No. 21-_____

In the Supreme Court of the United States

EMILY S. WILSON, AS EXECUTRIX OF THE ESTATE OF JOSEPH A. WILSON AND THE ESTATE OF JOSEPH A. WILSON,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Beginning in 1997, the Internal Revenue Service ("IRS") required the owners of foreign trusts to file an annual Form 3520, disclosing the trust's financial activities for the year. This filing requirement was set out in Form 3520 itself and its instructions, as well as a number of IRS official publications. Notwithstanding, in an effort to prevail in this litigation, the Government has now taken the conflicting position that there was no requirement for a trust owner to file Form 3520 until 2010, when the applicable Internal Revenue Code ("I.R.C." or "Code") section was amended. The Second Circuit Court of Appeals ("Court of Appeals") erroneously adopted the Government's position. The Questions Presented are:

1. Whether the Court of Appeals erred in not resolving the ambiguity in the statutory provisions of 28 U.S.C. §§ 6048 and 6677 in favor of Petitioners, as required by this Court's decision in *Gould v. Gould*, 245 U.S. 151 (1917) and other decisions of this Court following it?

2. Whether the Court of Appeals erred in not giving deference under *Chevron* or *Skidmore* to the IRS' position that it was authorized, pursuant to I.R.C. § 6048(b), to require trust owners to file an annual Form 3520?

3. Whether the Court of Appeals erred in disregarding well-established IRS policy and practice, but instead adopting the Government's litigating position that no Form 3520 was required to be filed by a trust owner until 2010, on which basis the Court of Appeals held that the 35% penalty applicable to a trust beneficiary under U.S.C. § 6048(c) applied to Taxpayer as both the owner and sole beneficiary of a foreign trust?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners hereby state that they have no parent corporation and no publicly held corporation owns ten percent (10%) or more of their shares.

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

No. 20-603

Published as 6 F.4th 432 (2nd Cir. 2021)

Emily S. Wilson, as Executrix of the Estate of Joseph A. Wilson, The Estate of Joseph A. Wilson, *Plaintiffs-Appellees, v.* United States of America, *Defendant-Appellant*

Date of Final Opinion and Judgment: July 28, 2021

United States District Court for the
Eastern District of New York

Case No. 2:19-cv-05037-BMC

Emily S. Wilson, as Executrix of the Estate of Joseph A. Wilson, The Estate of Joseph A. Wilson, *Plaintiffs, v.* United States of America, *Defendant*

Date of Final Judgment: December 20, 2019

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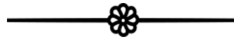
OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated July 28, 2021, is reported at 6 F.4th 432 (2d Cir. 2021) and is included below at App.1a. The decision of the United States District Court for the Eastern District of New York, dated December 20, 2019, granting Summary Judgment for the Plaintiffs, is included below at App.23a.



JURISDICTION

The Court of Appeals entered Judgment on July 28, 2021. (App.1a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

These relevant statutory provisions are reproduced in the appendix:

- **26 U.S.C. § 6048 [In effect in 2007]**
  Information with Respect to Certain Foreign Trusts (App.41a)
- **26 U.S.C. § 6048 [Effective March 18, 2010]**
  Information with Respect to Certain Foreign Trusts (App.47a)

- **26 U.S.C. § 6677 [In effect in 2007]**
  Failure to File Information with Respect to Certain Foreign Trusts (App.53a)
- **26 U.S.C. § 6677 [Effective March 18, 2010]**
  Failure to File Information with Respect to Certain Foreign Trusts (App.55a)

INTRODUCTION

This Court has long recognized that a federal agency may not change its interpretation of past administrative practices for the first time in briefs filed in an adversary proceeding solely in an effort to prevail. Yet, the Court of Appeals ignored this basic canon by endorsing the litigation position advanced by the Government even though it directly conflicted with longstanding agency policy and practice. The court's error warrants review.

The IRS, beginning in 1997, and continuing through 2007 (the year in question), unequivocally required owners of a foreign trust to file an annual information return, IRS Form 3520. Over the years, the IRS expressly and repeatedly reaffirmed this filing obligation in various publications, including the Internal Revenue Manual ("I.R.M."). Despite recognizing and enforcing this requirement since 1997, the Government, for the first time in the District Court, and later in the Court of Appeals, adopted the contrary position that Form 3520 was actually not required until 2010, when Congress amended 28 U.S.C. § 6048 (b). The Court of Appeals erroneously agreed with this position. *See, Wilson v. United States*, 6 F.4th 432,

433 (2d Cir. 2021) (the taxpayer, as the sole owner and beneficiary was only required by I.R.C. § 6048(b) to: (1) ensure that the trust filed an annual return; and (2) to file a return as the beneficiary reporting the distributions).

The court further held that: "Nothing in other parts of §§ 6048(b) and 6677 diminishes or eliminates the applicability of the 35% penalty to Wilson as a beneficiary of the trust." *Wilson,* supra, at 436. The court erred by ignoring I.R.C. § 6677(b)(2) which substituted "5%" for "35%" in the case of a penalty imposed for the violation " . . . of a return required under section 6048(b)." I.R.C. § 6677(b)(2). Further, the court erroneously held that I.R.C. § 6677 would support a penalty being assessed both against the trust owner for failure to file Form 3520 and against the trust owner (as beneficiary) for failure to file a single Form 3520. *Wilson, supra* at 437.

Since two different returns were involved, the IRS can assess a 5% penalty against the trust owner for failure to ensure that the trust filed Form 3520-A and against a beneficiary who failed to timely file Form 3520 reporting a distribution. However, there is no language in I.R.C. § 6677 which would be supportive of an IRS assessment of a 5% penalty (against the trust owner) and a 35% (against the trust owner as the beneficiary) for failure to file a single Form 3520. This is supported by the language in I.R.C. § 6677(a)(2) which provides: "the person required to file such notice or return shall pay a penalty equal to 35% . . . " (emphasis supplied). There is no support for the court's view that more than one penalty could be assessed by the IRS for the failure to file a single Form 3520.

The Court of Appeals erroneously held that the 5% penalty applicable to a violation of I.R.C. § 6048(b) only related to the owner's failure to ensure that the trust timely filed a return (Form 3520-A). *Wilson, supra* at 434. The court erroneously ignored the express language in I.R.C. § 6672(b)(2) that the 5% penalty applied to any failure to file a return required under I.R.C. § 6048(b).

The Government's about-face herein was an attempt to avoid the real issue presented: whether the penalty for a late filing by a trust owner or the penalty for a late filing by a trust beneficiary applies where the trust owner and trust beneficiary are the same person. This is an important distinction given that the Internal Revenue Code ("Code") provides very different penalties for the late filing of Form 3520 by a trust owner in comparison to the late filing of this return by a trust beneficiary. The statute is demonstrably ambiguous as to which penalty applies when the trust owner and beneficiary are the same individual.

Further, the Court of Appeals erred by finding that there was no requirement for a trust owner to file Form 3520 in 2007 (the year in question), leading it to hold that the applicable 35% penalty for the late filing by a trust beneficiary was the only applicable penalty. Under I.R.C. § 6677(a)(2), the penalty for a trust beneficiary's failure to timely file Form 3520 was 35% of the "gross reportable amount." Under I.R.C. § 6677(c)(3), the "gross reportable amount" was the amount of the non-reported distributions in the case of a beneficiary's failure relating to I.R.C. § 6048(c). In this case, the liquidating distributions amounted to $9.2 million. Treating the Taxpayer as a trust beneficiary, the IRS improperly assessed a late filing penalty

of $3,221,183, which amounted to 35% of the $9.2 million distribution.

If the reporting obligation fell on the Taxpayer as the trust owner — and not the trust beneficiary — under I.R.C. § 6677(b)(2) — the penalty would be 5% of the trust account balances at year-end. In this case, the parties stipulated that the 2007 year-end account balances of the trust were zero. (App. 19a). This led the District Court finding that there would be no penalty[1]. *See* District Court's Judgment dated December 20, 2019. (App. 17a).

The Court of Appeals' erroneous holding that the Taxpayer herein, as the trust owner, was not required to file Form 3520 in 2007. In so ruling, the court of appeals contravened authority from this Court prohibiting a federal agency from adopting a position solely in an attempt to prevail in a litigation proceeding.

Review by this Court is necessary in order to remedy these errors by the Court of Appeals.

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[1] Although there would not be a penalty for the late filing by the Taxpayer in this case, the 5% statutory penalty provision would be onerous in other circumstances. For example, if a non-reported distribution was $10,000 and the trust's year-end assets amounted to $1 million, the penalty for the trust owner's late filing would be $50,000 or five times the amount of the distribution. If the $10,000 distribution was not timely reported in Form 3520 by a trust beneficiary (who was not an owner of the trust), the penalty would only be $3,500 (35% of $10,000).

STATEMENT OF THE CASE

1. Joseph A. Wilson, deceased, established a foreign grantor trust in 2003 as the sole grantor. He was also the sole beneficiary[2]. The Complaint alleged that the singular purpose of the trust was to place assets beyond the reach of his then-wife, who he had reason to believe was preparing to file a divorce action against him. *Wilson, supra* at 433 n.1. In 2007, upon conclusion of the divorce proceedings, Mr. Wilson terminated the trust and transferred its assets (which amounted to $9,203,331) back to his bank accounts in the United States. Mr. Wilson was delinquent in filing the 2007 Form 3520, the requisite information return, to report this distribution as well as other trust activities during that year.

2. Form 3520 segregated the disclosure requirements for a trust distribution received by the trust owner from the reporting requirements for a trust distribution received by a beneficiary who was <u>not</u> an owner of the trust[3]. Part II of Form 3520 requested information from the trust owner. Part III requested

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[2] Pursuant to I.R.C. § 674, the grantor of a trust is treated as the "owner" if that person retains the power to dispose of the corpus or income of the trust. The Code also specifies other retained powers which would lead to the grantor being deemed the "owner". *See, e.g.*, I.R.C. § 676 (power to revoke the trust).

[3] Form 3520 for calendar year 1997, and the pertinent portion of its instructions, appear in App.86a. Form 3520 and its instructions on this point remained unchanged through 2007, the year in question. The 2007 Form 3520, and the pertinent part of its instructions appear as App.100a.

information from the trust beneficiary. In Part II, Line 22, the owner was asked whether the foreign trust had filed Form 3520-A in the calendar year. Form 3520-A is the annual information return for a foreign trust with a U.S. owner. Had the trust not done so, then Line 22 required the trust owner to file a "substitute" Form 3520-A (containing the same information as Form 3520-A). In either event, Lines 5 and 17 of Form 3520-A required full disclosure of any trust distribution.

3. These disclosure obligations fell solely on the owner — not the beneficiary. Where there had been a trust distribution, the information required to be provided by the owner in Part II of Form 3520 was the same as required for a beneficiary under Part III of Form 3520. The instructions to Part III of Form 3520 clearly stated that if a person was treated as the owner (and the distribution correctly reported in Part II and the trust had filed a Form 3520-A) then "do not separately disclose distributions again in Part III." In so many words, once the owner had provided this information, then no further information need be provided by the beneficiary. The trust distribution information to be provided by the owner was the same as for the beneficiary. Thus, no duplication was necessary or required. *See, Wilson supra* at 434 (" . . . the instructions for Form 3520 state 'do not separately disclose distributions again in Part III.'")

4. The Court of Appeals erroneously adopted the Government's position that until I.R.C. § 6048(b) was amended in 2010, the trust owner was not required to file an annual Form 3520. *Wilson, supra* at 433. To the contrary, the uncontested fact is that beginning in 1997, the IRS, time and time again, publicly stated

in various formats that a Form 3520 was required to be filed by the trust owner[4]. The plain language of Form 3520 itself made this clear. Further, the instructions for Form 3520, in its "Who Must File" section, stated: " . . . you are a U.S. person, who during the tax year, is treated as the owner of any part of the assets of foreign trust under the grantor trust rules."

5. The IRS made this filing requirement by the trust owner clear in its E-Notice, 2003-25, 2003 IRB LEXIS 144, which stated in pertinent part:

> Internal Revenue I.R.C. § 6048 requires information reporting with respect to certain foreign trusts. Persons subject to these information reporting rules must file Form 3520 . . . Form 3520 generally is filed on an annual basis on or before the due date for the U.S. owner's or U.S. beneficiary's income tax return.

Similar statements appeared in the I.R.M. [5] [6] I.R.M. 3.21.19.10, 2012 WL 7425702 (2012) (as in effect December 2012) (App.62a) stated, in pertinent part, in para. no. 2:

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[4] At no time prior to this litigation did the IRS alter or withdraw the publicly stated requirement that, beginning in 1997, a trust owner was required to file an annual Form 3520. The IRS took this position for the first time in this litigation.

[5] The I.R.M. is the source for IRS policies, authorities and procedures. *See* I.R.M. 1.11.5.1.2, 2017 WL 7415395 (2017) (App.61a).

[6] This Court has placed reliance on provisions in the IRM, *See Ransom v. FIA Card Servs. N.A.,* 562 U.S. 61, 72 (2011); and *Hall v. U.S.*, 566 U.S. 506, 516 (2012).

> Note: Beginning with 1997, Form 3520 and its instructions required U.S. Owners of a foreign trust to complete Part II of Form 3520 even if they did not have any transactions with the trust that were reportable on Parts I or III. However, this requirement was not explicitly stated in the Code. Recent legislation, effective for tax years beginning after March 18, 2010, now codifies this requirement that a U.S. owner of a foreign trust must file a Form 3520 every year.
>
> Reminder: Inform the U.S. Owner that they must complete the 2nd checkbox on page 1 of Form 3520, and Part II of the form.

This language was repeated verbatim in I.R.M. 3.21.19.11 (Jan. 1, 2015) (as in effect December 2014 (page 2). *(*App.65a). The important "Note" language was once again repeated in I.R.M. 3.21.19.12 (Nov. 10, 2015) (page 2) (as in effect December 2016). (App.69a).

In 2011, the IRS reconfirmed its position that, prior to the 2010 amendment of I.R.C. § 6048(b), it was authorized by that code section to require a trust owner to file an annual Form 3520. The IRS Chief Counsel Advisory Memorandum 201150029 stated: "A U.S. person treated as the owner of a foreign trust who fails to file Form 3520 <u>when required under section 6048(b)</u> will be subject to penalty for such failure only with respect to tax years beginning after March 18, 2010." (emphasis supplied). (App.77a)[7].

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[7] It is not clear why the IRS decided that no late filing penalties would be assessed against trust owners prior to the 2010 amendment. In any event, this pronouncement is fully applicable

6. Despite the IRS' repeated public statements that a trust owner was required, beginning in 1997, to file an annual Form 3520, the Government, in its opening brief filed in the Court of Appeals took the position that no such filing was required. In its opening brief, the Government repeatedly listed the Form 3520 and 3520-A filing requirements for the owner of a foreign trust and the foreign trust itself, but omitted the requirement that the trust owner was required to file an annual Form 3520. Government's Brief, pages 3-4, 6-7, 9, 14-16, 16 n.9 and 14-25. [Dkt no. 44].

7. In its Reply Brief, the Government, for the first time, took the position that there was no annual Form 3520 filing requirement for the trust owner because that requirement only came into being when Congress amended Section 6048(b) in 2010. *See* Government's Reply at 6, 8 and 16-17 n.6 [Dkt no. 87].

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to the Taxpayer herein; and, for that reason there should not have been a late filing penalty assessed against Mr. Wilson.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AS WELL AS A NUMBER OF CIRCUIT COURTS, WHICH HAVE HELD THAT A TAXPAYER CANNOT BE SUBJECTED TO A TAX PENALTY UNLESS THE STATUTE CLEARLY IMPOSES A PENALTY.

The Court of Appeals erred in concluding that I.R.C § 6048(b) is not ambiguous as applied to the Taxpayer. *Wilson, supra* at 438. I.R.C. §§ 6048(b) and 6677(b)(2) were patently ambiguous as to which penalty applied when the late filing of Form 3520 was made by a trust owner who was also the sole beneficiary. The statute fails to state, in that circumstance, whether the 5% or the 35% penalty provision applies.

In this circumstance, this Court's strongly stated maxim applies: where a statute imposing a tax penalty is not clear as to whether the penalty may be imposed, or on whom it is imposed, the ambiguity must be resolved in the Taxpayer's favor. Numerous circuit courts have applied this principle.

In a frequently cited decision, this Court held in *Gould v. Gould,* 245 U.S. 151, 153 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case

> of doubt they are construed most strongly against the Government, and in favor of the citizen.

See also United States v. Merriam, 263 U.S. 179, 188 (1923) ("in statutes levying taxes . . . [i]f the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer").

Later, in a landmark decision involving the interpretation of a tax penalty statute, *Comm'r of Internal Revenue v. Acker*, 361 U.S. 87 (1959), this Court reaffirmed this canon. At issue was whether a tax penalty could be asserted under former I.R.C. § 294(d)(1)(a) for the failure to file a declaration of estimated income tax *and* a separate penalty under former I.R.C. § 294(d)(2) for the filing of a return that substantially underestimated the tax which was due. Importantly, the Code itself did not contain language which indicated whether both penalties could be assessed. However, a Treasury regulation provided that both penalties could be assessed. Relying on that regulation, the IRS contended that both penalties applied. However, this Court rejected that position, holding that both penalties could not be assessed.

In reaching this conclusion, this Court did not find any express or implied language that authorized a penalty for underestimating a tax when no estimated return was filed. *Acker*, 361 U.S. at 91. The court proceeded to hold that "[The law is settled that 'penal statutes are to be construed strictly.'" *Id.* (citation omitted). It further held "one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Id.* (citation omitted).

The Second Circuit has similarly held. *See Exxon Mobil Corp. v. Comm'r*, 689 F.3d 191, 199 (2d. Cir. 2012) ("we are particularly mindful of the longstanding canon of construction that where 'the words [of a tax statute] are doubtful, the doubt must be resolved against the government and in favor of the taxpayer'") (quoting *Merriam*, 263 U.S. at 188).

Decisions from other circuits are consistent with *Exxon Mobil*. In *United States v. Marshall*, 798 F.3d 296, 318 (5th Cir. 2015), the court stated: "if 'the words of a tax statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.'" *Id.* (citations omitted); *Bradley v. United States*, 817 F.2d 1400, 1402-1403 (9th Cir. 1987) ("[A] tax provision which imposes a penalty is to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it."); *Christensen v. Qwest Pension Plan*, 462 F.3d 913, 919 (8th Cir. 2006) ("We agree with the [District Court's decision] that this is a statutory penalty that may not be imposed 'unless the words of the statute plainly impose it.'"); *United States v. Frame*, 885 F.2d 1119, 1142 (3rd Cir. 1989) ("If this charge were an additional penalty imposed by the Secretary . . . it would be invalid."); *Railway Labor Executives' Association v. Interstate Comm.*, 735 F.2d. 691, 701 n.10 (2d. Cir. 1984) ("If the Congress wishes to impose a tax or a penalty upon a citizen, it must act, not simply talk.").

In light of this Court's decisions holding that ambiguities in tax penalty statutes are to be resolved in the Taxpayer's favor, the ambiguity inherent within I.R.C. § 6048 as to whether the reporting requirement for a trust distribution falls under I.R.C. § 6048(b) (for a trust owner) or (c) (for a trust beneficiary) when the

trust owner was the sole beneficiary was required to be solved in the Taxpayer's favor. This would mean that the reporting obligation, and any penalty for failure to timely file Form 3520, fell on the Taxpayer as the trust owner under I.R.C. §§ 6048(b) and 6677 (b)(2).

II. IRS ACKNOWLEDGEMENT THAT IT VIEWED I.R.C. § 6048(B), PRIOR TO ITS 2010 AMENDMENT, AS PROVIDING IT WITH AUTHORITY TO REQUIRE TRUST OWNERS TO FILE AN ANNUAL FORM 3520 IS ENTITLED TO *CHEVRON*, OR AT A MINIMUM, *SKIDMORE* DEFERENCE.

As stated in the IRS Chief Counsel's Advisory Memorandum 201150029, the Chief Counsel acknowledged that it viewed I.R.C. § 6048(b) as providing it with statutory authority to require the owner of a foreign trust to file an annual Form 3520. The pertinent portion of this Memorandum stated: "A U.S. person treated as the owner of a foreign trust who failed to file Form 3520 when required under § 6048(b) . . . " (emphasis supplied). App.75a.

Earlier, the IRS reached a similar conclusion in its E-Notice 2003-25, which stated:

> Internal Revenue I.R.C. § 6048 requires information reporting with respect to certain foreign trusts. Persons subject to these information reporting rules must file Form 3520 . . . Form 3520 generally is filed on an annual basis on or before the due date for the U.S. owner's or U.S. beneficiary's income tax return. (App.58a).

This interpretation by the IRS is entitled to great weight under the *Chevron* doctrine. Yet, the Court of

Appeals disregarded it. *See Wilson*, *supra*, at 438 n.9. The court's stated reason for not deferring to this interpretation is that it applied only where "the statute is ambiguous, which we do not find." *Id.* The Court was only able to arrive at this conclusion by erroneously holding that I.R.C. § 6048(b) did not require the annual filing by a trust owner of Form 3520 prior to the 2010 amendment of I.R.C. § 6048(b).

As this Court has held, it is well acknowledged that "Administrative implementation of a . . . statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The IRS, in particular, has been charged with the broad responsibility to prescribe "all needful rules and regulations" for the enforcement of tax laws. *See Comm'r v. Engle*, 464 U.S. 206, 226-27 (1984); *see also* I.R.C. § 7803(a)(2)(A) ("The Commissioner [of the IRS] shall have such duties and powers as the Secretary [of the Treasury] may prescribe, including the power to administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party."); *Donaldson v. United States*, 400 U.S. 517, 534 (1971) ("We bear in mind that the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury . . . for the administration and enforcement of the internal revenue laws."). As the agency administering the Code, the IRS enjoys "primary interpret-

ational authority." *Cmty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (quoting *Mead Corp.*, 533 U.S. at 230, n.11).

Pursuant to *Chevron* deference, a court should not disturb the IRS' interpretation of the authority granted to it by Congress unless it is "arbitrary or capricious . . . or manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 534 (2011). There is no such inconsistency herein. Instead, the IRS reasonably interpreted I.R.C. § 6048(b) as granting it the authority to require trust owners to file an annual Form 3520[8]. This led the IRS to require Form 3520 to be filed by trust owners beginning as early as 1997.

This Court has held that an agency's authority to administer a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" and when an agency fills such a gap reasonably, and in accordance with other applicable requirements, courts accept the result as legally binding. *Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (citing *Chevron* 467 U.S. at 843).

At a very minimum, the Court of Appeals erred in failing to afford *Skidmore* deference to the IRS' interpretation of I.R.C. § 6048(b) as authorizing it to require a trust owner to file Form 3520. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), this Court held that: " . . . the rulings, interpretations and opinions of the Administrator under this Act, while not con-

[8] The Government has not taken the position in this litigation or elsewhere that its interpretation of I.R.C. § 6048(b), prior to its amendment in 2010, was for some reason wrong or misguided.

trolling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Similarly, in *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), this Court held at 556 n.20: "It is a commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight."

The Court of Appeals decision is also in direct conflict with other decisions from the Second Circuit. *See Wong v. Doar*, 571 F.3d 247, 260 (2d Cir. 2009) (even relatively informal interpretations warrant respectful consideration if given by a federal agency which "administers a large complex regulatory scheme . . . "); *In re New York Times SEC Servs Inc.*, 371 F.3d 68, 82-83 (2d Cir. 2004) (considerable weight is given to an agency's consistent, long-standing interpretation of the statute under which it operates); *Esden v. Bank of Boston*, 229 F.3d 154, 169 (2d Cir. 2000) (applying deference to IRS notice); *see also IRS v. WorldCom Inc. (In re WorldCom, Inc.),* 723 F.3d 346, 358 (2d Cir. 2013) (IRS rulings may be entitled to deference); *Nathel v. Comm'r*, 615 F.3d 83, 93 (2d. Cir. 2010) (general counsel memoranda may be entitled to deference).

The Court erred in failing to give *Chevron* or *Skidmore* deference to the IRS' stated view that it was

authorized under I.R.C. § 6048(b) to require trust owners to file an annual Form 3520.

III. The Court of Appeals Decision Runs Counter to This Court's Decision That an Agency May Not, in Litigation, Ignore or Disregard Its Own Rules and Practices.

The Court of Appeals' decision runs counter to this Court's decisions that an agency may not, in litigation ignore or disregard its own policies and practices. Yet, that is exactly what occurred herein.

In *FCC v. Fox TV* Stations*, Inc.*, 566 U.S. 502, 515 (2009), this Court held: "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books"; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 203 (1998) ("[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-157 (2012) (deference is unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question.") (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2418 (2019) ("We have therefore only rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior' one."). The Court of Appeals erred in ignoring the IRS policy and practice over many years; and instead deferring to the Government's litigation position in this case.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that this Court should grant certiorari.

Respectfully submitted,

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