No. 21-____

IN THE
Supreme Court of the United States

SAID RUM,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court established the standards of review for agency actions in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Courts are limited to determining whether the agency action was arbitrary and capricious at the time of the decision unless "the [agency] action is adjudicatory in nature and the agency factfinding procedures are inadequate." *Id.* at 415. This Court has never clarified what inadequacies of the factfinding procedure will merit de novo review of agency action and the Circuits are split on this issue.

Residents and citizens of the United States who transact with foreign financial agencies to file yearly reports called FBARs. When a resident or citizen fails to file an FBAR, that individual may be assessed willful or non-willful penalties for such failure. The Federal, Second and Eleventh Circuit in response to this defense have looked to whether the individual had a "reason to know" of the specific reporting requirement imposed by the law. This is a lesser standard than willfulness which requires reckless *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007).

The questions presented are:

1. Are courts to apply de novo review of agency actions when the inadequacy of the factfinding procedures is due to a procedural

due process violation as in *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) or are there other occasions to consider as the Ninth Circuit or D.C. Circuit have found?

2. How are Courts to apply the standard of willfulness in the context of a specific reporting requirements?

3. Is 31 C.F.R. § 1010.820(g)(2) superseded by 31 U.S.C. § 5321(a)(5)?

PARTIES TO THE PROCEEDING

Said Rum, petitioner on review, was defendant-appellant below.

United States of America, respondent on review, was plaintiff-appellee below.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit, No. 19-14464, *United States of America v. Said Rum*, Judgment entered April 23, 2021; Petition for Rehearing and Rehearing en banc denied July 22, 2021.

U.S. District Court for the Middle District of Florida, Case No. 8:17-cv-00826, final judgment entered September 27, 2019.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Regulation:

Other:

PETITION FOR WRIT OF CERTIORARI

Said Rum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

DECISIONS BELOW

The Magistrate Judge's report and recommendation granting Respondent's motion for summary judgment is unpublish and is available at App. 39a-89a. The District Court's order adopting the Report and Recommendation is unpublish and available at App. 30a-38a. The Eleventh Circuit's decision affirming summary judgment is reported at 995 F.3d 882 and is reprinted at App. 1a-29a. The Eleventh Circuit's denial of Petitioner's motion for rehearing and rehearing en banc is unpublished and is reprinted at App. 90a-91a.

STATEMENT OF JURISDICTION

Lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

26 U.S.C. § 706

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

31 U.S.C. § 5321(a)(5) & (b)

(a)

(5) FOREIGN FINANCIAL AGENCY TRANSACTION VIOLATION.—

(A) Penalty authorized.—

The Secretary of the Treasury may 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.

(D) Amount.—The amount determined under this subparagraph is—

(i) in the case of a violation involving a transaction, the amount of the transaction, or

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

(b) TIME LIMITATIONS FOR ASSESSMENTS AND COMMENCEMENT OF CIVIL ACTIONS.—

(1)ASSESSMENTS.—

The Secretary of the Treasury may assess a civil penalty under subsection (a) at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed.

(2) CIVIL ACTIONS.—The Secretary may commence a civil action to recover a civil penalty assessed under subsection (a) at any time before the end of the 2-year period beginning on the later of—

(A) the date the penalty was assessed; or

(B) the date any judgment becomes final in any criminal action under section 5322 in connection with the same transaction with respect to which the penalty is assessed.

INTRODUCTION

This case deals with the narrow exception to arbitrary and capricious review of the decision of an administrative agency. There is very little guidance on when this exception applies. Thus, the district and circuit courts have found the exception to almost never apply, except in the one case. While the exception should be narrow. If the exception never applies, it would frustrate judicial oversight in circumstances in which the agency treats people unfairly. If de novo review never applies, agencies may deny procedural due process rights at the agency, then rely on arbitrary and capricious review to escape reversal, so long as they can provide a ration ground for their decision. In this case, Petitioner suffered such a procedural due process violation. Petitioner lost the opportunity to contest the amount of the penalty assessment at the agency because the Internal Revenue Service misled him as to the grounds for its decision, lied to him and did not provide him with an explanation of the reasons for its decision prior to his administrative appeal.

STATEMENT OF THE CASE

I. Statutory Background

The Bank Secrecy Act was first published in 1970. Under the act, United States residents and citizens who transact with foreign financial agencies must file yearly a Foreign Bank Account Report, known as an FBAR. App. 13a. Those who do not file

the FBAR are subject to penalties on a tiered structure if the aggregate value of the foreign financial agency transactions in a given year exceeds $10,000. *Id.* For a long time, this provision went practically unenforced. This changed in 2008 when the United States arrived at a universal settlement with the Swiss banks. App. 6a. The United States has since proceeded to go after holders of foreign bank accounts who did not file the applicable FBAR form. Penalties for willful violations of the failure to file the FBAR are capped at $100,000 or 50% of the amount of the transaction whichever greater, or $25,000 or the full value of the transaction up to maximum of $100,000 whichever is greater, depending on whether the regulation or statute is controlling. 31 U.S.C. § 5321(a)(5); 31 C.F.R. § 1010.820(g). Non-willful violations are capped at $10,000 per year. Further, there is reasonable cause relief for such penalties. The Secretary of Treasury has express statutory authority to determine and impose any amount of the penalty under the maximum statutory penalty for any violation. App. 24a.

II. Factual Background

Said Rum is a United States citizen and held an interest in a Swiss Bank Account. App. 2a-3a. For years 1998 through 2007, Rum did not file the applicable FBAR form with FinCEN. App. 6a. Rum also did not report any income on his federal income tax return related to the foreign account. App. 9a. Rum did not report income from the account because

he believed foreign-earned income was not taxable and he believed the account was set up like an Individual Retirement Account. In 2009, Rum filed his first FBAR. *Id.* In 2008, the IRS began an examination of Rum's 2006 tax return. As part of the examination, Rum disclosed his foreign bank account. App. 7a.

Thereafter, Rum tried to enter the Offshore Voluntary Disclosure Program with the IRS and thought that his attorney at the time had enrolled him in the program. App. 76a. Under the Offshores Voluntary Disclosure Program, persons who failed to file FBARs could voluntarily disclose their foreign bank accounts to the IRS but would owe a 20% penalty on the maximum value of the foreign bank account and a 20% penalty on all income from the foreign bank account. *Id.* Persons who entered OVDP would not be prosecuted criminally assessed civil fraud penalties under I.R.C. § 6663 or be assessed the maximum 50% willful penalty for failing to file the FBAR form. *Id.*

A. The Second IRS Exam

In 2011, the IRS began an examination of Rum's tax returns for the 2005 and 2007 through 2010 tax years and his FBAR filing compliance. App. 6a. Agent Marjorie Kerkado was the revenue agent assigned by the IRS to Rum's case. Rum told Agent Kerkado that he thought he had entered OVDP. Rum requested that Agent Kerkado allow him to

make the OVDP submission through the examination. *Id.*

While initially she agreed, Agent Kerkado later proposed a deal of a 20% penalty on the maximum value of the bank account and 75% civil fraud penalties on additional tax assessed in the related tax examination. App. 85a. Rum did not agree to this deal because he had not fraudulently underpaid his tax obligation. After disagreeing to the deal, Agent Kerkado sent Rum a letter in response to Rum's appeal of his income tax examination. The letter stated in pertinent part:

> I also take this opportunity to point out that we had come to an agreed lower FBAR penalty based on a completely agreed case. The FBAR penalty was going to be limited to only one year and at only 20%. Unfortunately, an unagreed income tax case will bar me from anything less than a 50% FBAR penalty. App. 86a.

About a year later, the next notice Rum received was a Letter 3709 informing him that the IRS was proposing a 50% maximum willful penalty and giving Rum informal administrative appeal rights. App. 10a. Notably, this Letter 3709 did not include an explanation of items for why the penalty was willful or why he was assessed a maximum penalty. *Id.* Rum sent a letter in response to this letter 3709 requesting an informal administrative

appeal. *Id.* The tax and FBAR case were forwarded to the IRS Independent Office of Appeals. *Id.* Rum thought based on the last letter he received prior to Letter 3709, the reason he was assessed a 50% FBAR penalty was because he did not fully agree to the fraud penalties in the income tax examination.

When Rum went to the informal conference with the IRS's Independent Office of Appeals, Rum begged the appeals officer to reinstate the deal Agent Kerkado proposed to Rum. App. 86a. Because of the letter he received prior to the Letter 3709, Rum thought that the reason for the 50% penalty was because he had not agreed that he had been fraudulent. He did not know the facts or law that the IRS based its position on. He had every motivation to accept the fraud penalty in the related income tax examination to receive a mitigated 20% FBAR penalty and pleaded with appeals for it. *Id.* However, at the time, receiving mitigation under the Internal Revenue Manual hinged on there being no fraud penalties. I.R.M. 4.26.16-2(2008). Therefore, based on the IRS uncorrected misstatements, Rum was misled to argue for fraud penalty in the tax examination instead of against it.

The entire informal appeal conference became about the proposed deal Agent Kerkado gave to Rum. In the end, the appeals officer promised to give Rum the same deal if he could provide proof of it. *Id.* Rum could not provide proof of the deal; however, the appeals officer found independent evidence of the deal in her file and did not reinstate it. *Id.* IRS

appeals never discussed with Rum the actual reasons he was assessed with a maximum penalty. *Id.* The appeals officer never contacted Rum after the official conference or corrected his misconception that the reason he was assessed a 50% penalty was because he did not agree to Agent Kerkado's deal. *Id.* After a year at IRS appeals the 50% willful penalty was sustained and the assessment was mailed to Rum. App. 9a.

B. After the Assessment

After the official assessment of FBARs, Rum petitioned the Tax Court related to the assessment of civil fraud penalties on the tax examination. App. 10a. After waiving privilege with his prior attorney and accountant, Rum convinced the Internal Revenue Service to concede the civil fraud penalties for the tax years.

On April 7, 2017, the United States brought this action for the recovery of the FBAR penalty pursuant to 31 U.S.C. § 5321(b)(2). *Id.* During discovery, Rum uncovered the actual reasons for the 50% willful penalty. The penalty was willful for reasons contained in the Form 886-a.[1] The

[1] Although both the district court and the circuit court concluded the 886-a was mailed to Rum, there is no substantiation for it in the record. The Letter 3709 does not list it as enclosed. Regardless of whether it was mailed to Rum during the agency examination, it only contained arguments related to the willfulness determination. It contained nothing related to the penalty amount or the IRS penalty mitigation guidelines. I.R.M. 4.26.16-2.

maximum 50% penalty was assessed because the IRS found that the Mitigation guidelines contained in the Internal Revenue Manual did not apply. I.R.M. 4.26.16.4.6.1 (2008). The mitigation guidelines contain four criteria. The IRS specifically found that Rum did not meet the following criteria for mitigation: "the IRS did not sustain a civil fraud penalty against the person for an underpayment of tax" and "the person cooperates with the IRS." App. 78a-86a.

The first requirement Rum did not have a fair chance to argue with IRS appeals because he thought that the IRS proposed a 50% penalty because he did not fully agree to the tax exam. He was not alerted to the reasons for the 50% penalty amount. The second finding was contrary to the factual determination of Agent Kerkado who found Rum to be fully cooperative. Discovery was conducted in the district court case of the Agents. Agent Kerkado testified in deposition that she did not actually consider mitigation of the penalties other than the deal she offered Rum. *Id.*

On November 30, 2018, Petitioner and Respondent filed competing motions for summary judgment. App. 11a. On summary judgment, Petitioner tried to convince the district court to review evidence not in the administrative record to determine whether the amount of the penalty assessed was proper de novo under the law. *Id.* The primary basis for this decision was that Rum was misled and not aware of the reason for the assertion

of the 50% maximum penalty until after the assessment. Rum did not receive an 886-a or an explanation of why the penalty was 50% among other issues with the examination. *Id.*

On April 10, 2019, the district court judge referred the action to the magistrate for report and recommendation. A report and recommendation was filed on August 2, 2019. *Id.* This report and recommendation did not properly consider whether not revealing to Rum the reasons for the penalty amount prior to his administrative appeal entitled him to de novo review, though properly raised. Petitioner filed objections to the report and recommendations on August 16, 2019, and the district court filed an order adopting the report and recommendation on September 13, 2019. *Id.*

Petitioner appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the decision of the district court on April 23, 2021. App. 3a. The Eleventh Circuit mischaracterized Rum's argument so as to create a strawman and also did not properly consider whether Petitioner's due process rights were violated such as to merit going beyond the administrative record. App. 23a-28a. Petitioner filed a motion for panel rehearing and rehearing en banc on June 15, 2021. The Eleventh Circuit denied rehearing on July 22, 2021. App. 90a.

REASONS FOR GRANTING THE WRIT

I. Nobody Really Knows When Courts Are Allowed to Review Agency Action De Novo

Nobody really knows when courts can review de novo in proceedings contesting the lawfulness of an agency action. As a result, seemingly courts only look outside the agency record when it benefits the judge's preconceived political ideology on a hot-button issue. The courts and judicial confidence would benefit from applicable standards regarding when a court is permitted to peek beyond the agency record and look at agency decisions de novo.

As a general matter, a court's review of agency action is limited to the record before the agency at the time of the agency action. *Camp v. Pitts*, 411 U.S. 138 (1973). The original standard for when a court may go beyond the record was first discussed in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). *Overton Park* dealt with whether the Secretary of Transportation was permitted to construct a highway through a park in central Tennessee and what standard of review should apply to the agency's decision to construct the highway. In analyzing de novo review under 5 U.S.C. § 706(2)(F), the Court explained that de novo review of an agency is authorized under two circumstances, (1) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate" or (2) "when issues that were not before

the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Id.* at 415. The prong that has led to so much confusion is the first.

As a result, the Court opined on what did not constitute inadequate factfinding procedures only a few years later in *Camp v. Pitts*, 411 U.S. 138 (1973). *Pitts* is about the denial of an application to organize a new bank in Hartsville, South Carolina. *Id.* at 138. In *Pitts*, the Comptroller of the Currency reviewed the application and found, "the factors in support of the establishment of a new national bank in this area are not favorable." *Id.* at 138-39. Reconsideration was requested and the Comptroller issued another cursory response denying the application. *Id.* In response, the applicant sued in district court. The court of appeals found that the basis for the decision to deny the application was insufficiently stated such that it frustrated judicial review. The court of appeals ordered the case returned for trial de novo.

This Court found it was improper for the district court to hold a de novo trial. De novo review is improper when the agency "inadequately explained [its] decision." *Id.* at 142. Rather, if the agency's failure to explain its action frustrates effective judicial review, the remedy is to obtain from the agency additional explanations. *Id.* "If [the agency] finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated." *Id.* at 143. Thus, any reviewable action for which an agency does not

explain the reason for its decision should simply be vacated and remanded to the agency to articulate a reason for its decision.

Since *Pitts*, the Court has repeatedly held that failure to explain agency action does not empower the district court to conduct de novo review. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984). However, the Supreme Court has never discussed what circumstances would create inadequate factfinding procedures that would require de novo review. In *Overton Park*, the Court suggested that a "strong showing of bad faith or improper behavior" might allow extra-record discovery in cases on the ordinary arbitrary and capricious review. 401 U.S. at 420.

The Circuits have come up with their own sets of standards under which de novo review of agency action is applicable. The D.C. Circuit identified eight circumstances in which extra record evidence is permissible:

> (1) When agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs

> more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is a t issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989).[2] The Ninth Circuit held that there are four circumstances under which a court may consider extra record evidence:

> (1) If admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4)

[2] These circumstances have questionable basis in law as some of them seem to contradict the holding in *Florida Power & Light Co.*, decided only four years earlier, and *Pitts*. The D.C. Circuit has not expressly disavowed *Yeutter*; however, in subsequent decisions, the D.C. Circuit has applied different standards. *See IMS, P.C. v. Alvarez*, 129 F.3d 618 (D.C. Cir. 1997).

> when [a party] makes a strong showing of agency bad faith.

Lands Council v. Forester of Region One of the United States Forest Serv., 395 F.3d 1019, 1030 (9th Cir. 2004). The Eleventh Circuit in this case did not state any circumstances under which de novo review would be applicable but merely stated the arguments did not merit de novo review. *United States v. Rum*, 995 F.3d 882, 895 (11th Cir. 2021).

Throughout the courts below, Rum has argued for the application of *Porter v. Califano*, 592 F.2d 770, 782-84 (5th Cir. 1979). In *Porter*, the court ordered a de novo hearing on the merits of the agency action in the district court. In *Porter*, the plaintiff was suspended after accusing her superiors of corruption. The factfinding procedures were conducted by the individuals who she accused of corruption. *Id.* at 782. These individuals recommended her suspension. When she administratively appealed her suspension, the central agency investigator failed to interview persons who could corroborate the plaintiff's testimony and did not confront her accusers. The plaintiff was not allowed a hearing or to cross-examine her accusers. *Id.* The court found the process "inadequate in the instant case because the biased or otherwise inadequate initial fact-finding process was not cured by a subsequent impartial and full review in the agency." *Id.* at 783.

In 2019, this Court affirmed a case in which the district court went beyond the agency record, but did not expound on the standards a court is to apply in determining when extra-record evidence is available. In *Department of Commerce v. New York*, 588 U.S. ___; 139 S. Ct. 2551 (2019), this Court affirmed the decision that the Secretary of Commerce's decisions to reinstate the citizenship question on the 2020 census was arbitrary and capricious because the decision was pretextual. Notably, the district court allowed extra-record evidence because the challengers "had made a strong preliminary showing that the secretary had acted in bad faith." 139 S. Ct. at 2564 (citing *Overton Park*, 401 U.S. at 420). This Court upheld the district court's decision to go beyond the record based on the fact that the agency's reasons for the decision were pretextual. This Court found that review of extra-record evidence was ultimately merited. The Court amongst others, weighed the fact that the Secretary of Commerce actively solicited another agency to request the reassertion of the citizenship question in the census to determine that the reasons given for the agency action were pretextual. *Id.* at 2575. The dissent to *Department of Commerce v. New York* focused on this issue of using extra record evidence and argued that the district court should not have gone beyond the agency record. *Id.* at 2580 (J. Kavanaugh dissenting).

As a result of this confusion, district and circuit courts do not know how or when to go beyond

the record. Because the *Overton Park* exception is narrow, courts rule almost always to not allow extra-record evidence. *See California Trout v. FERC*, 572 F.3d 1003, 1021-22 (9th Cir. 2009); *GA Aquarium Inc. v. Pritzker*, 134 F. Supp. 3d 1374 (N.D. Ga 2014); *USA Group Loan Servs. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996). However, this tendency frustrates judicial oversight in cases in which the agency does something wrong. It is Petitioner's position that this exception to the arbitrary and capricious review is applicable when the procedures deny due process rights or are fundamentally unfair. "Inadequate factfinding procedures in an agency adjudication," can only mean some critical procedural error that deprived an individual of her rights, as was the case in *Porter v. Califano* and the present case.

Overall, the lack of guidance on when the exception applies has bred confusion for the courts. For instance, the district court in this case principally relied on extra-record evidence in determining that it could not rely on extra-record evidence to evaluate the agency action. App. 71a-79a. The Eleventh Circuit ignored Rum's argument that he was not made aware of the reasons for the agency's decision prior to his informal appeals conference. Instead, it pigeonholed the argument and set up a strawman that the agency did not disclose certain provisions of the Internal Revenue Manual upon which it relied. App. 25a-26a. While it is accurate that the agency did not disclose the Internal Revenue Manual provisions that its agents

relied on, Rum's main argument was that he was denied a fair informal appeal at the administrative agency because no one told him the basis for the agency's decision.[3]

The de novo review exception in *Overton Park* is a necessary exception to arbitrary is capricious review. Without de novo review of agency actions, agencies could deny persons their constitutionally guaranteed rights, then hide behind arbitrary and capricious review and the "rational reason" standard. So long as the agency could find a rational reason for its action, it would not be overturned. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983).

Rum has argued all along that de novo review is applicable when there are serious issues with the factfinding procedures such that basic principles of fairness or due process are violated, consistent with *Porter v. Califano*. If this Court determines this question does not merit review, this Court should at least remand this proceeding for the Eleventh

[3] This is essentially a due process argument, though not framed exactly that way in Rum's briefing. Rum was also denied a fair opportunity to contest the willfulness determination at the agency, but because courts, under 31 U.S.C. 5321(b)(2), have interpreted the willfulness determination to be subject to de novo review by the courts, there is no issue with respect to the willfulness determination. *See United States v. Williams*, 489 Fed. Appx. 655 (4th Cir. 2012). However, Rum lost the opportunity to contest the penalty amount at the agency, not ordinarily subject to trial de novo.

Circuit to consider the argument that Rum was not appraised of the reason for the penalty amount prior to his informal appeal with the agency and if that entitles him to de novo review.

II. Rum Is Likely to Win on Appeal

Rum challenged the fundamental fairness of his informal administrative appeal with the IRS. Specifically, the IRS did not articulate a reason for why it charged Rum a 50% penalty to Rum prior to, during, or after the informal appeal conference until litigation in this case. App. 10a. The last communication he received prior to Letter 3709 granting him informal appeal rights indicated he was charged a 50% penalty because he did not agree to a related tax examination. App. 86a. The Letter 3709 did not itself give any indication why he was charged a 50% penalty as opposed to another penalty amount. As a result, he did not know the basis for the 50% penalty prior to his informal appeal conference. Further, the administrative record clarifies that the reason for the 50% penalty was never discussed with Rum prior to the administrative decision.

In lower courts, Rum requested de novo review of the penalty amount, consistent with *Porter v. Califano*. 592 F.2d 770, 783 (5th Cir. 1979) ("Rather we find the process inadequate in the instant case because the biased or otherwise inadequate initial fact-finding process was not cured by a subsequent impartial and full review in the

agency"). What *Porter* essentially found was that a due process violation in the agency can be cured by de novo review in the courts. "[W]e affirm the lower court's denial of Porter's due process claim, but only on the ground that the provision of de novo judicial review hearing the federal court satisfies Porter's 5th Amendment right to due process in this case." *Id.* at 785.

Due Process is the right to be heard, at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Due Process requires notice that is "reasonably calculated, under all circumstances, to apprise interested parties and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "This includes a written statement by the factfinder as to the evidence relied on and reasons" for the decision. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 565 (1972)).

Rum did not primarily argue in this case that due process should result in a remand to the agency. This was because he had a pending lawsuit against several IRS agents involved in his examination at the agency in an unrelated case. *Rum v. United States*, Docket No. 8:18-cv-2714 (M.D. Fla Nov. 3, 2018). Rather, Rum argued that bad conduct from the agency merited de novo review. This bad conduct amounted to a due process violation.

Rum was never appraised of the reason for the 50% penalty prior to litigation in this action. In fact, he was misled as to what the actual reasons were for his penalty assessment. App. 25a-26a. Rum was told that the penalty was because he did not fully agree to the income tax examination. App. 39a. In reality, the reason Rum was assessed a maximum penalty was because he did not qualify for mitigation under Internal Revenue Manual guidelines. App. 46a. As a result, Rum lost the opportunity to contest the amount of the penalty at his informal appeals conference. Rum could have argued at the informal administrative appeal that he should be assessed a smaller penalty under the Internal Revenue Manual or that the IRS should impose a discretionary penalty on him less than the maximum amount. *See, generally,* I.R.M. 4.26.16-2. He lost that opportunity.

Judge Friendly listed ten required procedures guaranteed by due process. *Judge Henry Friendly*, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). These are (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) opportunity to present reasons why the proposed action should not be taken, (4) the right to present evidence , including the right to call witnesses, (5) the right to know opposing evidence, (6) the right to cross-examine adverse witnesses, (7) a decision based exclusively on the evidence presented, (8) opportunity to be represented by counsel, (9) requirement that the tribunal prepare a record of the evidence presented, and (10)

requirement that the tribunal prepare written findings of fact and reasons for its decision. Rum arguably did not have any of the five first requirements of due process at his independent appeals conference or throughout the agency. However, he unarguably lost the third requirement and did not have an opportunity to present reasons why the proposed action should not be taken at his informal appeals conference. This should amount to a due process violation and grant Rum de novo review if he wins on this appeal.

The district court and the Eleventh Circuit in this case did not consider this argument of whether Rum was provided a fair informal appeals conference. The district court plainly did not address it in its opinion. The Eleventh Circuit created a strawman argument that the Internal Revenue Manual provisions were not disclosed to him prior to the conference and struck that argument down. It stands to reason that the Eleventh Circuit could not come up with an argument for why it was ok for the IRS to not disclose the reason for the amount of penalties it was assessing. In addition, the factfinding procedures were littered with other errors raised in Rums briefs that show the procedure was biased against him.

III. Possible Circuit Splits May Justify Hearing Issues of Willfulness and Regulatory Interpretation

With regard to questions (2) and (3), there are currently many cases pending before the circuits on these issues. As a result, a circuit split may arise within the time between filing of this petition for writ of certiorari and a final determination as to whether to grant a writ of certiorari. This Court has just declined to hear *Kimble v. United States*, Supreme Court Docket No. 2019-1590, denied October 4, 2021, raising substantially the same issues as questions presented (2) and (3).

The Second, Federal, Fourth and Eleventh Circuits have found that reason to know of a reporting requirement creates a sufficient knowledge requirement to find reckless disregard for the purposes of willful failure to file an FBAR. *See United States v. Horowitz*, ___ F.3d ___, 2020 WL 6140674 (4th Cir. Oct. 20, 2020); *Kimble v. United States*, 991 F.3d 1238 (Fed. Cir. 2021); *United States v. Kahn*, ___ F.4th ___, Docket No. 19-3920 (2d Cir. 2021). This position has its roots in *Wright v. United States*, 809 F.2d 425 (7th Cir. 1987) (dealing with trust fund recovery penalties under I.R.C. § 6672 which contains a willfulness requirement). However, many of the considerations that encourage a lighter willfulness requirement in *Wright* do not apply to FBAR reporting requirements.

Under *Farmer v. Brennan*, "civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the fact of an *unjustifiably high risk* of harm that is either known or so obvious that it should be known." 511 U.S. 825, 837 (1994). The FBAR requirements have never been either known "or so obvious that they should be known." Your average prudent person does not know about foreign bank account reporting, unlike the requirement to file a tax return. *C.f United States v. Boyle*, 469 U.S. 241, 251 (1985) ("One does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due").

The circuits have used this reason-to-know standard to impute liability on individuals who do not review their tax return, who thereby, do not see a reference to an instruction to the tax return related to foreign bank accounts, which in turn contains a reference to the FBAR filing requirement. App. 57a. *Wright* itself acknowledges that it is a gross negligence standard. 809 F.2d at 427. The circuits have taken the willfulness requirement in FBARs and transformed it into a negligence standard.

Wright v. United States, is really about how a business owner cannot turn a blind eye to her business's financial woes and escape recklessness when she has reason to know of the issues. The same reasoning does not apply in the context of the FBAR and income tax returns. While a business owner is

likely to be alerted to a business's financial woes in the ordinary course of conducting business, a person who has an FBAR filing requirement may never learn of the requirement unless the IRS knocks at her door. Most people do not know how to read tax returns and cannot ascertain from them about the FBAR reporting requirements. As it stands, if the IRS prosecuted FBAR violations to the fullest extent possible under the current circuit precedent, there would be a shocking number of $100,000 or more fines on people who were only ignorant of the reporting requirement.

Additionally, the Second, Federal, Fourth and Eleventh Circuit have read the 2001 amendment to 31 U.S.C. § 5321 to supersede 31 C.F.R. § 1010.820(g). Normally, regulations and statues are read consistently. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). The regulation and the statute are not inconsistent with each other on their face. While both prescribe a different penalty range. The regulation is a subset of the statutorily imposed range. As a result, both the regulation and statute can be effectuated. Further, FinCEN has repromulgated the regulation twice: once to switch the code section and the second time to adjust for interest.

While Petitioner does not think these issues yet merit hearing before this Court. Petitioner thinks these issues were wrongly decided at the circuit court, are important and will merit hearing soon. If a circuit split arises in the time between

filing and consideration. These issues would assuredly merit hearing. FBARs reporting affect a large number of individuals and businesses. The Government has a strong interest in hearing these issues as it affects its ability to collect tax and stopped tax evasion. Citizens and residents of the United States have a strong interest in these issues being heard as many people have foreign bank accounts and are not aware of the requirements. As the world becomes more global, the issue of the standard of willfulness in the context of the FBAR will become more important as the penalties for willful failure are massive.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, vacate the judgment below and remand for further consideration.

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