No. ________

In The
Supreme Court of the United States

RICHARD COLLINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the Bank Secrecy Act's foreign bank account reporting ("FBAR") penalty, which is assessed against individuals who "willfully" fail to report to the Treasury Department the existence of their foreign bank accounts with a value of over $10,000. The Treasury Department delegated assessment authority to the Internal Revenue Service. Under the statute, the Treasury Department has two years to reduce the penalty assessment to a judgment in a *de novo* proceeding filed in federal district court.

Collins contends that this Court should review the penalty imposed in this action. The FBAR penalty imposes draconian financial punishments on "willful" failures to report foreign bank accounts. However, the term "willful" really means "reckless" in this context and the penalty is up to fifty percent of the value of the account. Such a penalty can be exceedingly harsh, as was the case here where the IRS imposed a penalty of nearly 35% of the balance of Collins's foreign accounts, which represented a substantial portion of his retirement funds.

This case is an ideal vehicle to analyze the grossly disproportionate penalty along with the complete lack of substantive proof of willfulness. The underlying penalty assessed by the Government was an overreach and certainly not warranted on these facts. The questions presented to this Court are as follows:

Whether the Government overreached by imposing any penalty on a taxpayer who owed no additional

QUESTIONS PRESENTED—Continued

income tax and voluntarily amended his tax return before the IRS alerted him to a problem.

In the alternative, whether the assessment of a $308,064 penalty is an abuse of discretion on these facts.

PARTIES TO THE PROCEEDING

Petitioner-Defendant Richard Collins ("Collins"), age 85, is a naturalized citizen who resides in Cranberry Township, Pennsylvania. Collins maintains dual citizenship with Canada.

Respondent-Plaintiff is the United States of America.

RELATED PROCEEDINGS

Both proceedings were styled as "*United States of America v. Richard Collins*":

1. U.S. District Court for the Western District of Pennsylvania, No. 2:18-cv-01069-CB

    - Docket Entry No. 86, dated February 8, 2021 ("Findings of Facts, Conclusions of Law & Order"). Available on Westlaw at 2021 WL 456962; and

    - Docket Entry No. 94, dated March 15, 2021 ("Judgment").

2. U.S. Court of Appeals for the Third Circuit, No. 21-1935

    - Opinion, dated June 6, 2022. Published at 36 F.4th 487.

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PETITION FOR A WRIT OF CERTIORARI

Richard Collins respectfully petitions this honorable Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

Both proceedings were styled as "*United States of America v. Richard Collins*":

1. U.S. District Court for the Western District of Pennsylvania, No. 2:18-cv-01069-CB
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2. U.S. Court of Appeals for the Third Circuit, No. 21-1935
    - Opinion, dated June 6, 2022. Published at 36 F.4th 487.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 2022. No petition for rehearing was sought. This Court granted petitioner a 30-day extension of time to file his petition on September 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

31 U.S.C. § 5314

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe—

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

31 U.S.C. § 5321

(a)

(1) A domestic financial institution or nonfinancial trade or business, and a partner, director, officer, or employee of a domestic financial institution or nonfinancial trade or business, willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except sections 5314, 5315, and 5336 of this title or a regulation prescribed under sections 5314,

5315, and 5336), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508, is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $100,000) involved in the transaction (if any) or $25,000. For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues. . . .

. . .

(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.

(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.

REGULATORY OVERVIEW

This is a civil enforcement action brought under the Bank Secrecy Act ("BSA"), 31 U.S.C. §§ 5312 *et seq*. & 26 U.S.C. § 6050I. The BSA requires, among other things, that individuals who have a financial interest in or signature authority over a foreign bank account with a balance over $10,000 file a TD Form 90-22.1 with the U.S. Treasury Department (the form has since been renamed FinCEN Form 114). Until recently, the form, oftentimes referred to as the FBAR form, was required to be filed by the accountholder with the Treasury Department by June 30 of the following calendar year at FinCEN's office in Detroit. As presently written, the Government has the discretion to impose a penalty of up to 50% of the balance of the account each year if the failure to file the Form TD 90.22-1 was willful. 31 U.S.C. § 5321(a)(5)(C). The statute also permits the alternate imposition of a negligence penalty. 31 U.S.C. § 5321(a)(5)(B).

Under the administrative scheme, the Treasury Department (in this case, the IRS) is permitted to impose a civil monetary penalty. 31 U.S.C. § 5321(a)(5)(C). The Treasury Department may assess this penalty within six years of the date of the transaction. 31 U.S.C. § 5321(b)(1). The Government then has two years to collect the payment or file a lawsuit in district court to reduce the civil assessment to a judgment. 31 U.S.C. § 5321(b)(2).

STATEMENT OF THE CASE

Richard Collins was born in Canada in 1937 and moved to the United States for the first time in the 1960s where he obtained a doctorate in engineering. During this period, he became a U.S. citizen. He spent eight years in the United States and then moved to France in the early 1970s. While living in France he worked as an engineer. Collins spent another decade in France. Emigrating from France in the 1980s, he spent the next roughly twelve years living in Canada and the United States, also working in the engineering field. He returned to the United States permanently in 1994. He has since retired.

When Collins first lived in France, he opened both a French bank account and a Swiss bank account. The French bank account was required by law and was also a matter of convenience; Collins lived in France and needed a French bank account. However, his employer, the French government, also required that he maintain a French bank account to deposit his wages. The Swiss bank account was opened in response to the fragility of the French economy and served as a means for him to make modest investments. During his initial period living in France, Collins visited the U.S. Embassy in Paris. In the course of this meeting, he discussed his tax reporting obligations with U.S. Embassy Officials. These officials never told him about the FBAR reporting obligation. Specifically, the officials did tell him about the foreign income exclusion (which was approximately $80,000 at that time). This was a rule that applied a credit toward U.S. income tax of certain money earned abroad. It effectively exempted Collins from filing U.S. tax returns. As he would later explain at his 2014 audit, no one at the Embassy told Collins that he had a legal requirement to report his foreign bank account to the U.S. Treasury Department on a separate form.

As noted, Collins also lived in Canada and opened a Canadian bank account in which he received his Canadian wages. Both Canada and France continued to pay Collins small amounts of what can be characterized as separation pay (*i.e.*, small payments like a pension but which began as soon as he left his position). Collins kept his Canadian and French accounts after he left those countries and those foreign accounts continued to receive these separation payments.

Collins "would periodically sweep" these retirement funds into his Swiss account. Appendix ("App.") 03. In 2002, Collins's Swiss accounts suffered a significant capital loss of about $396,000. That loss notwithstanding, by late 2007, the Swiss account had a balance of over $800,000.

In 2005, Collins engaged Dale Cowher, a certified public accountant, to prepare his federal tax return. The two met at a hotel lobby near Collins's home. Little is remembered about what transpired during the meeting and the subsequent return preparation process. However, what is not in dispute is that Cowher did not prepare a TD Form 90.22-1. Cowher also testified that he used a questionnaire for all of his clients. This document asked questions about income and deductions and guided the preparation process. It included a question about the existence of foreign accounts. At trial, the questionnaire provided to Collins in 2006 was admitted and the document was blank, meaning that it had not been completed by Collins. What is also not in dispute is that Cowher "was unaware of the [FBAR] reporting requirement and believed it to be new."[1] App. 07. Cowher continued to prepare tax returns for Collins for 2006, 2007, 2008 2009, and thereafter until roughly 2015.

In 2010, *Collins contacted Cowher* when he (Collins) discovered that he was required to report his foreign accounts to the Government. Collins paid Cowher several thousand dollars to prepare amended tax returns for tax years 2002 to 2008. As part of that review, Cowher analyzed Collins's Swiss bank records. Cowher concluded that for each year, 2002 through 2008,

[1] The requirement to file FBARs has been in place since roughly 1970 when the Bank Secrecy Act was enacted. Although this document is not a "tax" form, this form is referenced on Line 7 of the Schedule B, which asks whether the taxpayer has a financial interest in a foreign account with a balance of over $10,000.

Collins was entitled to slightly larger refunds of between $16 and $1,593.

Cowher completed the returns and they were provided to the IRS, through counsel, as part of the IRS's Voluntary Disclosure program, which is an amnesty program. Under the terms of this Voluntary Disclosure program, a taxpayer is permitted to amend his tax returns, pay the taxes due, and receives a stipulated, but far lower, penalty. The Voluntary Disclosure program only applies to taxpayers who owe taxes. Taxpayers who owe no additional taxes, but need to file additional information returns like FBAR forms, are instructed to simply file those returns and not enter the Voluntary Disclosure program. Under existing IRS guidance, taxpayers who do not enter the Voluntary Disclosure program pay no penalty.

The returns prepared by Cowher and reviewed by Collins's lawyer determined that Collins did not owe additional taxes for any of the seven years at issue. Specifically, Cowher concluded that the $396,000 capital loss from 2002 eliminated any gains that accrued in the accounts for the next six years.

Collins withdrew from the amnesty program. Consistent with IRS policy and practice, Collins, like all other taxpayers who "opted out" of the Voluntary Disclosure program was selected for audit. The subsequent civil audit determined that Collins did not owe additional income tax. However, the auditor did determine that a completely different tax was owed on his foreign bank accounts. This tax, the Passive Foreign

Investment Company ("PFIC") tax, is a tax on foreign mutual fund holdings.[2]

During the subsequent audit, the IRS assessed a PFIC tax for years 2005 through 2007, but not for 2008. Those tax liabilities were:

2005	2006	2007
$10,363.00	$7,214.00	$53,747.00

For tax year, 2008, the IRS determined that Collins was entitled to a larger refund.

When told that he owed additional taxes, Collins promptly paid the debt. App. 07. The revenue agent further determined that because Collins owed more tax, he was subject to the FBAR penalty. The IRS then computed a $308,064 penalty based on the highest value of the various accounts in 2007. It imposed a penalty of $154,032 for 2007 and a penalty of $154,032 for 2008. Tellingly, notes produced from the audit

[2] 26 U.S.C. §§ 1291 *et seq*. Under the PFIC regime, gains on the sale of foreign mutual funds and similar investments were amortized ratably over the holding period of the stock, taxed at the highest marginal rate for each year, and subject to an interest-like charge on the amortized gain that was "realized" each year, even if the "gain" was not received by the accountholder. As a result of this onerous treatment, U.S. taxpayers are subject to effective tax rates as high as 60% or more when they sell foreign mutual funds. Individuals who timely report PFICs can avoid this regime by opting for more favorable tax treatment when filing their return. *See* 26 C.F.R. § 1.1296-1(h). Thus, the tax due and owing under the PFIC regime is itself penal, and can be avoided by a timely election.

indicated that the revenue agent decided against imposing a fraud penalty on the unreported taxes. She computed the penalty based on an IRS worksheet. She also repeatedly recommended a lower penalty, but her supervisor rejected her recommendations. App. 14.

The IRS assessed this penalty administratively on August 26, 2016.[3] After the assessment was made Collins submitted a FOIA request to the IRS, which produced workpapers that included a journal of the auditor's activities during the audit. That journal revealed that she recommended that the IRS impose a lower penalty on four separate occasions, but she was overruled by her supervisor. The FOIA production also confirmed that the revenue agent recommended against imposing a fraud penalty.

The Government filed this lawsuit on August 16, 2018, 102 weeks later. During the course of discovery, Collins attempted to depose the IRS auditor about her recommendations to her supervisor. Specifically, the magistrate judge held "that the opinions, conclusions, and reasoning of IRS officials are irrelevant to the ultimate issue in dispute, *i.e.*, a determination of whether the Defendant's conduct was willful." App. 13.

After the parties completed discovery, the District Court conducted a bench trial on February 13, 2020. The IRS auditor, Cowher, and Collins testified. At the

[3] Under the Bank Secrecy Act, the Government assesses a penalty through administrative means. The statute then requires that the Government file a lawsuit to reduce the penalty to a judgment.

conclusion of the trial, the District Court ruled from the bench that Collins acted willfully. One year later, on February 8, 2021, the District Court entered written findings of fact and conclusions of law. Those findings affirmed the IRS's penalty of $308,064, both under a *de novo* standard and an arbitrary and capricious standard. App. 30-39.

It subsequently entered a judgment against Collins in the amount of $308,064, plus an additional $98,191.81, which represents interest and penalties under the Federal Claims Collection Act, 31 U.S.C. § 3717.

Collins appealed. Oral argument was held on April 27, 2022, and the Third Circuit affirmed, writing:

> Collins argues that the voluntary correction of his tax returns and application for amnesty prior to any investigation evidences a simple, honest mistake rather than willfulness. He faults the District Court for not considering that neither he, his accountant, nor his lawyer believed he owed any tax prior to the audit. He also points to his prompt payment towards the passive foreign investment company tax as evidence of good faith compliance inconsistent with willfulness. Finally, Collins contends he could not have been expected to know about the FBAR requirement since his experienced accountant was unaware of the reporting requirement and believed it to be new. (In fact, the requirement has been in place since the 1970s.)

> Collins offered various explanations over the years to justify his conduct, but the District Court found them unpersuasive. In 2010, Collins claimed he believed filing an IRS Form W-9 with his Swiss bank satisfied all reporting requirements-including those banks for which he did not file a Form W-9. In 2013, he justified his failure to report by citing his reliance on advice in the 1970s from an official at the U.S. Embassy in Paris. He next justified his non-disclosure in 2014 by explaining that his Swiss bank advised that withholding at the source absolved him of any further tax obligations. Finally, in 2015 Collins excused his failure to report by suggesting that Swiss law had prohibited him from even acknowledging the existence of his private bank accounts. The District Court found these justifications "objectively unreasonable." *Collins*, 2021 WL 456962, at *1 [App. 22]
>
> . . .
>
> Our review of the record leads us to conclude that the District Court committed no error, much less clear error, when it found that Collins's failure to disclose his foreign accounts was willful. Schedule B of IRS Form 1040 contains a check-the-box question (line 7a) that places a taxpayer on notice of this obligation.

App. at 07-08.

Collins now files this petition for certiorari.

REASONS FOR GRANTING THE PETITION

The unprompted, voluntary correction of an error on a tax return should be sufficient to negate a finding of recklessness. The Third Circuit erred by sanctioning the departure by the lower court. Pursuant to Supreme Court Rule 10(a), this Court should exercise its supervisory power by granting certiorari and correcting this error.

A. The IRS overreached by imposing such an exorbitant penalty.

The heart of the issue here is that the District Court ordered Collins to pay a penalty of $308,064 in 2021, based on his failure to file an arcane tax form some 13 years earlier—a mistake which he promptly corrected less than two years after the fact. Collins contends that the penalty is not supported by the law for several reasons.

1. Collins provided sufficient evidence to negate a finding of willfulness.

Collins contends that he provided sufficient evidence to negate his willfulness. This Court should grant certiorari and reverse the findings below.

a. Collins did not use his accounts to avoid paying taxes.

Collins was born in Canada. He did not become a U.S. citizen until later in life. He currently maintains dual citizenship with Canada.

Collins opened his foreign accounts while he was living abroad. He opened his French and Swiss accounts before he became a U.S. citizen. Although he had U.S. citizenship at the time that he had the Canadian account, Collins was living in Canada and needed the account to receive his foreign pay. There were sound reasons for opening these accounts. These foreign accounts were not opened to evade taxes.

Collins did not use a "numbered" Swiss account.[4] He treated his Swiss account just like he treated his Canadian and French accounts. This was not a case where Collins reported some accounts and failed to report his accounts from Switzerland, a secrecy jurisdiction. Rather, he failed to report any account, which suggests only that an innocent mistake was made.

Further, Collins did not deposit pre-tax dollars into his account. The Bank Secrecy Act was designed to stop taxpayers from hiding income offshore. Collins did not hide his income offshore. Rather, the only money deposited into these accounts were subject to taxes paid in foreign jurisdictions. This includes the

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[4] A numbered account is synonymous with an anonymous account.

Swiss account. Thus, these accounts were not used to evade taxes.

At trial, Cowher's client questionnaire was blank, which leads to the conclusion that Cowher and Collins never discussed whether Collins had any foreign accounts. Cowher himself was unfamiliar with the FBAR obligation, so even if he had been told that Collins had foreign accounts, it is unclear that Cowher would have known what to do with the information.

Collins immediately contacted his accountant when he first learned about this reporting requirement. Collins took immediate corrective action. "[T]he prompt correction of errors by filing amended returns and by making tax payments is relevant." *Hill v. United States*, 363 F.2d 176, 180 (5th Cir. 1966) (citing *Berkovitz v. United States*, 213 F.2d 468, 472 (5th Cir. 1954) and *Heindel v. United States*, 150 F.2d 493, 497 (6th Cir. 1945)).

Collins voluntarily stepped forward to update his tax filings with the IRS. His actions were unprompted and were undertaken to correct a perceived mistake. A heavy-handed punishment of this nature is completely unwarranted and serves only to deter future wrongdoers from correcting their mistakes, regardless of their intent. The IRS's actions are inconsistent with basic fairness. Collins urges this Court to intervene to right this unfair result.

Where a taxpayer amends his tax return voluntarily and without prompting, such correction is evidence of a mistake. Here, where the taxpayer was merely updating an information reporting status, the taxpayer should not be presumed to have acted willfully in the first instance. The taxpayer's voluntary correction should be sufficient to vitiate any finding of willfulness as a matter of law.

b. Collins believed in good faith that he owed no taxes and the FBAR penalty is designed to ensure tax compliance.

The undisputed evidence is that Collins did not know that he owed taxes. Collins's Swiss account had a $396,000 capital loss in 2002 which continued to carry forward. Collins did not owe income tax on these accounts. With respect to Collins's other foreign accounts in Canada and France, the IRS determined that the foreign retirement payments were not subject to U.S. income tax reporting.

Collins only learned that he owed any taxes when the IRS auditor determined that his accountant who prepared the tax returns omitted an additional tax on foreign mutual funds. When amending his tax returns, Collins laid out all relevant facts to Cowher, his accountant, and his attorney. Therefore, he held these beliefs about the absence of a tax liability in good faith. *Williamson v. United States*, 207 U.S. 425, 453 (1908).

Perhaps more tellingly, the IRS auditor credited these beliefs. Despite the fact that additional tax was owed and these accounts were not disclosed initially, she recommended against a fraud penalty.

In reality, the accounts were subject to a tax that was unknown to Collins, his accountant and his attorney—the PFIC tax, which itself is a draconian tax resulting in tax rates on capital gains of over 50%. Taxpayers who make a timely election do not pay this tax. The tax is only imposed on the unwitting. This rather arcane tax should not be the *sine qua non* of that used by the IRS to impose a FBAR penalty.

In a prior decision, the Third Circuit has held that the FBAR penalty is part of the "IRS's machinery for the collection of federal taxes." *Bedrosian v. United States, Dep't of Treasury, IRS*, 912 F.3d 144, 150-51 (3d Cir. 2018) (citing *United States v. Chabot*, 793 F.3d 338, 344 (3d Cir. 2015) (describing the purpose of the Bank Secrecy Act: "for tax collection, development of monetary policy, and conducting intelligence activities")). Yet, here the Third Circuit determined that a $308,064 penalty was warranted. It reasoned that his "subjective belief he owed no tax is, at best, tangential to the core inquiry of a § 5314 violation-whether a taxpayer 'clearly ought to have known' of his obligation to report his interest in foreign financial accounts." App. 09 (citing *Bedrosian*, 912 F.3d at 153).

The Third Circuit has twice held that the FBAR form is to assist with tax collection. Therefore, it seems axiomatic that a taxpayer (1) who does not believe that he owes taxes and (2) voluntarily corrects the returns without being prompted—cannot have acted willfully. This Court should exercise its supervisory powers and weigh in on this matter.

2. The rationale offered by the Third Circuit was insufficient to justify ruling in favor of the United States.

The Third Circuit concluded that there was sufficient evidence in the record to affirm the District Court's findings. Collins disagrees and urges this Court to intervene by granting certiorari.

a. Collins's failure to check "yes" on his Schedule B should not overcome a finding of willfulness.

The Third Circuit faulted Collins for not checking "yes" on Line 7 of his Schedule B. That line on the tax return asks taxpayers if s/he has a foreign account with a balance greater than $10,000. However, the IRS itself has taken the position that the response on a taxpayer's Schedule B is not enough to make and establish willfulness. The Internal Revenue Manual (the "I.R.M." or the "Manual"), which is a compendium of IRS procedures, states as follows:

> The failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved, may lead to a conclusion that the violation was due to willful blindness. The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, in itself, to establish that the FBAR violation was attributable to willful blindness.

I.R.M. § 4.26.16.6.5.1. *But see Kimble v. United States*, 991 F.3d 1238, 1242 (Fed. Cir. 2021) (Schedule B puts taxpayer on notice of FBAR requirement). This IRS guidance is particularly apt to Collins who did not take any other affirmative steps to conceal the existence of these accounts from the IRS.

Further, Cowher acknowledged that he only reviewed those lines of the Form 1040 with Collins that contained numbers. He did not review the entire document including this Line 7 of the Schedule B, which simply asks for a "yes" or "no."[5] Finally, the question on Line 7 is asked on a tax return which suggests that the requisite answer "yes" would only apply to foreign accounts with income. Collins's foreign accounts for these years did not have income. Given the context in which the question is asked (*i.e.*, on a tax return), Collins's failure to answer this question correctly should not be viewed as a sign of intent.

b. Collins's interaction with UBS AG does not provide a sufficient basis to find that he acted willfully.

The courts below found that Collins's prior history with UBS AG, the Swiss bank where Collins had his account, was sufficient to show that he was acting willfully. The District Court suggested that Collins

[5] In the criminal context, a jury need not infer that a taxpayer reviewed his tax return. *United States v. Rayborn*, 491 F.3d 513, 519 (6th Cir. 2007); *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005).

instructed his Swiss bank, UBS AG, not to mail him statements at his U.S. residence. The evidence presented below, however, was that UBS AG stopped corresponding with *all* of its U.S. clients in roughly 2003 by U.S. first class mail. It seems hard to fault Collins for continuing his banking relationship with one of the largest and oldest banks, simply because it ceased using the U.S. mail system. The bank continued to correspond with him by email, and Collins had no reason to think that the bank's changed policy was nefarious.

3. Court intervention is warranted.

Collins is a dual citizen who did not use his foreign accounts to evade U.S. income tax. Collins took the initiative to disclose his foreign accounts when his own accountant was unfamiliar with the reporting requirement. Likewise, Collins held a good faith belief that he had no additional reporting obligation based on his earlier interaction with, among others, U.S. embassy officials. Collins urges this Court to exercise its supervisory powers, grant certiorari and reconsider the rulings below.

B. In the alternative, the amount of the penalty is too high.

Simply put, the penalty imposed by the IRS against Collins was too high. As noted, the IRS assessed a penalty of $308,064, which represents roughly 34.7% of the balance of his foreign accounts as of 2007.

Such an approach was heavy-handed and not reasonable.

1. Intervention of this Court is warranted.

"Where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)). However, when "the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter." *American Power & Light Co.*, 329 U.S. at 112-13.

This Court should intervene because the penalty is "without justification in fact." Preliminarily, the IRS assessed the FBAR penalty because Collins owed a PFIC tax. This PFIC tax was a tax about which Collins, his accountant, or his lawyer had never heard. Had Collins known about the PFIC regime, he could have made a timely election and opted out of it. There is no deterrent effect to penalizing an individual for failing to pay an unknown tax.

The I.R.M. states that, for first-time FBAR nonfilers, a warning letter may be sufficient. I.R.M. § 4.26.16.6(3) ("The examiner must consider all the facts and circumstances of this case to determine if a warning letter is appropriate in this case or if it would be appropriate to determine civil FBAR penalties.").

Here: (1) Collins was a dual citizen who had opened the accounts when he lived outside of the United States; (2) the accounts held after-tax dollars; and (3) Collins believed that he owed no taxes. A warning letter should have been sufficient. Court intervention is warranted.

2. A two-sizes-fits-all approach is not warranted.

By statute, the IRS may impose a penalty of 50% of the balance of the foreign account, for all willful cases. 31 U.S.C. § 5321(a)(5)(C)(i)(II). The I.R.M. states the IRS will impose a 50% penalty in such circumstances. I.R.M. § 4.26.16.6.5.3. If the IRS determines that mitigation is warranted, it imposes a lower penalty. Mitigation is warranted where:

> a. The person has no history of criminal tax or BSA convictions for the preceding 10 years and has no history of prior FBAR penalty assessments.
>
> b. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose.
>
> c. The person cooperated during the examination.
>
> d. IRS did not determine a fraud penalty against the person for an underpayment of income tax for the year in question due to the failure to report income related to any amount in a foreign account.

I.R.M. § 4.26.16.6.6.1(2).[6] The I.R.M. further provides:

> The examiner may determine that a penalty under these guidelines is not appropriate or that a lesser penalty amount than the guidelines would otherwise provide is appropriate or that the penalty should be increased (up to the statutory maximum).

I.R.M. § 4.26.16.6.7. However, the mitigated penalty is also a formulaic calculation. Unlike the non-mitigated penalty, the instructions for this penalty computation do not appear in the Manual. In this case, the revenue agent testified that "there was an Excel workbook that was used to calculate the mitigated willful penalties." None of the subjective factors listed above were considered in other than a purely binary fashion. However, the Manual grants discretion to the revenue agent subject to the approval of his/her supervisor. *Id.*

The IRS is vested with discretion to impose a penalty. Discretion invariably means a fact-specific analysis. However, the trial testimony revealed that the IRS utilized a two-step process to determine if the taxpayer merits "mitigation." If the answer is yes, it applies a mitigated penalty, which is also a pre-calculated amount. The two-sizes-fits-all approach is not warranted. Where the statute gives the agency discretion, it should be utilized.

Further compounding the error was the FOIA records showing that the revenue agent's discretion

[6] Collins met all four criteria for mitigation.

was disregarded. Records produced in the FOIA request reveal that the revenue agent repeatedly requested that her group manager impose a lower penalty. App. 14. The group manager refused this request. In its opinion, the Third Circuit stated that the penalty was mitigated further. It wrote: "Collins still received a penalty determination well below the original mitigated value." *Id.* However, the panel's conclusion is not correct. The revenue agent testified that the penalty amount was a figure that she computed on her Excel worksheet, not the one that she believed should have been imposed. Transcript (2/13/20) at pp. 48-49.

The Manual suggests that the revenue agent is to be afforded discretion, yet that did not happen here. The Third Circuit noted the IRS does not act arbitrarily when it follows the Manual (App. 14), yet the Court of Appeals affirmed an agency action that did not follow the I.R.M. Court intervention is warranted.

3. The District Court should have granted Collins discovery into the computation of the penalty amount.

The Government selected what information would be included in the administrative record. One of the challenges that Collins faced through the District Court litigation was that the administrative record was defined by the plaintiff. During discovery, Collins issued a Rule 30(b)(6) deposition notice to the IRS seeking information as to how the FBAR penalty was computed. The magistrate judge precluded Collins from collecting discovery as to what factors the IRS considered when it rejected the revenue agent's recommendations. Further, at trial, the District Court issued an order *in limine* excluding this evidence. The Government was able to justify its version of the events because the record was one-sided.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971), this Court wrote:

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Id. "Neither this Court nor the lower courts has ever read *Overton Park* to limit the 'full administrative record' to those materials that the agency unilaterally decides should be considered by the reviewing court." *In re United States*, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting). "[J]udicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record. Effective review depends upon the administrative record containing all relevant materials presented to the agency, including not only materials supportive of the government's decision but also materials contrary to the government's decision." *Id.*

On review, the Court of Appeals reasoned that the "supervisor was empowered to reject the revenue agent's proposal as too low before the agent selected an appropriate penalty." App. 14. However, Collins was denied the opportunity to discover any information from the decision-maker him/herself.

Collins was plainly entitled to information about and upon which factors the IRS relied to impose this significant penalty. Collins could have advanced different arguments about the reasonableness of the penalty before the District Court to challenge the penalty if he had received this information. Certiorari is warranted.

CONCLUSION

The IRS did not meet its burden of proof at trial. Collins received reliable advice in the 1970s upon which it was reasonable for him to continue relying, especially since the accounts only held after-tax dollars and his Swiss account had generated a large capital loss. As noted, Collins voluntarily stepped forward to update what he believed was as a purely information reporting violation. Under the circumstances, a penalty letter was warranted. Certainly, Collins should not have been forced to pay a penalty of 34.7% of his foreign retirement accounts.

Collins is a retiree and the IRS seeks to take a grossly disproportionate amount of his retirement funds solely because he failed to disclose bank accounts which did not have taxable income. *See Bajakajian v. United States*, 524 U.S. 321, 333 (1998) ("The harm that respondent caused was also minimal.

Failure to report his currency affected only one party, the Government, and in a relatively minor way.").

The IRS imposed this penalty because Collins owed taxes on foreign mutual funds, *i.e.*, PFICs. This was a separate tax, other than the income tax, about which Collins, his accountant, and his attorney had never heard. Had Collins heard of this tax, he could have timely elected out of paying the lion's share of the amount due. Instead, the IRS has obtained a significant windfall of tax dollars because Collins did not make a timely election. It then imposed the FBAR penalty because of this PFIC tax. Penalties like this should be reserved for instances where there is fraud or evasion.

The result here is unfair and unreasonable and inconsistent with the recommendations of the IRS revenue agent who audited Collins. Collins urges this Court to grant certiorari.

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