No. 26-____

# In the Supreme Court of the United States

JOSEPH SAFDIEH, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*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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## QUESTION PRESENTED

Under 28 U.S.C. § 2461(a), the government must bring "a civil action" to collect any civil penalty "prescribed for the violation of an Act of Congress," unless Congress "specif[ies]" a different "mode of recovery." Congress sometimes deviates from that default rule. For instance, Congress has made certain Tax Code penalties "assessable," meaning the IRS can collect them using its lien and levy powers without going to court. The IRS asserts that one such provision is I.R.C. § 6038(b), which provides for a $10,000 penalty—increasable to $60,000—for each year in which a taxpayer fails to report control of a foreign business.

Two courts of appeals and the Tax Court have split over whether § 6038(b) penalties are assessable. The Tax Court has repeatedly held—including in a decision joined by 16 of 17 judges—that § 2461(a)'s default rule requires the government to use a civil action to collect § 6038(b) penalties, because the Tax Code doesn't make those penalties assessable. *E.g.*, *Mukhi v. Commissioner*, 163 T.C. 150, 162 (2024). The Tax Court has expressly stated that, until this Court weighs in, the IRS cannot assess § 6038(b) penalties nationwide except in circuits, with which it disagrees, holding the penalties assessable. *Id.* at 154. The D.C. and Second Circuits disagree. Those courts hold that § 6038(b) penalties are assessable based on their notions of congressional purpose, even though they admit the Tax Code is silent on the question. App. 6a-7a; *Farhy v. Commissioner*, 100 F.4th 223, 230-31 (D.C. Cir. 2024). The question presented is:

Whether the government must use a civil action under 28 U.S.C. § 2461(a), rather than assessment, to collect I.R.C. § 6038(b) penalties.

## PARTIES TO THE PROCEEDING

Petitioner Joseph Safdieh was Petitioner-Appellee below. Respondent the Commissioner of Internal Revenue was Respondent-Appellant below.

## RELATED PROCEEDINGS

United States Court of Appeals (2nd Cir):

*Safdieh v. Commissioner of Internal Revenue*, No. 25-501 (2nd Cir. June 24, 2026) (denial of rehearing en banc)

*Safdieh v. Commissioner of Internal Revenue*, No. 25-501 (2nd Cir. Feb. 27, 2026) (opinion below)

United States Tax Court:

*Safdieh v. Commissioner of Internal Revenue*, No. 11680-20L (T.C. Dec. 5, 2024)

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## INTRODUCTION

This case presents an acknowledged and entrenched conflict over an important issue arising from government overreach and tax exceptionalism: whether the government can collect I.R.C. § 6038(b) penalties via assessment—that is, using its powerful extrajudicial levy and lien tools—or whether it must instead sue under 28 U.S.C. § 2461(a), the default rule for civil penalties where, as here, the statute doesn't provide a specific recovery mechanism. The plain-text answer, as 16 of 17 Tax Court judges have explained, is that the government must sue. And the Tax Court has established that as the nationwide rule, except in circuits that disagree, "until the Supreme Court decides the point." *Mukhi v. Commissioner*, 163 T.C. 150, 154 (2024) (*Mukhi II*) (reviewed decision). The time has come for the Court to do just that.

Section 6038(b) provides for a $10,000 penalty if a taxpayer fails to report that he controls a foreign business—a penalty increasing to up to $60,000 per year for continued failure to report. These penalties often affect low-to-moderate-income taxpayers and businesses who cannot afford expert tax advisors. Every court that has addressed the question agrees that the Tax Code doesn't provide that the IRS can assess § 6038(b) penalties. That uncontroverted proposition, combined with § 2461(a)'s civil-action default rule, means that the government must bring a civil action to collect § 6038(b) penalties. It's that simple.

Although the Tax Court has repeatedly reached that straightforward conclusion, two courts of appeals resist it based on unrestrained purposivism. Mr. Safdieh's case is the fourth time the Tax Court has held or reaffirmed, based on a plain reading of the relevant

statutes, that the IRS cannot assess § 6038(b) penalties. *See* App. 17a-19a; *Farhy v. Commissioner*, 160 T.C. 399, 405-07 (2023) (*Farhy I*); *Mukhi v. Commissioner*, 162 T.C. 177, 192-95 (2024) (*Mukhi I*); *Mukhi II*, 163 T.C. at 162. But the D.C. and Second Circuits disagree and have both reversed the Tax Court on this issue. Filling the Tax Code's silence regarding § 6038(b) penalties' assessability with purposivist notions of congressional intent, those courts hold that the IRS can assess § 6038(b) penalties. *See* App. 7a; *Farhy v. Commissioner*, 100 F.4th 223, 231 (D.C. Cir. 2024) (*Farhy II*).

The Tax Court has made clear that this conflict will not resolve until this Court intervenes. *Mukhi II*, 163 T.C. at 154. In a reviewed opinion joined by 16 of 17 participating judges, the Tax Court squarely rejected the D.C. Circuit's reasoning in *Farhy II* as an atextual misunderstanding of tax procedure and the Tax Code. The result—given the applicability of Tax Court precedent nationwide except in cases appealable to courts of appeals with contrary precedents—is that § 6038(b) penalties will be assessable only for taxpayers subject to the D.C. and Second Circuits' jurisdiction. For all others, the government can collect the penalties only through civil actions. This Court should grant review and correct the Second and D.C. Circuits' atextual answer to this important question.

**1.** Two courts of appeals have split with the Tax Court over whether the IRS can assess § 6038(b) penalties. The Tax Court holds that, because the Tax Code doesn't state that the penalty is assessable, the government must sue to collect § 6038(b) penalties, as § 2461(a)'s civil-action default rule requires. The D.C. and Second Circuits, in contrast, hold that § 6038(b) penalties are assessable. Like the Tax Court, these

courts acknowledge that the statutory text "is silent" on the question. App. 6a; *see Farhy II*, 100 F.4th at 230. Relying on a strained reading of § 6038(b)'s legislative history and their own notions of congressional purpose, those courts believe Congress must not have wanted to burden the government with having to file civil actions to collect the penalties.

The split is entrenched. After the D.C. Circuit reversed the Tax Court in *Farhy*, the full Tax Court revisited the issue using its quasi–en banc procedure. All but one judge joined in the resulting opinion, which expressly states that the Tax Court "remains convinced that [its] original decision was right" and that it will "follow [its] own honest beliefs until the Supreme Court decides the point." *Mukhi II*, 163 T.C. at 154. Thus, while the IRS can assess § 6038(b) penalties within the D.C. and Second Circuits, the Tax Court's otherwise nationwide rule means the government must sue to collect them everywhere else—just as if all the other courts of appeals had so held.

**2.** The D.C. and Second Circuits are wrong. The government must use civil actions to collect § 6038(b) penalties, because that's what the U.S. Code expressly says. Congress sometimes writes default rules that apply "absent congressional indication otherwise." *McLaughlin Chiropractic Assocs. v. McKesson Corp.*, 606 U.S. 146, 157 (2025). Section 2461(a) does just that. It provides that, when Congress enacts a civil penalty without specifying a recovery mechanism, the penalty is collectible only through a civil action. Because § 6038(b) doesn't specify a mode of recovery, § 2461(a)'s default rule applies, and the government must file a civil action to collect the penalties.

The D.C. and Second Circuits' contrary reasoning fails. Those courts concede that the Tax Code's text doesn't address whether § 6038(b) penalties are assessable. But rather than applying § 2461(a)'s default rule, those courts claimed to infer congressional intent through creative readings of legislative history and relying on their own policy sensibilities. App. 5a-16a; *Farhy II*, 100 F.4th at 230-36. That "psychoanalysis of Congress" defies this Court's repeated directives that "statutory interpretation must focus on the text." *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, 608 U.S. 608, 624 (2026).

The D.C. and Second Circuits' speculation about congressional purpose is also wrong on its own terms. Those courts claim that a Senate report shows Congress enacted § 6038(b) to make it easier for the IRS to collect the penalty, App. 7a-10a; *Farhy II*, 100 F.4th at 228, 232-33, but the report indicates only that Congress wanted the penalty to be easier to *calculate*. The circuits further surmise that Congress wouldn't expect the government to sue to collect just $10,000, App. 11a-12a; *Farhy II*, 100 F.4th at 232, even though many smaller penalties are collectible only in civil actions, *e.g.*, I.R.C. § 7269 ($500).

Although the D.C. and Second Circuits claimed not to understand why Congress would have made collecting § 6038(b) penalties harder, Congress often withholds tools to control how a statute is enforced. Just consider Congress's decision not to create private rights of action and this Court's refusal to imply them. *E.g.*, *FS*, 608 U.S. at 613-18. The courts of appeals might not have understood Congress's choice, but "[t]he text of [the statute] controls. Better to live with the mystery than to rewrite the statute." *Montgomery v. Caribe Transport II, LLC*, 608 U.S. 219, 229 (2026).

**3.** The question presented is important, and this case is an ideal vehicle. Thousands of taxpayers incur § 6038(b) penalties every year. *See* Taxpayer Advocate Service, *National Taxpayer Advocate Annual Report to Congress* 110-11 & n.63 (2023) [hereinafter Taxpayer Advocate Report]. Most are moderate-to-low-income individuals and small businesses, who often lack the resources to comply with the burdensome reporting requirements for foreign investments. *Id.* at 108. In most of those cases, the IRS automatically assesses § 6038(b) penalties only to abate them months, if not years, later. *Id.* at 110-11 & n.63. That means § 6038(b) often threatens unsophisticated taxpayers with insurmountable penalties that never should have been assessed. That oppressive scheme is not what Congress enacted. And it reinforces that Congress had good reason for requiring the government to file a civil action, and closely consider each taxpayer's circumstances, to collect § 6038(b) penalties.

The Court should grant review.

## OPINIONS BELOW

The court of appeals' opinion (App. 1a-16a) is reported at 169 F.4th 102. The Tax Court's opinion (App. 17a-20a) is unreported.

## JURISDICTION

The court of appeals entered its judgment on February 27, 2026, App. 1a-16a, and denied rehearing en banc on June 24, 2026, App. 24a-25a. On September 8, 2026, Justice Sotomayor extended the time to file a petition for a writ of certiorari to November 23, 2026. *See* 28 U.S.C. § 2101(c).This petition is timely filed on November 20, 2026. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions (I.R.C. §§ 6038 and 6201(a) and 28 U.S.C. § 2461(a)) are reproduced in the appendix. *See* App. 26a-38a.

## STATEMENT

### A. Legal background

**1.** When Congress enacts a civil penalty without "specifying the mode of recovery," the government can recover that penalty only through "a civil action." 28 U.S.C. § 2461(a). That default rule applies to penalties imposed under the Tax Code, too: As I.R.C. § 7401 confirms, the government can initiate a "civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture."

Congress can deviate from this default rule. And for many Tax Code provisions, it has. As I.R.C. § 6201(a) recognizes, the IRS has authority to assess taxes and "assessable penalties." The IRS can collect assessable penalties without filing a civil action.

**a.** The tax-collection process begins with gathering information about a taxpayer's liability. *Direct Marketing Association v. Brohl*, 575 U.S. 1, 8 (2015). The next step is an "assessment," which is "the official recording of a taxpayer's liability." *Polselli v. IRS*, 598 U.S. 432, 438 (2023). The "tax system is basically one of self-assessment," 26 C.F.R. § 601.103(a), meaning "each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment," *United States v. Galletti*, 541 U.S. 114, 122 (2004). Typically, the IRS "accepts the self-assessment and simply records the liability." *Id.* But if the taxpayer fails to file a return, or the IRS thinks the taxpayer incorrectly calculated the amount due, the

IRS must "assess[]" "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties)." I.R.C. § 6201(a).

An assessment triggers the IRS's administrative collection powers. Those powers include "the seizure of assets, the freezing of bank accounts and the creation of liens." *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1064 n.1 (3d Cir. 1991); *see Galletti*, 541 U.S. at 122. After making the assessment and determining that there's "unpaid tax," the IRS must provide notice to the taxpayer and "demand[] payment." I.R.C. § 6303(a). If the taxpayer doesn't pay, the IRS can levy the taxpayer's property to satisfy the debt. *See* I.R.C. §§ 6330, 6331. Or the IRS might file a lien, which is a legal claim against the taxpayer's property. *See* I.R.C. § 6321.

**b.** Some Tax Code provisions make clear that the IRS can assess certain penalties.

For example, chapter 68 of subtitle F addresses "assessable penalties." *See Mukhi II*, 163 T.C. at 161. Within chapter 68, I.R.C. § 6665(a) states that "additions to the tax, additional amounts, and penalties provided by" that chapter "shall be assessed, collected, and paid in the same manner as taxes."

Similarly, outside of chapter 68, some Tax Code provisions state that particular penalties "shall be assessed." *E.g.*, I.R.C. §§ 527(j)(1), 4980H(d)(1), 5000A(g)(1), 5114(c)(3), 5684(b), 5761(e). Other sections make penalties assessable by incorporating by reference chapter 68's penalty provisions. *See, e.g.*, I.R.C. §§ 1275(c)(4), 6033(p), 6043(d), 6046(f), 6046A(e), 6420(i)(2), 6421(j)(1), 6427(p)(1), 7501(b). And some statutes make penalties assessable by stating that they "shall be treated in the same manner as"

a tax, *e.g.*, I.R.C. § 9707(f), or paid "in the same manner as" a tax, *e.g.*, I.R.C. §§ 856(g)(5)(C), 857(f)(2)(A).

Section 6201(a), in turn, provides that "[t]he Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." The provision thus gives the IRS authority to assess taxes and recognizes its authority to assess "assessable penalties."

**2.** This case is about whether the IRS can assess penalties under I.R.C. § 6038(b). Section 6038(a) requires taxpayers to disclose information "with respect to any foreign business entity which [the taxpayer] controls." That information includes, among other things, "a balance sheet" quantifying all "assets, liabilities, and capital" and a list of every transaction between the business, the taxpayer, and large U.S. investors. I.R.C. § 6038(a)(1). Failure to make the disclosure can result in two penalties, which the taxpayer can avoid by "show[ing] to the satisfaction of the Secretary" that the taxpayer had "reasonable cause … for failure to furnish" the information. I.R.C. § 6038(c)(4)(B).

The first penalty is at issue here. Under § 6038(b)(1), a taxpayer who fails to disclose the required information "shall pay a penalty of $10,000 for each annual accounting period with respect to which such failure exists." If, after receiving notice, the taxpayer still doesn't disclose, the penalty may increase to up to $60,000 per tax year in which there's a violation. I.R.C. § 6038(b)(2).

Section 6038(c) provides the second penalty. If a taxpayer fails to report the required information,

§ 6038(c) reduces the foreign tax credits the taxpayer could otherwise claim. Foreign tax credits generally give a taxpayer credit against her U.S. taxes based on "taxes paid or accrued during the taxable year to any foreign country." I.R.C. § 901(b)(1).

Section 6038 "coordinat[es]" the two penalties. It provides that "[t]he amount of the reduction" in foreign tax credits in a given year, under § 6038(c), "shall be reduced by the amount of the penalty imposed by" § 6038(b). I.R.C. § 6038(c)(3).

### B. Factual and procedural background

**1.** In 2018, the IRS assessed $50,000 in civil penalties against Mr. Safdieh under I.R.C. § 6038(b) for tax years 2005 to 2009. App. 3a. When the penalties went unpaid, the IRS sent Mr. Safdieh a notice of a federal lien against his property. App. 3a. Mr. Safdieh requested an administrative hearing where he unsuccessfully contested the penalties. App. 3a-4a.

**2.** Mr. Safdieh, proceeding pro se, petitioned the Tax Court for review under I.R.C. §§ 6320(c) and 6330(d)(1). *See* App. 18a-19a. He contested the lien and explained that he had paid his federal taxes for the years in question, that he had experienced net operating losses, and that, given the COVID-19 pandemic, he had encountered difficulty obtaining the necessary records before his hearing. Administrative Record 5-6. The court eventually granted Mr. Safdieh summary judgment, holding that the IRS lacks authority to assess § 6038(b) penalties. App. 20a.

**a.** The Tax Court relied on three of its opinions—*Farhy I*, *Mukhi I*, and *Mukhi II*—holding that the IRS cannot assess § 6038(b) penalties.

While Mr. Safdieh's petition was pending, the Tax Court held in *Farhy I*, a case appealable to the D.C. Circuit, that § 6038(b) penalties aren't assessable. 160 T.C. at 405. The Tax Court later reaffirmed that holding in *Mukhi I*, a case appealable to the Eighth Circuit. 162 T.C. at 194-95. Because the Tax Court had "twice held that the Code does not permit the assessment of section 6038 penalties," it gave the IRS in Mr. Safdieh's case "an opportunity to point out any difference between this case[] and *Farhy* and *Mukhi*." App. 22a-23a. The IRS conceded that "the basic facts" of Mr. Safdieh's case "do not differ" from those in *Farhy* or *Mukhi*. App. 19a.

Shortly after the Tax Court decided *Mukhi I*, the D.C. Circuit reversed in *Farhy*, holding that § 6038 penalties are assessable. *See Farhy II*, 100 F.4th at 236. Given the reversal, the IRS asked the Tax Court to reconsider *Mukhi*. In a reviewed opinion joined by 16 of 17 participating judges, the Tax Court reaffirmed its holding that § 6038 penalties are not assessable. *Mukhi II*, 163 T.C. at 156-62. The Tax Court considered, and rejected, each of the D.C. Circuit's reasons for its contrary holding. *Id.* at 162-75.

For context, the Tax Court hears cases nationwide, and appeals go to the circuit where the taxpayer resides. I.R.C. §§ 7445, 7482(b). When an appellate court reverses a Tax Court decision—as in *Farhy II*—the Tax Court "will 'thoroughly reconsider'" its views "in the light of the reasoning of the reversing appellate court." *Mukhi II*, 163 T.C. at 154. If the Tax Court "remains convinced that [its] original decision was right," it will follow its own precedent "until the Supreme Court decides the point." *Id.* But, as "a narrow exception," in cases appealable to the court of appeals with contrary precedent, the Tax Court "will follow the

appellate court's decision." *Id.*; *see Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

The outcome, after *Mukhi II*'s definitive rejection of the D.C. Circuit's holding that § 6038(b) penalties are assessable, is that the Tax Court will "continue [its] disagreement with the D.C. Circuit in cases appealable to other circuits." App. 18a.

**b.** Because this case was appealable to the Second Circuit, the Tax Court granted Mr. Safdieh summary judgment under *Mukhi II*, reaffirming that the IRS "lacks the power to assess [§ 6038(b)] penalties." App. 19a.

**3.** The court of appeals vacated and remanded. App. 16a.

**a.** The court acknowledged that § 6038(b) is "silent as to whether the penalty is assessable." App. 6a. It nonetheless held the penalty assessable based on § 6038(b)'s "history, purpose, and structure." App. 7a.

The court thought that § 6038(b)'s legislative history "suggests that the penalty is assessable" given a Senate report that stated that the foreign-tax-credit-reduction penalty that preceded § 6038(b) was "complicated." App. 7a-12a. In the court's view, an assessable penalty would be less "complicated." App. 8a. The court also reasoned that Congress "acquiesced" to the "IRS's practice" of assessing § 6038(b) penalties by failing to question it. App. 10a.

The court then focused on what outcome would streamline the IRS's collection of § 6038(b) penalties and concluded that requiring the government to sue for § 6038(b) penalties would "disrupt the section's overall enforcement scheme." App. 13a. The court

reasoned that, because Congress provided that the § 6038(b) penalty would offset the § 6038(c) foreign-tax-credit reduction, "Congress meant for the Commissioner to be able to impose" both penalties "at the same time" through assessment. App. 13a.

Finally, the court reasoned that § 2461(a) cannot authorize the government to collect § 6038(b) penalties through civil actions because "§ 2461(a) is not in the I.R.C.," but is instead "codified in Title 28, which concerns the judiciary." App. 15a.

**b.** The court denied Mr. Safdieh's petition for rehearing en banc. App. 24a-25a.

## REASONS FOR GRANTING THE PETITION

Two courts of appeals have split with the Tax Court over whether the government must sue to collect § 6038(b) penalties. Adhering to statutory text, the Tax Court applies § 2461(a)'s default rule and holds that the government can collect § 6038(b) penalties only through civil actions, because nothing in the Tax Code makes them assessable. *Mukhi II*, 163 T.C. at 162. The D.C. and Second Circuits, in contrast, acknowledge that the Tax Code is silent about whether § 6038(b) penalties are assessable but hold that they are, based primarily on legislative history and purposive notions. App. 6a-7a; *Farhy II*, 100 F.4th at 230-31. The split is entrenched and outcome-determinative. Given the Tax Court's nationwide jurisdiction, the IRS can collect § 6038(b) penalties for taxpayers outside the D.C. and Second Circuits' jurisdiction only through civil actions.

The D.C. and Second Circuits are wrong. Section 2461(a) makes clear that, whenever Congress enacts a civil penalty without specifying its mode of recovery, the penalty can be recovered only through

civil actions. Thus, because no statute makes § 6038(b) penalties assessable or specifies a mode of recovery, the government must collect those penalties through civil actions. Rejecting that straightforward conclusion, the D.C. and Second Circuits infer from legislative history and purposivist reasoning that § 6038(b) penalties are nonetheless assessable. That atextual approach defies this Court's repeated instruction to read statutes according to their plain text. And the D.C. and Second Circuits' speculation about Congress's intent is wrong. Among other errors, those courts misconstrue the legislative history and misunderstand how § 6038(b) interacts with § 6038(c).

The question presented is important, and this case is an ideal vehicle. Every year, the IRS imposes thousands of § 6038(b) penalties on moderate-to-low-income individuals and small businesses. Many of those taxpayers lack the resources to hire tax advisors who can help ensure compliance with § 6038(a)'s complex reporting requirements—let alone afford § 6038(b)'s escalating penalties. And the IRS automatically assesses almost all § 6038(b) penalties—no matter taxpayers' reasonable explanations for their unintentional noncompliance—only to later abate the vast majority of them. But the cost and stress of seeking abatement make § 6038(b) penalties punitive even when the IRS eventually agrees the penalty never should have been assessed. That agency overreach is possible only through an atextual and purposivist reading of § 6038(b) that grants the IRS authority that Congress never gave it.

The Court should grant review and reverse.

## I. The decision below deepens an entrenched nationwide conflict over whether the government can assess § 6038(b) penalties.

The D.C. and Second Circuits hold that the IRS can assess § 6038(b) penalties. But the Tax Court holds that the IRS can recover those penalties only through civil actions. Because the Tax Court follows its own precedent, except in cases appealable to circuits with contrary precedent, the IRS can assess § 6038(b) penalties only for taxpayers in the D.C. and Second Circuits, and must sue everywhere else.

### A. The D.C. and Second Circuits hold that § 6038(b) penalties are assessable.

The D.C. and Second Circuits concede that the Tax Code doesn't say that the IRS can assess § 6038(b) penalties. But rather than understand that silence to trigger § 2461(a)'s civil-action default rule, those courts hold that the penalties are assessable.

**1.** In *Farhy II*, the D.C. Circuit acknowledged that "[t]he text of section 6038 does not explicitly say whether the penalties … are assessable." 100 F.4th at 230. The court nonetheless held—based largely on the court's views of Congress's unstated "objectives"—that the penalties are assessable. *Id.* at 231.

The D.C. Circuit's holding rested primarily on that court's policy views about what would be "more streamlined" for the IRS. *Id.* at 231-32. The court thought Congress must have intended § 6038(b) penalties to be assessable because it thought the government wouldn't want to "file lawsuits to recover from taxpayers the flat, $10,000 penalty." *Id.* at 232. The court's analysis also relied heavily on a statement in a Senate report that the preexisting "foreign tax credit penalty" in § 6038(c) "was overly 'complicated'

and rarely imposed." *Id.* at 228. The court was concerned it would be too "complicated" for the IRS to offset the foreign-tax-credit-reduction penalty in § 6038(c) by the fixed § 6038(b) penalty if the § 6038(b) penalty wasn't assessable. *Id.* at 232.

The court also thought § 6038's "'reasonable cause' affirmative defense" meant that the § 6038(b) penalty must be assessable. *Id.* at 233. As explained (at 8), noncompliance with § 6038(a) is excusable if the taxpayer shows "to the satisfaction of the Secretary" that she "'exercised ordinary business care and prudence' in attempting to adhere to her reporting obligations." *Farhy II*, 100 F.4th at 233. If the § 6038(b) penalty weren't assessable, the court reasoned, there would be no "administrative process in which the taxpayer could make a reasonable cause showing to the Secretary." *Id.*

**2.** The Second Circuit here agreed that § 6038(b) penalties are assessable. The Second Circuit likewise acknowledged that "[s]ection 6038(b)'s text is silent" on the issue. App. 6a. Still, the court concluded that § 6038(b) penalties are assessable based on the provision's "history, purpose, and structure." App. 16a.

The court began by reasoning that § 6038(b)'s legislative history "suggests that the penalty is assessable." App. 7a-12a. Pointing to same Senate report as the D.C. Circuit, the court reasoned that Congress must have wanted the IRS to be able to more easily collect penalties via assessment. App. 7a-9a. The court also noted that the IRS has assessed § 6038(b) penalties since 1982 and concluded that Congress must have "acquiesced" to the practice. App. 9a-10a.

The court also thought that requiring the government to sue for § 6038(b) penalties would "disrupt the section's overall enforcement scheme." App. 13a. In the court's view, the penalty-coordination provision "suggests that Congress meant for the Commissioner to be able to impose" both the § 6038(b) penalty and the § 6038(c) foreign-tax-credit reduction "at the same time." App. 13a-14a. And it would be "complicated" and "wasteful," the court continued, to litigate § 6038(b) penalties in district court but § 6038(c) foreign-tax-credit reductions in Tax Court. App. 14a-15a.

Finally, the court concluded that § 6038(b) penalties must be assessable because § 2461(a)'s civil-action default rule is in Title 28, not the Tax Code. App. 15a-16a.

### B. The Tax Court holds that § 6038(b) penalties are not assessable and that the government can recover them only through civil actions.

The Tax Court holds and has repeatedly reaffirmed that § 6038(b) penalties aren't assessable. In an opinion joined by 16 of 17 participating judges, the court directly rejected the D.C. Circuit's reasoning.

**1.** In *Farhy I*—the decision the D.C. Circuit reversed in *Farhy II*—the Tax Court held that the government must sue to collect § 6038(b) penalties because "[t]here is no statutory provision, in the Code or otherwise, specifically authorizing assessment of these penalties." 160 T.C. at 403.

The court noted that, under Congress's default rule, a civil penalty must "be recovered in a civil action" whenever Congress has not "specif[ied] the mode of recovery or enforcement" of that penalty. *Id.* at 406 (quoting 28 U.S.C. § 2461(a)). And "no mode of

recovery or enforcement is specified" for § 6038(b) penalties. *Id.* The court thus declined "to disturb this well-established statutory framework by inferring the power to administratively assess and collect the section 6038(b) penalties when Congress did not see fit to grant that power to the Secretary of the Treasury." *Id.* The court further noted that "Congress has explicitly authorized assessment with respect to myriad penalty provisions in the Code," "but not for section 6038(b) penalties." *Id.* at 405.

**2.** Since *Farhy I*, the Tax Court has twice reaffirmed that § 6038(b) penalties are not assessable. And it has repeatedly declined the government's requests to reverse that holding.

**a.** In *Mukhi*, a case appealable to the Eighth Circuit, the Tax Court ruled that the § 6038(b) penalties are unlawful based on its *Farhy I* holding that the IRS "lacks the authority to assess penalties under section 6038(b)" in the first place. 162 T.C. at 194.

The court declined the government's invitation to "revisit and overrule" *Farhy*. *Id.* The court noted that it "adhere[s] to the doctrine of stare decisis and thus afford[s] precedential weight" to earlier decisions. *Id.* And the court further reasoned that "the mere fact that *Farhy*" was, at the time, "currently on appeal at the D.C. Circuit [was] insufficient" reason to revisit the § 6038(b) holding. *Id.* That was because the Tax Court will "apply [its] own precedent," unless there is "a 'squarely on point' decision of the appellate court to which an appeal would lie" that "contradicts [its] own precedent." *Id.* at 194-95. But because *Mukhi* was appealable to the Eighth Circuit, even if the D.C. Circuit overruled *Farhy* (as it later would), "any ruling from

the D.C. Circuit would not be binding" on the Tax Court in resolving *Mukhi*. *Id.* at 194.

**b.** After *Mukhi I*, the D.C. Circuit decided *Farhy II*, reversing the Tax Court's holding that § 6038(b) penalties are not assessable. The Tax Court then granted the government's motion to reconsider its non-assessability holding in light of the D.C. Circuit's contrary holding. *Supra* pp. 10-11. In the resulting opinion—*Mukhi II*—the Tax Court doubled down, once again "reaffirm[ing]" that the IRS "lacks authority to assess the section 6038(b)(1) penalty." 163 T.C. at 151. Sixteen of 17 participating Tax Court judges joined the decision, which rejected the D.C. Circuit's reasoning from *Farhy II*. *Id.* at 162-75.

***i.*** The court reiterated that, to resolve whether § 6038(b) penalties are assessable, it must "look to the statute[s]," because courts should "'presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id.* at 156 (quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). And after conducting that statutory analysis, the court concluded "that the IRS does not have authority to assess the section 6038(b)(1) penalty." *Id.* at 162.

The court first held that § 6201(a), which allows the IRS to assess "taxes" and "assessable penalties," doesn't automatically make all Tax Code penalties assessable. *See Mukhi II*, 163 T.C. at 156-62. The court reasoned that § 6201(a)'s use of "assessable penalties" indicates that Congress contemplated that not *all* penalties are assessable—otherwise, "the adjective 'assessable' would be unnecessary to modify 'penalties.'" *Id.* at 157. And "[r]eading 'taxes'" in § 6201(a) to encompass all penalties, as the government urged,

"would also render superfluous the various Code provisions deeming penalties to be taxes for certain purposes." *Id.* The court thus "reject[ed]" the government's argument that § 6201(a) "authorizes the IRS to assess all exactions found in the code." *Id.* at 160.

The court next concluded that "[n]othing in the text of section 6038(b)(1) expressly authorizes the IRS to assess the section 6038(b)(1) penalty." *Id.* The court noted that, in *Farhy I*, it had "conducted a survey of other civil penalties in the Code, all of which expressly detail that the IRS may assess the penalty." *Id.* But, it emphasized, § 6038(b) "does not contain any text that approaches the assessment text in the other civil penalty statutes." *Id.* at 162.

Thus, "[i]n the absence of a specified mode of recovery" for § 6038(b) penalties, the Tax Court concluded that it must "fall back on the default rules of collection under 28 U.S.C. § 2461(a)." *Id.* And that default rule requires that the government collect the penalty through a civil action, meaning "the IRS does not have authority to assess" it. *Id.*

***ii.*** The Tax Court dismantled the D.C. Circuit's contrary reasoning from *Farhy II*.

Reiterating that "textual analysis is sufficient to conclude" that § 6038(b) penalties are not assessable, the court nonetheless proceeded to refute "the policy concerns advanced by the D.C. Circuit." *Id.* at 173.

*First,* the court rejected the D.C. Circuit's musing that the § 6038(b) penalty, set at $10,000 for an initial violation, would become "largely ornamental" if it weren't assessable. *Farhy II*, 100 F.4th at 232. The Tax Court noted that a $10,000 penalty "is comparable" with other penalties that aren't assessable. *Mukhi II*, 163 T.C. at 173. And, besides, the D.C.

Circuit's reasoning "fails to account for the accumulation of penalties over several tax years"—in *Mukhi*, over $100,000. *Id.*

*Second*, the Tax Court rejected the notion that the purported "administrative burden" on the IRS from having to coordinate the § 6038(b) and § 6038(c) penalties supports assessability. *Id.* at 168-70. For one thing, the Tax Court found that "the alleged administrative burden is overstated" given that the IRS "rarely asserts the section 6038(c) penalty." *Id.* at 168. For another, the coordination problem would be "significantly amplified" under *the D.C. Circuit's* "unworkable" framework, because § 6038(c) penalties are "subject to the typical deficiency procedures," which "create[] a whole host of obligations on the IRS." *Id.* at 165, 169-70.

The court also found the D.C. Circuit's reliance on legislative history misguided because it "rest[ed] on a misunderstanding of tax procedure." *Id.* at 164-65. In the D.C. Circuit's view, Congress intended the § 6038(b) penalty to be assessable because a "phrase in the Senate Finance Committee report" indicated that some legislators thought the preexisting foreign-tax-credit-reduction penalty was "complicated." *Id.* at 164. But, the Tax Court explained, "[w]hen read in context," the statement "appears to be directed at the unpredictable effect of the penalty," which legislators thought could sometimes be "too harsh." *Id.* And it would have been "unusual" for Congress to "resolve the 'unduly harsh' section 6038(c) penalty" by making the newly enacted § 6038(b) penalty "not subject to any pre-assessment judicial review." *Id.* at 164-65.

The Tax Court also found unpersuasive the D.C. Circuit's invocation of § 6038(c)(4)(B)'s provision that

a taxpayer's "reasonable cause" for his failure to comply with § 6038 could be "shown to the satisfaction of the Secretary." *Id.* at 165-67. "[N]othing in the statute's text," the Tax Court explained, "demands that the IRS make the reasonable cause determination after assessment of the penalty." *Id.* at 167.

### C. Only this Court can resolve the entrenched and outcome-determinative conflict.

The conflict is entrenched, and only this Court can resolve it. Until that time, § 6038(b) penalties will be assessable in the D.C. and Second Circuits but collectible only by civil action everywhere else.

As the Tax Court explained in *Mukhi II*, because it has "nationwide jurisdiction," it "takes seriously its obligation to facilitate uniformity in the tax law." *Id.* at 154. Thus, when a court of appeals reverses the Tax Court, the court will "thoroughly reconsider the problem in the light of the reasoning of the reversing appellate court and, if convinced thereby, … follow the higher court." *Id.* (quoting *Lawrence v. Commissioner*, 27 T.C. 713, 716-17 (1957)). But if the Tax Court "remains convinced that [its] original decision was right," it will continue to "follow [its] own honest beliefs until the Supreme Court decides the point." *Id.* A "'narrow exception' to this approach" is that the Tax Court will follow a court of appeals' contrary holding in a case where "an appeal would lie" to that court. *Id.*; *see Golsen*, 54 T.C. at 757. Put differently, when the Tax Court's precedent conflicts with a circuit's precedent, the Tax Court will apply its own precedent nationwide *except* in cases appealable to that circuit.

The result, given the split between the Tax Court and the D.C. and Second Circuits, is that the

government can assesses § 6038(b) penalties for taxpayers in the Second and D.C. Circuits, but it must file a civil action to collect those penalties in all other cases. That split is outcome-determinative for Mr. Safdieh. If he lived outside of the Second or D.C. Circuits, the government would have needed to bring a civil action to collect the § 6038(b) penalties.

This Court's intervention is thus necessary to restore uniformity in the nation's tax laws. The Tax Court made clear that it will continue to hold that § 6038(b) penalties are not assessable "until the Supreme Court decides the point." *Mukhi II*, 163 T.C. at 154. The D.C. and Second Circuits have likewise entrenched their views, declining to grant rehearing in *Farhy II* and below. *See Farhy v. Commissioner*, No. 23-1179, 2024 WL 2978743, at *1 (D.C. Cir. June 13, 2024); App. 24a-25a. The conflict will not resolve on its own. This Court should thus grant review to ensure that the nation's tax laws are "uniform throughout the United States," as the Constitution requires. U.S. Const. art. I, § 8, cl. 1.

## II. The D.C. and Second Circuits are wrong.

The D.C. and Second Circuits are wrong that § 6038(b) penalties are assessable. No statute authorizes the IRS to assess § 6038(b) penalties, so the government can collect them only through a civil action under § 2461(a). The Second Circuit's contrary conclusion below—like the D.C. Circuit's prior decision—ignores statutory text, relying instead on the court's purposivist divinations of congressional intent.

### A. Because Congress didn't authorize assessment of § 6038(b) penalties, 28 U.S.C. § 2461(a)'s default rule applies, and the government may collect those penalties only through a civil action.

**1.** Sections 2461(a) and 6201(a) make clear that the government must file a civil action to collect penalties unless another provision grants penalty-assessment authority. Congress sometimes writes default rules that apply "absent congressional indication otherwise." *McLaughlin*, 606 U.S. at 157. When Congress wants to override a default rule, "it can easily say so." *Id.* And, for many Tax Code penalties, Congress has done just that by expressly providing that those penalties are assessable.

Section 2461(a) states that, if Congress creates a penalty "without specifying" its "mode of recovery," the government must collect it "in a civil action." 28 U.S.C. § 2461(a). The Tax Code recognizes that default rule by confirming that the government can file a "civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture." I.R.C. § 7401.

Other Tax Code provisions show that Congress knew how to deviate from § 2461(a)'s default rule to make penalties assessable. As the Tax Court explained, "other civil penalties in the Code … expressly detail that the IRS may assess the penalty"—whether by stating they are assessable or providing that the penalty may be collected like a tax, which is assessable. *Mukhi II*, 163 T.C. at 160. And other provisions align with § 2461(a)'s default rule by requiring civil actions to collect penalties, reinforcing that there is no broad assessment authority that applies across the Tax Code. *See* I.R.C. §§ 5761(a), 7269.

Section 6201(a) confirms that only some civil tax penalties are assessable. Section 6201(a)'s text confers authority to assess "assessable penalties," not *all* penalties. *See Mukhi II*, 163 T.C. at 160. And the many Tax Code provisions making clear that particular penalties are assessable show that § 6201(a)'s reference to "assessable penalties" refers only to penalties made assessable elsewhere. Put differently, § 6201(a) grants the IRS authority to assess penalties only if another provision makes them assessable.

What's more, the substantive changes Congress enacted in § 6201(a) underscore that the provision contemplates that only some penalties are assessable. Section 6201(a)'s predecessor granted the IRS authority to assess "all taxes and penalties." Internal Revenue Code of 1939, Pub. L. No. 76-1, § 3640, 53 Stat. 1, 442. But Congress amended the statute in 1954 to restrict the assessment authority over penalties to only those that are "assessable." Internal Revenue Code of 1954, Pub. L. No. 83-591, § 6201(a), 68A Stat. 3, 767. As the Court has explained, "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren v. United States*, 593 U.S. 374, 393 (2021). The effect of § 6201(a)'s 1954 amendment is clear: it "remov[ed]" the IRS's "blanket assessment authority for all penalties." *Mukhi II*, 163 T.C. at 159. The upshot is that a Tax Code penalty is assessable only if the Tax Code makes it so.

**2.** No provision authorizes assessment of § 6038(b) penalties, so the government can collect them only through a civil action. Section 6038(b) contains no "text that approaches the assessment text in the other civil penalty statutes." *Mukhi II*, 163 T.C. at 162. It has "no text demanding that the penalty be

treated as an assessable penalty," "no text indicating the penalty should be treated as a tax," and "no text directing the taxpayer to pay the penalty in a manner like a tax." *Id.* Thus, because § 6038(b) doesn't "specify[]" a "mode of recovery" that would override § 2461(a)'s default rule, that default rule applies. *Id.* The government must collect § 6038(b) penalties through civil actions.

### B. The D.C. and Second Circuits' contrary reasoning lacks merit.

The D.C. and Second Circuits fundamentally erred by declining to engage with the plain text of I.R.C. §§ 6038(b) and 6201(a) and 28 U.S.C. § 2461(a) and thus failing to determine "the best textual reading" of those provisions, *Bowe v. United States*, 607 U.S. 13, 39 (2026). Instead, those courts relied on the atextual assumption that Congress must have wanted to make it easy for the IRS to collect § 6038(b) penalties. App. 8a-9a; *Farhy II*, 100 F.4th at 228, 232-33. That purposivist, legislative-history-oriented approach contravenes what this Court "has 'emphasized many times'": "what Congress (possibly) expected matters much less than what it (certainly) enacted." *Stanley v. City of Sanford*, 606 U.S. 46, 58 (2025). It is "mistaken to assume"—as the D.C. and Second Circuits have done—"that any interpretation of a law that does more to advance a statute's putative goal must be the law." *Id.* As § 2461(a)'s and § 6201(a)'s text makes clear, the government must sue to collect § 6038(b) penalties unless another provision grants penalty-assessment authority. The D.C. and Second Circuits provide no persuasive argument that § 6038 or any other provision does so.

**1.** The D.C. and Second Circuits invoked legislative history suggesting that the foreign-tax-credit penalty was "complicated" and reasoned that Congress must have thus wanted to make it easy for the IRS to collect § 6038(b) penalties. App. 8a; *Farhy II*, 100 F.4th at 228, 232. But "legislative history is not the law." *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 523 (2018). And even if requiring suit for § 6038(b) penalties would create an "administrative inconvenience," that wouldn't "justify departing from the statute's clear text." *Niz-Chavez v. Garland*, 593 U.S. 155, 169 (2021).

What's more, the courts of appeals misinterpreted the legislative history. "When read in context," the statement that the foreign-tax-credit penalty was "complicated" likely was "directed at the unpredictable effect of the penalty that could be too harsh." *Mukhi II*, 163 T.C. at 164; *see* S. Rep. No. 97-494, at 299 (1982). In other words, § 6038(b)'s fixed penalty would be more predictable because it was easier to *calculate*. And it would have been "unusual," as the Tax Court noted, for Congress to replace the "harsh" preexisting scheme with a penalty not "subject to any pre-assessment judicial review." *Mukhi II*, 163 T.C. at 164-65. In short, "[e]ven assuming that Congress's subjective intent were knowable and controlling," the D.C. and Second Circuits "fail[] to deliver. Far from demonstrating the value of legislative history, [they] model[] its misuse." *FS*, 608 U.S. at 621.

The courts of appeals were similarly wrong to conclude based on legislative history that Congress had "acquiesced" to the assessment of § 6038(b) penalties by failing to "question[] the IRS's practice." App. 10a; *see Farhy II*, 100 F.4th at 236. Agencies cannot acquire authority by "adverse possession." *Rapanos v.*

*United States*, 547 U.S. 715, 752 (2006). Besides, there is little in the legislative history indicating whether Congress even knew about the practice. *See Mukhi II*, 163 T.C. at 171. And the notion that Congress silently acquiesced to an atextual and unauthorized agency practice is particularly troubling in the tax context. "Americans fought the Revolution in no small part because they believed that only their elected representatives … possessed authority to tax them." *Learning Resources, Inc. v. Trump*, 607 U.S. 229, 290 (2026) (Gorsuch, J., concurring).

**2.** The D.C. and Second Circuits also based their assessability holdings on their policy views of what would best "streamline" the IRS's collection of § 6038(b) penalties. App. 11a-15a; *Farhy II*, 100 F.4th at 231-34. But "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Services*, 587 U.S. 566, 581 (2019). And the courts' policy concerns are misguided on their own terms.

**a.** The courts speculated that Congress wanted § 6038(b) penalties to be assessable because the government might not find it "worthwhile" to pursue civil suits to collect § 6038(b)'s $10,000 penalty. App. 11a-12a; *Farhy II*, 100 F.4th at 232. Even if the courts' views about what was "worthwhile" could trump the statutes' plain text, that reasoning would still fail.

For starters, many statutes provide far lower damages or penalties than § 6038(b)'s current $10,000 penalty and still require civil actions. For example, I.R.C. § 7269 imposes a maximum $500 penalty "to be recovered … in a civil action" for failure to produce records. *See also, e.g.*, 15 U.S.C. § 1681n(a)(1) ($100-$1,000 per violation); *id.* § 1692k(a)(2)(A) ($1,000); 47

U.S.C. § 227(b)(3)(B) ($500). Congress wasn't wrong in those statutes, and it wasn't wrong in § 6038(b) either. Congress—not courts—decides "how best to weigh … competing costs and benefits" of different enforcement mechanisms. *Medina v. Planned Parenthood South Atlantic*, 606 U.S. 357, 369 (2025). What's more, reporting failures across several years can result in § 6038(b) penalties exceeding $100,000 (as in *Mukhi II*), especially when the penalty for a given year can reach up to $60,000 for a continuing violation. *See* 163 T.C. at 173 & n.11; I.R.C. § 6038(b)(2).

**b.** The D.C. and Second Circuits were concerned that requiring civil actions for § 6038(b) penalties would make it difficult to coordinate with the § 6038(c) foreign-tax-credit reduction. *See* App. 13a-15a; *Farhy II*, 100 F.4th at 232, 234. But how the § 6038(b) and (c) penalties "relate to each other is up to Congress," not courts, "and the best evidence of Congress's intent is the statutory text." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544 (2012). And to the extent the IRS needs to coordinate the penalties, the courts of appeals' approach would make coordination even more difficult.

*First*, the D.C. and Second Circuits overstated the significance of any coordination challenges. "[T]he Commissioner rarely asserts" the § 6038(c) reduction. *Mukhi II*, 163 T.C. at 168. In fact, the Tax Court "found only one case after the addition of the section 6038(b)(1) penalty in which the section 6038(c) penalty was mentioned." *Id.*

*Second*, the courts misunderstood how the § 6038(c) penalty applies, making their approach "unworkable." *Id.* at 170. When it applies, § 6038(c) reduces a taxpayer's foreign tax credits such that the

taxpayer may owe more tax and thus may have understated her tax liability. The IRS must ordinarily send her a deficiency notice, I.R.C. §§ 6212(a), 6211(a), informing her that it intends to assess the liability. The taxpayer can then petition the Tax Court for a redetermination in deficiency proceedings, I.R.C. § 6213(a), and the IRS can assess the deficiency only after the decision becomes final, I.R.C. § 6215(a). Those deficiency proceedings aren't more streamlined than a civil action—they are a full-blown Tax Court action. And because, under the D.C. and Second Circuits' approach, the § 6038(b) penalty would not be reviewable in any court, it "is far from straightforward" how the § 6038(b) penalty would be coordinated with the § 6038(c) penalty in deficiency proceedings. *Mukhi II*, 163 T.C. at 170.

**3.** The D.C. Circuit also found relevant that the codified "reasonable cause" defense to § 6038 penalties must be shown "to the satisfaction of *the Secretary*." I.R.C. § 6038(c)(4)(B) (emphasis added); *see Farhy II*, 100 F.4th at 232-34. But the court was wrong to conclude from that provision that § 6038(b) penalties are assessable, and its error resulted from its mistaken premise that the IRS can consider a reasonable cause defense only after it has assessed a penalty. As the Tax Court pointed out, "nothing in the statute's text … demands that the IRS make the reasonable cause determination after assessment." *Mukhi II*, 163 T.C. at 167. Rather, a reasonable cause "determination could come before the [IRS's] referral" to the Department of Justice for a civil suit. *Id.*

**4.** The Second Circuit, for its part, suggested that § 2461(a) can't authorize suits to collect § 6038(b) penalties because § 2461(a) isn't in the Tax Code. App. 15a-16a. That reasoning fails, too.

Section 2461(a) states that, when Congress provides for a civil penalty "without specifying the mode of recovery," "it may be recovered in a civil action." The provision doesn't carve out tax penalties. Section 6038 doesn't specify a mode of recovery, as the Second Circuit acknowledged. App. 6a-7a. So § 2461(a)'s default rule applies.

Which U.S. Code title a statute is placed into "will not, of course, 'override the plain words' of a statute." *Dubin v. United States*, 599 U.S. 110, 121 (2023). And one would expect a default rule broadly applicable to all civil litigation—including disputes over taxes—to be placed in Title 28, which covers "judicial procedure." Indeed, the Court has jurisdiction here under a statute in Title 28. *See* 28 U.S.C. § 1254(1).

## III. The question presented is important and recurring, and this case is an ideal vehicle.

**A.** The question presented is important and recurring. The government has even acknowledged that this case is certworthy by asking the Second Circuit to hold in abeyance a case presenting the "identical legal question" pending this Court's resolution of Mr. Safdieh's case. Motion to Hold Appeal in Abeyance, *Cauchon v. Commissioner*, No. 25-1257 (2d Cir. Sept. 14, 2026) (Doc. 23). And the Second Circuit, too, acknowledged the certworthiness of the question presented by granting that motion. *See* Order, *Cauchon*, No. 25-1257 (2d Cir. Sept. 24, 2026) (Doc. 24).

**1.** Section 6038(b) penalties are common, particularly for those who can least afford them. Many taxpayers don't know they must report foreign-business ownership, and the IRS often automatically imposes penalties whenever it discovers noncompliance. *See* Taxpayer Advocate Report 102, 110-11.

Thus, thousands of taxpayers incur § 6038(b) penalties each year. *See id.* at 110-11 & n.63. Indeed, across all penalties involving international information returns (like those relating to the receipt of foreign gifts, *see* I.R.C. § 6039F), § 6038 is the "most frequent[]" basis for assessment. Taxpayer Advocate Report 110.

And those assessments can be burdensome. Most § 6038 penalties are imposed on moderate-to-low-income taxpayers and small businesses. *Id.* at 102. Often, these taxpayers are, or are owned by, individuals who immigrated to the United States while retaining a business interest in their home country. *See id.* at 104. Or they might be "accidental Americans" who were born in the United States but have spent the bulk of their lives abroad. *See id.* at 102. These taxpayers are generally unaware of § 6038's "obscure and complex" filing requirements and lack the means to hire tax advisors. *Id.* By contrast, high-income taxpayers may be able to avoid these penalties with help from sophisticated advisors. *Id.* at 101.

The data bears that out. Between 2018 and 2021, almost 25% of individual taxpayers who incurred § 6038 penalties earned under $50,000, and over 70% earned under $400,000. *Id.* at 108. Small and midsize companies likewise make up the lion's share of § 6038 penalties for business taxpayers. *Id.* Because § 6038(b) triggers a per-violation penalty of *at least* $10,000—which increases with every 30 days of delay, *see* I.R.C. § 6038(b)(2), and with every year of noncompliance, *see* I.R.C. § 6038(b)(1)—taxpayers in these low income brackets often incur insurmountable penalties for missing a reporting deadline they might never have known about.

**2.** The IRS's mechanical approach to § 6038(b) assessments means that the penalties are assessed without regard to any reasonable explanation for the taxpayer's noncompliance. In about 90% of cases, the IRS "systemically impose[s]" § 6038 penalties "as a preprogrammed, automatic matter." *Mukhi II*, 163 T.C. at 174; Taxpayer Advocate Report 110-11 & n.63. For example, if a taxpayer learns of its unintentional noncompliance and files a late form, the IRS "[t]ypically" and automatically "reward[s]" that voluntary late compliance "with a harsh penalty." Taxpayer Advocate Report 103. The IRS considers case-specific facts and circumstances—including a taxpayer's "reasonable cause" defense—only after taxpayers have devoted significant time and energy to contesting the penalties. *Id.* at 112.

What's more, "[a] large portion of the systemically assessed [§ 6038] penalties"—about 74% of all penalties, and about 84% of their total dollar value—"are subsequently abated," indicating that the IRS often agrees that these penalties should never have been assessed. *Mukhi II*, 163 T.C. at 174; Taxpayer Advocate Report 110-11 & n.63. But the cost of seeking abatement after assessment is itself punitive to taxpayers who don't already have the knowledge or skill to act on their own behalf. And any reduction in the penalty offered through a "post-assessment conference" doesn't solve the problem because post-assessment conferences "cannot be appealed to any court," and they "foreclose [the Tax Court's] review of the underlying liability in a subsequent collection due process proceeding." *Mukhi II*, 163 T.C. at 167-69. The result is that § 6038(b), when unlawfully treated as assessable, frequently threatens unsophisticated taxpayers with insurmountable penalties that never should

have been imposed and that cannot functionally be reviewed in court.

All of that is a perfect illustration of why level of enforcement is a policy question for Congress. Requiring civil actions protects taxpayers from overreach by forcing the Justice Department's "individual consideration of these cases" before the government imposes "taxpayer liability." *Id.* at 174. And deciding to enforce § 6038(b) through civil litigation was an eminently reasonable policy choice for Congress to have made. As the Tax Court explained, "[e]ven if the Department of Justice does not bring a civil action against every taxpayer for the section 6038(b)(1) penalty, the mere possibility of such enforcement will have a deterrent effect." *Id.*

**3.** Beyond § 6038(b), the D.C. and Second Circuits' reasoning sets a dangerous precedent for how the IRS can wield the government's assessment power. The Tax Code elsewhere sets forth penalties without specifying whether they can be assessed. *See, e.g.*, I.R.C. § 6038A(d). Under the D.C. and Second Circuits' logic, these penalties too can now be collected via assessment. That's because those courts did what this Court has "repeatedly" forbidden: it replaced "the text of a law" with "purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). The Court should intervene now to prevent further erroneous and atextual holdings in the lower courts that will continue to harm taxpayers.

**B.** This case is an ideal vehicle. The split is entrenched and outcome-determinative. There are no factual disputes or alternative holdings that would complicate the Court's review. The only issue before

the court of appeals below was whether § 6038(b) penalties are assessable, and the Second Circuit squarely decided that question. App. 3a-4a. What's more, the IRS has acknowledged that "the basic facts" of this case "do not differ" from the facts in *Farhy* or *Mukhi*. App. 19a. This petition thus presents the ideal opportunity for the Court to resolve the split and restore a uniform, nationwide rule that the government can collect § 6038(b) penalties only through a civil action, as statutory text makes clear.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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