No. 25-680

In the Supreme Court of the United States

BERNARD T. SWIFT, JR. AND KATHY L. SWIFT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 6751(b)(1) of the Internal Revenue Code, 26 U.S.C. 6751(b)(1), provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary [of the Treasury] may designate."

The question presented is:

Whether supervisory approval must be obtained before the Internal Revenue Service formally communicates a proposed penalty to the taxpayer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 144 F.4th 756. The order of the tax court (Pet. App. 32a-111a) is reported at T.C. Memo. 2024-13.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2025. A petition for rehearing was denied on September 10, 2025 (Pet. App. 112a-113a). The petition for a writ of certiorari was filed on December 9, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Our Nation's income taxes are "based on a system of self-reporting," which "depends upon the good faith and integrity of each potential taxpayer." *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975). If a taxpayer underpays his taxes due to "[n]egligence" or the "substan-

tial understatement of income tax," a 20% penalty applies. 26 U.S.C. 6662(a), (b)(1), and (2). The Secretary of the Treasury is authorized "to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by" the Internal Revenue Code, 26 U.S.C. 1 *et seq.* 26 U.S.C. 6201(a). "[A]ssessment" is a ministerial function: It refers to "the calculation or recording of a tax liability," which triggers various methods to collect the tax. *United States* v. *Galletti*, 541 U.S. 114, 122 (2004); see 26 U.S.C. 6203.

Some tax penalties, including the ones here, are subject to the Code's deficiency procedures. See, *e.g.*, 26 U.S.C. 6211-6215, 6665(a). Under those procedures, when the Internal Revenue Service (IRS) determines that the taxpayer owes more tax than he reported—*i.e.*, that there is a "deficiency," see 26 U.S.C. 6211—it may "send notice of such deficiency to the taxpayer," 26 U.S.C. 6212(a). A taxpayer may seek redetermination of the deficiency in the tax court. 26 U.S.C. 6213(a). If the taxpayer does so, the deficiency "shall be assessed" once the tax court's decision becomes final. 26 U.S.C. 6215(a). If the taxpayer does not do so, the deficiency "shall be assessed" 90 days after the notice of deficiency. 26 U.S.C. 6213(a) and (c).

The Code imposes a supervisory-approval requirement on the assessment of most penalties. With exceptions not relevant here, "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary [of the Treasury] may designate." 26 U.S.C. 6751(b)(1). Section 6751(b)'s supervisory-approval re-

quirement applies both to penalties that are subject to the Code's deficiency procedures and to those that are not. *Kroner* v. *Commissioner*, 48 F.4th 1272, 1280 (11th Cir. 2022).

2. Petitioner Bernard Swift is an osteopathic doctor who ran a chain of urgent-care clinics and other medical businesses as a sole proprietor. Pet. App. 32a, 34a-36a. In 2010, Bernard formed a pair of "micro-captive" insurance companies in St. Kitts and Nevis using trusts benefiting his children. *Id.* at 2a-3a. Micro-captive insurance companies have a known "potential for tax evasion" because taxpayers may use "sham" transactions with companies they control to exploit a tax break for small insurance companies. *CIC Servs., LLC* v. *IRS*, 593 U.S. 209, 213 (2021). Here, the micro-captives provided purported insurance to Bernard's businesses but exhibited "irregular handling of claims," "various oddities" in their policies, and "unreasonable" premiums that "dwarfed more traditional insurance premiums." Pet. App. 20a, 33a. Those premiums, however, produced "healthy deductions for petitioners" (Bernard and his wife Kathy), which exceeded $6 million across tax years 2012 to 2015. *Id.* at 33a, 70a.

The IRS opened an examination into petitioners' tax returns. Pet. App. 70a. On December 31, 2015, a revenue agent sent petitioners' attorney a letter stating that the agent had completed his review for 2012 and 2013 and was "recommending" disallowance of the deductions and a 20% accuracy-related penalty for each year. *Id.* at 114a-115a. The letter noted that petitioners faced the "*possible* issuance" of a notice of deficiency and stated that IRS counsel "will review the issue and will make a determination." *Id.* at 115a. Four calendar days (and one business day) later—on Monday, January 4,

2016—an IRS supervisor signed a form formally approving the 20% penalty for the 2012 and 2013 tax years. *Id.* at 71a.

On March 15, 2016, the IRS issued a notice of deficiency disallowing the deductions for 2012 and 2013 and asserting the 20% penalty for both years (along with a separate 40% penalty that the government later conceded it was not pursuing). Pet. App. 72a & n.9; Gov't C.A. Br. 11. The IRS also issued notices of deficiency for 2014 and 2015 that petitioners no longer contest. Pet. App. 72a.

3. In the tax court, petitioners challenged the IRS's determination of the deficiencies and penalties for 2012 and 2013. Pet. App. 8a. The court sustained the IRS's disallowance of the deductions, finding that petitioners had not engaged in bona fide insurance transactions. *Id.* at 90a, 102a. The court also sustained the 20% penalties. *Id.* at 107a, 111a. As relevant here, the court rejected petitioners' argument that 26 U.S.C. 6751(b)(1) required the revenue agent to obtain supervisory approval before sending the December 31, 2015 letter with the penalty recommendation. Pet. App. 105a-108a.

The tax court recognized that each of the courts of appeals to have considered the question has found that supervisory approval is timely if it occurs when the notice of deficiency has not issued and the penalty has not been assessed. See Pet. App. 106a n.16. But the tax court applied its own precedent requiring supervisory approval to occur at an earlier point—before the first "formal communication" to the taxpayer expressing "a definite decision to assert penalties." *Id.* at 105a (quoting *Frost* v. *Commissioner*, 154 T.C. 23, 35 (2020); and then quoting *Belair Woods, LLC* v. *Commissioner*, 154 T.C. 1, 15 (2020)); see *id.* at 106a n.16. Even under that

standard, however, the tax court held that the IRS complied with Section 6751(b)(1) because the revenue agent's letter to petitioners' attorney did not have a "high degree of concreteness and formality." *Id.* at 107a.

4. The court of appeals affirmed. Pet. App. 1a-30a. As relevant here, the court agreed with the tax court that the supervisor's approval of the penalties was timely, albeit on different grounds. *Id.* at 21a-25a. Rather than decide whether the December 31, 2015 letter was sufficiently "formal" under the tax court's test, the court of appeals adopted "the interpretation of the statute every circuit to address the issue has adopted: Supervisory approval is required before assessment, or if earlier, before the supervisor loses discretion" about whether to approve a potential penalty assessment. *Id.* at 22a.

As the court of appeals noted, Section 6751(b)(1) focuses on assessment. The statute directs that no penalty "'be *assessed unless* the initial determination of such assessment' is approved." Pet. App. 24a (quoting and adding emphasis to 26 U.S.C. 6751(b)(1)). Supervisory approval, the court held, must therefore come before the penalty is assessed. *Ibid.* In addition, the court observed, "approval" connotes that the supervisor must also have "the discretion to give or withhold" approval, which, in cases like this one, continues at least until the notice of deficiency issues. *Ibid.* (quoting *Chai* v. *Commissioner*, 851 F.3d 190, 220 (2d Cir. 2017)); see *id.* at 25a. Here, the court held, supervisory approval came before assessment and before the notice of deficiency, so the IRS complied with Section 6751(b)(1). *Id.* at 25a.

ARGUMENT

Petitioners contend (Pet. 14) that 26 U.S.C. 6751(b)(1) requires an IRS agent to obtain his supervisor's ap-

proval before he "communicates proposed penalties to the taxpayer." The court of appeals correctly rejected that contention, and its decision is consistent with those of every court of appeals to address the question. This Court recently denied a petition for a writ of certiorari raising the same question. *Minemyer* v. *Commissioner*, 144 S. Ct. 182 (2023) (No. 23-4).* Further review is also unwarranted here, particularly given that, as the tax court held, petitioners would not even prevail under their own preferred rule.

1. The court of appeals correctly held that the IRS complied with Section 6751(b)(1)'s supervisory-approval requirement.

a. Section 6751(b)(1) provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." 26 U.S.C. 6751(b)(1). By its text, that provision "regulates the process of assessing tax penalties." *Kroner* v. *Commissioner*, 48 F.4th 1272, 1276 (11th Cir. 2022). No penalty "shall *be assessed* unless" a supervisor approves the initial determination of "*such assessment*." 26 U.S.C. 6751(b)(1) (emphases added). An IRS supervisor must therefore approve the penalties before "assessment"—*i.e.*, before the formal recording of penalty liability in the IRS's books. *United States* v. *Galletti*, 541 U.S. 114, 122 (2004).

As the court of appeals observed, the concept of supervisory "approval" also suggests that the supervisor must have "the discretion to give or withhold" approval. Pet. App. 24a (quoting *Chai* v. *Commissioner*, 851 F.3d

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* Another pending petition for a writ of certiorari raises the same question. See *Battat* v. *Commissioner*, No. 25-719 (filed Dec. 15, 2025).

190, 220 (2d Cir. 2017)). A supervisor cannot meaningfully "approve" something that she lacks discretion to disapprove. The court therefore correctly required the supervisor to give approval at a time when she had discretion to reject the proposed penalties. *Id.* at 22a.

In cases subject to the Code's deficiency procedures, the line that terminates the supervisor's discretion is generally the issuance of the notice of deficiency. At that point, the taxpayer may seek review in the tax court at any time within 90 days. 26 U.S.C. 6213(a). If the taxpayer does so, the tax court—not the IRS—will determine the amount of the deficiency (including penalties), 26 U.S.C. 6214(a), that "shall be assessed," 26 U.S.C. 6215(a). And if the taxpayer does not seek the tax court's review, the amount in the notice of deficiency "shall be assessed." 26 U.S.C. 6213(c). But until the notice of deficiency, the revenue agent's supervisor typically retains discretion to approve (or disapprove) the proposed penalties.

The supervisor undisputedly retained that discretion when she acted in petitioners' case. She signed the penalty-approval form on January 4, 2016—only four calendar days after the revenue agent's letter and two months before the notice of deficiency issued. See Pet. App. 71a; Gov't C.A. Br. 11. Because the supervisor approved the penalties before assessment, at a time when she retained discretion, the court of appeals correctly held that the IRS complied with Section 6751(b)(1).

b. Petitioners contend (Pet. 14) that supervisory approval must come "before the IRS communicates proposed penalties to the taxpayer." As the court of appeals recognized, that test has "no basis in the text of the statute." Pet. App. 23a (quoting *Laidlaw's Harley Davidson Sales, Inc.* v. *Commissioner*, 29 F.4th 1066,

1072 (9th Cir. 2022)). Section 6751(b)(1) requires approval before assessment, and it "does not make any reference to the communication of a proposed penalty to the taxpayer." *Ibid.* (quoting *Laidlaw's*, 29 F.4th at 1072).

Petitioners note (Pet. 13) that Section 6751(b)(1) requires the supervisor to approve the "initial determination" of the penalty. But that phrase refers to "*what* must be approved," not when the approval must occur. *Kroner*, 48 F.4th at 1279. Here, petitioners view (Pet. 17) the revenue agent's December 31, 2015 letter as the relevant initial determination. Even assuming that that letter could be described as a "determination," the supervisor approved *that* determination when she signed the penalty form four days later. Pet. App. 70a-71a. The supervisor thus "personally approved" "the initial determination" before the penalty was "assessed," as the statutory text requires. 26 U.S.C. 6751(b)(1). Nothing in the text supports petitioners' position that the supervisor must also have given her approval before the revenue agent first communicated with the taxpayers about the revenue agent's recommended penalty.

Petitioners claim (Pet. 14 n.1) that the Internal Revenue Manual endorses their reading. But the Manual—which reflects the IRS's internal guidance for its revenue agents—"do[es] not have the force and effect of law" and should have no bearing on the Code's meaning. *Electronic Privacy Info. Ctr.* v. *IRS*, 910 F.3d 1232, 1244-1245 (D.C. Cir. 2018). Regardless, the current Manual does not even contain the provision that petitioners quote. That provision was added in August 2021—long after the revenue agent's letter was sent to petitioners' attorney—and was deleted in October 2025. See Internal Revenue Manual 20.1.5.18.4.1 (Aug. 31, 2021); Internal Revenue Manual, Manual Transmittal

20.1.5 (Oct. 1, 2025). Consistent with the tax court's decision in *Clay* v. *Commissioner*, 152 T.C. 223, 249 (2019), that relatively short-lived provision advised revenue agents to obtain approval before "issuing any written communication of penalties to a taxpayer that offers the taxpayer an opportunity to sign an agreement, or consent to assessment or proposal of the penalty." Internal Revenue Manual 20.1.5.18.4.1(4) (Aug. 31, 2021). Given the tax court's adverse precedent, that provision is best understood as an effort to avoid litigation while the IRS (successfully) challenged that precedent in the courts of appeals, not as a sign that the IRS had acquiesced in the tax court's erroneous position.

Petitioners allude (Pet. 17; see Pet. 3-4) to legislative purpose and history, which they say reflect Congress's desire to avoid the use of penalties "as a bargaining chip." But supervisory approval also provides a check against "the imposition of erroneous penalties" before assessment, and it "disincentivizes agents from proposing improper penalties solely for the sake of negotiations" because they know that their work will be checked. *Kroner*, 48 F.4th at 1279-1280; see *id.* at 1281-1282 (Newsom, J., concurring). Regardless, no statute "pursues its stated purpose at all costs." *Stanley* v. *City of Sanford*, 606 U.S. 46, 58 (2025) (citation omitted). The court of appeals properly applied the statute that Congress wrote.

Petitioners also claim (Pet. 14) that the court of appeals should have deferred to the tax court's "expertise in federal tax procedure." But Congress has instructed courts of appeals to review tax-court decisions "in the same manner" as district-court decisions in civil bench trials, 26 U.S.C. 7482(a)(1)—*i.e.*, de novo on questions of law. Particularly after *Loper Bright Enterprises* v.

Raimondo, 603 U.S. 369 (2024), the tax court should not get deference on purely legal questions.

Finally, petitioners posit (Pet. 13) that "ambiguities in statutes imposing penalties must be resolved in favor of the individual," citing a two-Justice plurality in *Bittner* v. *United States*, 598 U.S. 85, 101 (2023). Even assuming that lenity-like considerations are relevant to a purely civil statute governing the IRS's internal procedures, petitioners identify no grievous ambiguity in Section 6751(b) to which any such canon would apply. See *Wooden* v. *United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring).

2. This case does not implicate any circuit split that might warrant this Court's review.

a. Petitioners assert (Pet. 7) that the decision below aligns with a decision of the Ninth Circuit but conflicts with decisions of the Second, Tenth, and Eleventh Circuits. According to petitioners (Pet. 7-10), the Second and Tenth Circuit require supervisory approval before a notice of deficiency, the Eleventh Circuit permits approval up until assessment, and the Fifth and Ninth Circuits adopt a "middle ground" that requires approval to occur when the supervisor retains discretion to disapprove the proposed penalties.

Even if that were an accurate summary of the courts of appeals' positions, this case would not implicate the asserted conflict. The supervisor here approved the penalties months before either the notice of deficiency or assessment, at a time when she undisputedly retained discretion to reject the proposed penalties. See p. 7, *supra*. The approval was therefore proper under any of the circuit rules that petitioners identify.

Petitioners instead endorse (Pet. 12-14) the position of the tax court and a Ninth Circuit dissent. But this

Court does not typically grant review to resolve disagreements within a court-of-appeals panel or between the courts of appeals and the tax court. See Sup. Ct. R. 10(a) (identifying a conflict between the "United States court[s] of appeals" as a potential basis for certiorari). Congress subjected the tax court's decisions to de novo review on legal questions by the courts of appeals, just like district-court decisions in civil bench trials. See 26 U.S.C. 7482(a)(1). Here, that process has worked as intended, with the courts of appeals uniformly rejecting the tax court's (and petitioners') view about the timing of supervisory approval.

b. In any event, petitioners' claim of a circuit conflict is mistaken. As the court of appeals recognized, "every circuit to address the issue has adopted" the rule that "[s]upervisory approval is required before assessment, or if earlier, before the supervisor loses discretion." Pet. App. 22a; see *id.* at 22a n.8.

The Second Circuit first confronted the question in *Chai*, *supra*. Like the decision below, the Second Circuit recognized that, "[i]f supervisory approval is to be required at all, it must be the case that the approval is obtained when the supervisor has the discretion to give or withhold it." *Chai*, 851 F.3d at 220. For cases subject to the Code's deficiency procedures, the court observed, "the truly consequential moment of approval is the IRS's issuance of the notice of deficiency." *Id.* at 221. In a deficiency case, the court "h[e]ld that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency." *Ibid.* That tracks the holding in the decision below. Pet. App. 25a & n.10.

As petitioners recognize (Pet. 10), the Tenth Circuit has adopted the same rule in an unpublished opinion.

See *Minemyer* v. *Commissioner*, No. 21-9006, 2023 WL 314832, at *4-*5 (Jan. 19, 2023), cert. denied, 144 S. Ct. 182 (2023). That court was "persuaded by the Second Circuit's reasoning and h[e]ld that with respect to civil penalties, the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency." *Id.* at *5. Petitioners claim (Pet. 10) that the Tenth Circuit took a "different" approach in *Roth* v. *Commissioner*, 922 F.3d 1126 (2019). But that case presented a distinct question about which of several communications counted as the "initial determination." *Id.* at 1130. As *Minemyer* recognized, that case "has no bearing" on the timing question. 2023 WL 314832, at *4 n.5.

The Ninth Circuit adopted the same legal rule in *Laidlaw's*, *supra*. In language that the decision below quoted with approval, Pet. App. 24a, *Laidlaw's* "h[e]ld that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment." 29 F.4th at 1074. The penalty in *Laidlaw's* was not subject to the Code's deficiency procedures, see *id.* at 1071, so *Laidlaw's* stated its rule in terms of the supervisor's discretion and not vis-à-vis the notice of deficiency. But the court recognized that "a notice of deficiency * * * could limit a supervisor's discretion to prevent the assessment of a penalty," *id.* at 1072, just as the court of appeals held here, Pet. App. 24a-25a.

The Eleventh Circuit's rule is likewise consistent with the decision below. In *Kroner*, that court held "that the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty

assessment before [the IRS] assesses those penalties." 48 F.4th at 1276. *Kroner* left open whether the supervisor's loss of discretion might impose an earlier deadline because it was undisputed in that case that the supervisor had discretion whether to approve the penalties. *Id.* at 1279 n.1. That reservation has led some to characterize the Eleventh Circuit's rule as different from that of its sister circuits. See *Minemyer*, 2023 WL 314832, at *5 n.6; Pet. App. 106a n.16. But the Eleventh Circuit, without resolving the question, has since looked favorably to other circuits' precedents treating the notice of deficiency as the relevant line in deficiency cases. See *Battat* v. *Commissioner*, No. 24-13401, 2025 WL 2652443, at *7 (Sept. 16, 2025) (per curiam), petition for cert. pending, No. 25-719 (filed Dec. 15, 2025). But even if the Eleventh Circuit drew a bright line at assessment, that rule would not help petitioners. It would be even less favorable than the notice-of-deficiency line applied by the court of appeals below.

Finally, petitioners invoke (Pet. 10-11) *Wells Fargo & Co.* v. *United States*, 957 F.3d 840 (8th Cir. 2020). But that case does not address the question presented. The Eighth Circuit held that Section 6751(b)(1) did not apply to a penalty that was collected as an offset in a refund action without assessment. *Id.* at 854-855. That decision does not evidence any circuit conflict.

3. In any event, this case would be an unsuitable vehicle to address the question presented because petitioners' challenge would fail under any standard.

Petitioners claim (Pet. 14) to endorse the tax court's approach, which they paraphrase as requiring supervisory approval "before the IRS communicates proposed penalties to the taxpayer." But the tax court actually requires approval before the first "*formal* communica-

tion" expressing "a definite decision to assert penalties." Pet. App. 105a (quoting *Frost* v. *Commissioner*, 154 T.C. 23, 35 (2020); and then quoting *Belair Woods, LLC* v. *Commissioner*, 154 T.C. 1, 15 (2020)) (emphasis added). As the tax court itself concluded in this case, petitioners fail that test. *Id.* at 107a-108a. The revenue agent stated that he was "recommending" a 20% penalty and that a notice of deficiency was "*possible*." *Id.* at 114a-115a. While the court of appeals noted petitioners' arguments to the contrary, *id.* at 22a n.9, the tax court found that the revenue agent's letter was "clear that no final decision had been made." *Id.* at 108a. That factual finding is not clearly erroneous and should foreclose petitioners' contention that they would prevail under the tax court's rule.

Petitioners also claim to endorse (Pet. 12-13) Judge Berzon's dissenting opinion in *Laidlaw's*, *supra*. Her test likewise poses an insuperable barrier to petitioners' challenge. Judge Berzon would not require approval before "*any* communication to the taxpayer" but only before "an operative decision—one that will go into effect unless objected to." 29 F.4th at 1077 n.3 (Berzon, J., dissenting). That does not describe the letter here which made clear that even a notice of deficiency was merely "*possible*." Pet. App. 115a. Because the penalties were proper under the legal rules petitioners endorse, resolution of the question presented would be purely academic in petitioners' case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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