932(a)(2) required for USVI nonresidents. The basis for the court of appeals' decision is thus that petitioners filed *no* return with the IRS, not that they filed an "incomplete" return, Pet. 14 (quoting *Germantown Trust*, 309 U.S. at 309-310).

2. Petitioners contend (Pet. 18-20) that review is warranted because the court of appeals' decision conflicts with the decisions of other courts of appeals. That contention is incorrect.

a. Only one other court of appeals has addressed the filing requirements under Section 932 for taxpayers claiming to be USVI residents. See *Commissioner* v. *Estate of Sanders*, 834 F.3d 1269 (11th Cir. 2016). The decision below is fully consistent with the Eleventh Circuit's decision in that case, which presented nearly identical facts. In *Estate of Sanders*, as here, the taxpayer claimed to be a USVI resident and filed only with the VIBIR, which in turn sent two pages of the taxpayer's 2002 return to the IRS as a cover-over request under Section 7654. See *id.* at 1272; *Estate of Sanders* v. *Commissioner*, 144 T.C. 63, 69 (2015), vacated and remanded, 834 F.3d 1269 (11th Cir. 2016). The Eleventh Circuit held that the taxpayer was not entitled to invoke the limitations period under 26 U.S.C. 6501(a), because "a taxpayer who files a return only with the VIBIR does not trigger the statute of limitations unless he actually is a bona fide resident of the USVI." *Estate of Sanders*, 834 F.3d at 1278-1279. The court accordingly remanded

the case for the Tax Court to make a residency determination. *Id.* at 1276, 1285.

Petitioners address *Estate of Sanders* only in a footnote (Pet. 19 n.8), attempting to distinguish the decision based on what they term a "concession" by the government in this case that a return filed under Section 932(c) is a "federal return required by the Internal Revenue Code."[5] That attempt is unavailing. There was no dispute in *Estate of Sanders*, just as there was no dispute here, that a return filed with the VIBIR is "a return required to be filed under the Internal Revenue Code" (Pet. 22 (quoting Gov't C.A. Resp. to Mot. 5 (Oct. 16, 2020)); see p. 22, *supra*. Indeed, the Eleventh Circuit stated as much. See *Estate of Sanders*, 834 F.3d at 1272 ("Bona fide residents of the USVI are required to file tax returns only with the USVI Bureau of Internal Revenue ('VIBIR'). 26 U.S.C. § 932(c)(2)."). But as both

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[5] Petitioners refer to returns filed with the VIBIR pursuant to Section 932 as "federal returns" (see Pet. 10 n.4, 12, 22). To eliminate any confusion over petitioners' use of the phrase "federal returns"—a phrase not used in Section 932—we note that returns filed with the VIBIR are "federal returns" in the sense that they are filed pursuant to federal law (26 U.S.C. 932(a)(2) and (c)(2)). They are not "federal returns" in the sense that they are filed with the IRS or any other component of the federal government. For that reason, agreements that the United States and the USVI have entered into to coordinate U.S. and USVI tax enforcement use the phrase "federal return" to distinguish returns that have been filed with the IRS from those filed with the VIBIR. For example, the 1987 Tax Implementation Agreement, entered into by the IRS and the VIBIR shortly after Section 932 was enacted, distinguishes between a "Federal Return" (which is filed with the IRS) and a "Possession Return" (which is filed with the VIBIR). C.A. App. 369-375; see *id.* at 377 (2004 Memorandum of Understanding between the IRS and the VIBIR drawing a distinction between "federal returns" filed with the IRS and "BIR returns" filed with the VIBIR).

the Eleventh Circuit there and the Eighth Circuit here have correctly recognized, nonresidents are required to file returns with the IRS *and* the VIBIR, and unless and until they do, their limitations periods remain open under Section 6501(c)(3). Pet. App. 11a (citing *Estate of Sanders*, 834 F.3d at 1278-1279).

The decision below is also consistent with the decisions of other courts of appeals that have addressed dual-filing requirements in the context of other U.S. Territories. See *Condor Int'l, Inc.* v. *Commissioner*, 78 F.3d 1355, 1358-1359 (9th Cir. 1996); *Helvering* v. *Campbell*, 139 F.2d 865, 866-868 (4th Cir. 1944); *Robinette* v. *Commissioner*, 139 F.2d 285, 287-288 (6th Cir. 1943), cert. denied, 322 U.S. 745 (1944). In those cases, the courts have recognized that a taxpayer subject to a dual-filing requirement (like the one in 26 U.S.C. 932(a)(2)) does not trigger the federal limitations period by filing a tax return with only the territorial taxing authority. In *Campbell*, for example, the Fourth Circuit addressed the limitations period for U.S. taxpayers who filed income-tax returns with another then-Territory (the Philippines) but did not file returns with the IRS. 139 F.2d at 868. The court of appeals rejected the taxpayers' argument that filing returns with the Philippines was "sufficient to set the [federal] period of limitations running," reasoning that a "return must be filed as the statute requires to set the statute of limitations running" and that the "statute required" the taxpayers to file returns in "Baltimore." *Ibid.* The Fourth Circuit observed that "the statute of limitations never runs in cases where no returns are filed" with the IRS, even where the taxpayer is operating under a "widespread misapprehension" that a return filed with a U.S. Territory would suffice. *Id.* at 869 (citation omitted); see

Robinette, 139 F.2d at 288 ("Petitioner insists that the statute of limitations began to run * * * when [he] filed his return with the Collector at Manila, * * * but petitioner's handicap here is that the taxpayer failed to file a 'required return' with the Collector at Baltimore and no statute of limitations protected that failure") (citation omitted); see also *Condor Int'l, Inc.*, 78 F.3d at 1358-1359.

b. Petitioners contend (Pet. 18-20) that the decision below conflicts with five other decisions from the courts of appeals. None of the cited decisions, however, addresses Section 932 or any similar dual-filing regime. Instead, those decisions address whether "the filing of a return other than the one prescribed" by the Code or by Treasury Regulations "can be 'the return'" that starts the limitations period. Pet. 19 (quoting *Law Office of John H. Eggertsen P.C.* v. *Commissioner*, 800 F.3d 758, 763 (6th Cir. 2015)); see *Springfield* v. *United States*, 88 F.3d 750, 752 (9th Cir. 1996) (addressing the contention that "the filing of Forms 1099 did not start the three years running because the 'returns' Springfield was required to file were Forms 940 and 941"); *Siben* v. *Commissioner*, 930 F.2d 1034, 1034-1035 (2d Cir.) (noting the "sole issue on appeal" was whether the limitations period "should be measured from the date the partnership return was filed or the date the income tax return of the individual partner was filed"), cert. denied, 502 U.S. 963 (1991); *Neptune Mut. Ass'n* v. *United States*, 862 F.2d 1546, 1555 (Fed. Cir. 1988) (observing that "the *Lane-Wells* decision upholds a regulation requiring returns to be filed on a specific tax return form, [but] it does not go so far as to hold that noncompliance with such a regulation per se tolls the statute of limitations," and remanding for trial on "[w]hether Neptune's

income tax return was adequate to apprise the IRS of the facts on which to predicate [tax] liability") (emphasis omitted); *Atlantic Land & Imp. Co.* v. *United States*, 790 F.2d 853, 858 (11th Cir. 1986) ("[A] good faith tax return filed on the wrong form may trigger the limitations period.").

Those decisions thus apply the principle addressed in *Germantown Trust*, *supra*, holding that "the limitations clock may start in some settings even when the taxpayer fails to file the right return." *Law Office of John H. Eggertsen*, 800 F.3d at 763. But they do not suggest that failing to file a return at all satisfies the filing requirement of 26 U.S.C. 6501(a); on the contrary, those decisions—consistent with the other decisions discussed above—acknowledge that a "key predicate for [the] exception" espoused by *Germantown Trust* and the cases following it is that a return of some sort has actually been "filed" with the IRS. *Law Office of John H. Eggertsen*, 800 F.3d at 763.

3. Petitioners further contend that the court of appeals' decision could have "catastrophic consequence[s] for USVI taxpayers." Pet. 20-21 (capitalization altered; emphasis omitted). That policy argument is unfounded and misdirected.

Neither the court of appeals' decision here nor the 2016 decision by the Eleventh Circuit in *Estate of Sanders* has resulted in the "nullification of the millions of tax returns filed in the USVI since 1986," as petitioners conjecture (Pet. 21). Indeed, we are unaware of any broad initiative by the IRS to challenge claims of USVI residency beyond the relatively small group of taxpayers who began to claim USVI residency after engaging in Notice 2004-45 transactions in the early 2000s. That those taxpayers must establish the accuracy of their

residency claim as a component of their statute-of-limitations defense is not a "disastrous" or unusual consequence. Pet. 21, 24.

Under the Internal Revenue Code, statute-of-limitations issues frequently involve similarly fact-specific disputes, such as whether a taxpayer (i) had income sufficient to require the filing of a return; (ii) filed a false return; (iii) substantially omitted gross income; or (iv) engaged in certain abusive tax-avoidance transactions without making the requisite disclosures. See 26 U.S.C. 6501(c)(1)-(10). Taxpayers taking the position that they do not fall into one of these filing regimes always run the risk that the IRS may disagree. Indeed, before petitioners filed their 2003 return with the VIBIR, the IRS had explicitly warned taxpayers that it would challenge "highly questionable" claims of USVI residency and impose (among other things) "failure to file" penalties under 26 U.S.C. 6651. Notice 2004-45, at 33.

Moreover, longstanding USVI residents who have not engaged in abusive tax schemes (such as the one outlined in Notice 2004-45) have no cause for concern about the court of appeals' limitations decision; and those who have engaged in such schemes likely do so only after being warned of the risks by tax advisors. As the Eleventh Circuit explained in *Estate of Sanders*, any "fairness concern is mitigated by the * * * practicality" that genuine permanent residents of the USVI will not be materially burdened by enforcement of the dual-filing requirement (because they are not subject to it), while "[o]ther taxpayers with USVI-sourced income * * * claiming [the USVI's Economic Development Program] tax credits, will certainly act only with professional tax advice," including advice about "the risks

* * * that the IRS might make a contrary determination." 834 F.3d at 1277 n.5.

4. Finally, even if a conflict existed with respect to whether Section 932(a)(2)'s dual-filing requirements could be avoided by nonresidents of the USVI who file returns with the VIBIR claiming to be USVI residents, the question presented in this case would not warrant this Court's review because it lacks substantial prospective importance.

As petitioners acknowledge (Pet. 9 n.3), the Department of the Treasury promulgated regulations in 2008 that provide, on a prospective basis, that returns filed with the VIBIR by taxpayers claiming USVI residency would trigger the federal limitations period. See p. 6, *supra*. And contrary to petitioners' suggestion, nothing in the court of appeals' decision "invalidates" those 2008 regulations, Pet. 21 (citation omitted), or casts doubt on the Treasury Secretary's established authority "to modify an individual's reporting requirements" set out in Section 932, *Appleton* v. *Commissioner*, 140 T.C. 273, 290 (2013) (citing the express delegation of authority provided in 26 U.S.C. 7654(e)); see 26 U.S.C. 6091(a), 7654(e). Because those regulations have been in place for over 13 years, and replaced the filing regime challenged by petitioners, the question presented is of diminishing importance.

Petitioners contend (Pet. 21) that "repose" is still necessary for taxpayers—like themselves—who failed to file returns with the IRS as required by 932(a) in tax years before 2008. But, as petitioners have acknowledged, the "Code prohibits repose for non-filers." Pet. C.A. Br. 74; see 26 U.S.C. 6501(c)(3). Nevertheless, even with non-filers, the Commissioner generally does not initiate tax proceedings more than six years after

the tax year in question. See I.R.M. 4.12.1.3 (Oct. 5, 2010). The notices of deficiency that the IRS issued in 2009 in this case were consistent with that discretionary policy. At this point, however, any new notices of deficiency with respect to "the millions of tax returns filed in the USVI [between] 1986" and the adoption of the 2008 regulations, Pet. 21 (citation omitted), could not be.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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