No. 26A____

In the Supreme Court of the United States

JOSEPH SAFDIEH, APPLICANT

v.

COMMISSIONER OF INTERNAL REVENUE

APPLICATION DIRECTED TO THE HONORABLE SONIA SOTOMAYOR FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Applicant is Joseph Safdieh. Respondent is the Commissioner of Internal Revenue.

APPLICATION FOR EXTENSION OF TIME

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit:

1. Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 12, 13.3, 13.5, 22, 30, and 33.2, Applicant Joseph Safdieh respectfully requests a 60-day extension of time, up to and including Monday, November 23, 2026, to file a petition for a writ of certiorari. The Second Circuit issued its opinion and entered judgment in Mr. Safdieh's case on February 27, 2026, and issued its order denying Mr. Safdieh's petition for rehearing en banc on June 24, 2026. The court of appeals' opinion, available at 169 F.4th 102, is attached as Appendix A (App. 1a-17a). The order denying rehearing is attached as Appendix B (App. 18a). Mr. Safdieh's petition is currently due September 22, 2026. This application has been filed on September 3, 2026, more than ten days before the current deadline for filing the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Second Circuit's decision.

2. As the petition for a writ of certiorari will explain, this case warrants review because, among other things, the Second Circuit's purposivist decision conflicts with the precedential decision of the Tax Court, in a textualist opinion joined by 16 of 17 judges, on an important question regarding whether the IRS can wield its far-reaching levy and lien powers to seek penalties under I.R.C. § 6038(b).

When Congress authorizes the government to seek civil penalties but doesn't "specify[] the mode of recovery," the government can recover those penalties only through "a civil action" in district court. 28 U.S.C. § 2461(a). Sometimes Congress deviates from this default rule. Relevant here, certain Tax Code penalties can be "assessed," meaning that they trigger the IRS's powerful administrative collection tools. Those powers include "the seizure of assets, the freezing of bank accounts and the creation of liens"—all of which the IRS can invoke without going to court. *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1064 n.1 (3d Cir. 1991).

This case is about whether the IRS can assess penalties under § 6038(b) for a taxpayer's failure to report information about holdings in foreign business entities. Section 6038(a) requires taxpayers to submit a form disclosing information "with respect to any foreign business entity which [the taxpayer] controls." Failure to submit the form can result in penalties, including "$10,000 for each annual accounting period" in which the taxpayer fails to submit the form. I.R.C. § 6038(b)(1).

In 2018, the IRS assessed $50,000 in civil penalties against Mr. Safdieh under § 6038(b). After the IRS sent Mr. Safdieh a notice of a federal lien against his property, he petitioned the Tax Court for review. That court held that the IRS lacked authority to assess the penalties, relying on its full-court precedential decision in *Mukhi v. Commissioner*, 163 T.C. 150, 162 (2024) (reviewed decision). In *Mukhi*, an opinion joined by 16 of 17 participating judges, the Tax Court reasoned that nothing in § 6038(b)—or any provision—authorizes the IRS to assess penalties for violations of § 6038(a). *Id.* at 160-62. The Tax Court thus held that, to collect § 6038(b) penalties, the government must sue in district court under 28 U.S.C. § 2461(a). *Id.* at 162.

In so holding, the Tax Court expressly disagreed with the D.C. Circuit, which had held in *Farhy v. Commissioner*, 100 F.4th 223, 236 (D.C. Cir. 2024), that the IRS can assess § 6038(b) penalties. The D.C. Circuit's decision had reversed an earlier Tax Court decision, *Farhy v. Commissioner*, 160 T.C. 399, 403-13 (2023), that had held that the IRS cannot assess § 6038(b) penalties. In *Mukhi*, the full Tax Court reconsidered its *Farhy* decision in light of the D.C. Circuit's reversal. Dissecting the D.C. Circuit's reasoning, the Tax Court concluded that the D.C. Circuit was wrong on the text, structure, and fundamental operation of the Tax Code. *Mukhi*, 163 T.C. at 164-75. The Tax Court thus resolved to apply *Mukhi*, not the D.C. Circuit's *Farhy* decision, in all cases nationwide except those appealable to the D.C. Circuit, "until the Supreme Court decides the point." *Id.* at 154; *see Golsen v. Commissioner*, 54 T.C. 742, 757 (1970). The Tax Court then followed *Mukhi* in Mr. Safdieh's case, holding that the IRS couldn't assess § 6038(b) penalties against Mr. Safdieh.

The government appealed Mr. Safdieh's case to the Second Circuit. That court reversed, siding with the D.C. Circuit in holding that § 6038(b) penalties are assessable. App. 1a-17a. The D.C. and Second Circuits have thus split with the Tax Court over whether the government must sue to collect § 6038(b) penalties. Given the Tax Court's nationwide jurisdiction and precedential holdings, plus the Tax Court's decision to adhere to its holding despite the disagreement, the split is entrenched and will resolve only if this Court "decides the point." *Mukhi*, 163 T.C. at 154. The Tax Court "takes seriously its obligation to facilitate uniformity in the tax law." *Id.* So when an appellate court reverses a Tax Court decision—as in *Farhy*—the Tax Court will "thoroughly reconsider" its views "in light of the reasoning of the reversing appellate court." *Id.* That's exactly what the Tax Court did in *Mukhi*. Unpersuaded by the D.C. Circuit, the Tax Court resolved to "follow [its] own honest belief[]" that § 6038(b) penalties cannot be assessed, except in cases appealable to circuits that have held otherwise. *Id.* The result: The IRS can assess § 6038(b) penalties for taxpayers in the D.C. and Second Circuits but must sue to collect them everywhere else.

The question presented is important, and the consequences of the D.C. and Second Circuits' decisions are significant and troubling. Thousands of taxpayers incur § 6038(b) penalties each year. *See* Taxpayer Advocate Service, National Taxpayer Advocate Annual Report to Congress 110-11 & n.63 (2023). Most are moderate- to low-income individuals and small businesses—taxpayers who often lack the resources to comply with the Tax Code's reporting requirements for foreign investments. *Id.* at 108. In the vast majority of cases, the IRS automatically assesses § 6038(b) penalties, regardless of any reasonable explanations for taxpayers' noncompliance, only to later significantly reduce the penalties. *Id.* at 110-11 & n.63. That means that § 6038(b), when unlawfully treated as assessable, threatens unsophisticated taxpayers with insurmountable penalties that never should have been imposed. The cost of seeking abatement after assessment is, itself, punitive to taxpayers. That's why § 6038(b)'s enforcement method is a policy question for Congress, not the courts of appeals. Requiring civil actions protects taxpayers from overreach by forcing the Justice Department's "individual consideration of these cases" before the government imposes "taxpayer liability." *Mukhi*, 163 T.C. at 174.

3. Mr. Safdieh has good cause to seek an extension. Undersigned counsel have been addressing and must continue to address competing deadlines in

September and October, including before this Court, that have made and will continue to make it difficult to meet the current deadline for filing a petition for writ of certiorari. Those briefing deadlines and argument dates include:

- September 8, 2026: opening brief and appendix due in *Verisk Analytics, Inc. v. ExactLogix, Inc.*, No. 369,2026 (Del.) (deadline not extendable);
- September 9, 2026: cert-stage reply brief due in *Indian Harbor Insurance Co. v. Town of Vinton*, No. 25-1383 (U.S.);
- September 21, 2026: opening brief and joint appendix due in *Aventis, Inc. v. Commissioner*, No. 26-2027 (3d Cir.) (on a 60-day extension);
- September 21, 2026: opening brief and joint appendix due in *United States v. Haygood*, No. 25-6345 (4th Cir.) (on a 60-day extension);
- October 1, 2026: opening brief and joint appendix due in *Kaplan v. Trans Union LLC*, No. 26-2678 (3d Cir.) (on a 30-day extension);
- October 13, 2026: opening brief and joint appendix due in *Altria Group, Inc. v. United States*, No. 26-2127 (4th Cir.);
- October 21, 2026: cert-stage reply brief due in *The Capital Group Companies, Inc. v. Pover*, No. 26-267 (U.S.);
- October 21, 2026: oral argument scheduled in *Verisk Analytics, Inc. v. ExactLogix, Inc.*, No. 369,2026 (Del.);
- October 23, 2026: reply brief due in *United States v. Haygood*, No. 25-6345 (4th Cir.); and
- October 26, 2026: response brief due in *DC Gambling Recovery LLC v. American Wagering, Inc.*, No. 26-7046 (D.C. Cir.).

Mr. Safdieh submits that counsel's need for additional time to prepare a petition given the press of existing business constitutes good cause for an extension.

CONCLUSION

Mr. Safdieh respectfully requests entry of an order extending the time to file a petition for a writ of certiorari by 60 days, up to and including November 23, 2026.

Dated: September 3, 2026

Respectfully submitted,

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APPENDIX A

25-501-cv
Safdieh v. Comm'r

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM 2025
No. 25-501-cv

JOSEPH SAFDIEH,
Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant.

Appeal from the United States Tax Court.

ARGUED: DECEMBER 17, 2025
DECIDED: FEBRUARY 27, 2026

Before: JACOBS, CABRANES, and LOHIER, *Circuit Judges*.

Respondent-Appellant, the Commissioner of Internal Revenue, appeals from a December 5, 2024, order of the United States Tax Court

(Mark V. Holmes, *Judge*) granting summary judgment to Petitioner-Appellee Joseph Safdieh.

The Commissioner assessed Safdieh $50,000 in penalties for allegedly failing to report control of a foreign business in tax years 2005–09. *See* I.R.C. § 6038(b). But the Tax Court granted Safdieh summary judgment, reasoning that Congress did not empower the Commissioner to collect the penalties through assessment, an administrative process. If the Commissioner wanted to collect the penalties, the Tax Court ruled, he had to go to federal district court.

Seeing things differently, we hold that the Commissioner may assess penalties under § 6038(b). Accordingly, we **VACATE** the Tax Court's order granting Safdieh summary judgment and **REMAND** for further proceedings consistent with this opinion.

ROBERT J. WILLE (Jennifer M. Rubin, *on the brief*), Tax Division, Department of Justice, Washington, DC, *for Respondent-Appellant*.

PARKER RIDER-LONGMAID (Shay Dvoretzky, Armando Gomez, Sylvia Tsakos, Eman Cuyler, Sherry M. Tanious, *on the brief*), Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC, and New York, NY, *for Petitioner-Appellee*.

AUDREY PATTEN, Legal Services Center of Harvard Law School, Jamaica Plain, MA, *for Amicus Curiae Center for Taxpayer Rights*.

JOSÉ A. CABRANES, *Circuit Judge*:

The question presented is whether Respondent-Appellant, the Commissioner of Internal Revenue, can collect penalties under Internal Revenue Code ("I.R.C.") § 6038(b)[1] through administrative assessment, or instead must obtain a judgment in federal district court.

The Commissioner appeals from a December 5, 2024, order of the United States Tax Court (Mark V. Holmes, *Judge*) granting Petitioner-Appellee Joseph Safdieh summary judgment.[2]

Safdieh allegedly failed to report control of a foreign business in violation of I.R.C. § 6038. That provision carries a $10,000 penalty for each year during which such a reporting failure exists.[3] For Safdieh, who allegedly failed to report in tax years 2005–09, the penalties add up to $50,000.

[1] I.R.C. § 6038 requires "[e]very United States person [to] furnish, with respect to any foreign business entity which such person controls, such information as the Secretary may prescribe . . . ." I.R.C. § 6038(a). Though the statute speaks of the Secretary of the Treasury, the Secretary has delegated his authority to administer and enforce the I.R.C. to the Commissioner. *See generally* Treas. Reg. §§ 301.7701-9, 301.6201-1(a), 301.7601-1.

[2] *Safdieh v. Comm'r*, No. 11680-20L (T.C. Dec. 5, 2024).

[3] I.R.C. § 6038(b)(1).

When Safdieh did not pay the penalties, the Commissioner filed notice of a federal tax lien. Safdieh challenged the lien before the Independent Office of Appeals in a Collection Due Process hearing.[4] When he lost that appeal, he petitioned the Tax Court for relief.

The Tax Court sided with Safdieh, granting him summary judgment. Its rationale was purely legal. It held that Congress had not statutorily authorized the Commissioner to collect the § 6038(b) penalty through assessment, the administrative process that records a taxpayer's liability and triggers the Internal Revenue Service's collection powers.[5] If the Commissioner wished to penalize Safdieh's reporting failures, the Court held, he had to go to federal district court.

In this Court, whether the Commissioner may assess the penalty for failure to report control of a foreign business under § 6038(b) is a new question. Like the D.C. Circuit,[6] the only other court of appeals to have decided the issue, we hold that he can.

DISCUSSION

The IRS normally does not have to go to federal district court to take taxpayers' money, though some might wish it did. Only in

[4] *See generally Farhy v. Comm'r*, 100 F.4th 223, 227 (D.C. Cir. 2024). A Collection Due Process hearing gives the taxpayer a chance for a highly "informal oral or written conversation with the IRS before he must pay." *Id.* (citation omitted).

[5] *See Safdieh*, No. 11680-20L at 1–2.

[6] *Farhy*, 100 F.4th at 223.

rare instances is a lawsuit necessary.[7] The agency can instead usually collect taxpayers' liabilities through "assessment." The power of assessment is vital, handing the Commissioner the tools needed to collect "*all* taxes."[8] As such, assessment is commonplace in tax collection.

Take the familiar example of a taxpayer adding up how much she owes Uncle Sam and mailing off her return with the payment due. This process is "self-assessment,"[9] which one Commissioner called a "marvel of the world."[10] The Commissioner will normally accept the taxpayer's self-assessment. But if the taxpayer does not file a tax return or misstates what she owes, the Commissioner will calculate the tax liability on her behalf and record it in the government's books.[11]

Assessment does much more than keep the IRS's books in good order. It plays the singular role of triggering an all-important process: collection. "[I]t is the assessment, and only the assessment, that sets in motion the collection powers of the IRS."[12] Those powers allow the

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[7] *Id.* at 226.

[8] I.R.C. § 6201(a) (emphasis added).

[9] *United States v. Galletti*, 541 U.S. 114, 122 (2004).

[10] Bob Kuttner, *The Taxing Trials of I.R.S.*, N.Y. Times, Jan. 6, 1974, https://www.nytimes.com/1974/01/06/archives/the-taxing-trials-of-irs-white-house-heat-and-artful-dodging.html.

[11] *Galletti*, 541 U.S. at 122.

[12] *Phila. & Reading Corp. v. United States*, 944 F.2d 1063, 1064 n.1 (3d Cir. 1991).

IRS to seize assets, freeze bank accounts, and create liens—all without setting foot in a courtroom.[13]

We have noted that these tools, "which quite obviously place the Government in a better position to collect on alleged tax debts than individuals seeking to collect on private debts, are said to be necessary because . . . 'taxes are the life-blood of government, and their prompt and certain availability an imperious need.'"[14]

Critical to this case, the Commissioner's assessment power extends beyond "all taxes" to include "assessable penalties."[15] There is no question that the dollar amount at issue here is a "penalty": the statute says so outright.[16] The only doubt is whether this penalty is "assessable." Though the great Professor Boris Bittker and his coauthors observed that "[v]irtually all civil penalties are assessed,"[17] Safdieh contends that § 6038(b) is an exception.

Section 6038(b)'s text is silent as to whether the penalty is assessable.[18] In this sense, it is unlike the provisions in the I.R.C. that

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[13] *Id.* That said, the IRS may have to go to court if the taxpayer challenges the assessment. *See generally Farhy*, 100 F.4th at 226–28.

[14] *United States v. Forma*, 42 F.3d 759, 766 (2d Cir. 1994) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)).

[15] I.R.C. § 6201(a).

[16] *Id.* § 6038(b) ("such person shall pay a penalty of $10,000").

[17] Boris I. Bittker, Martin J. McMahon & Lawrence Zelenak, *Federal Income Taxation of Individuals* ¶ 50.03 (3d ed. 2002).

[18] The core of the penalty provision reads:

expressly allow, or bar, assessment.[19] Section 6201(a), which covers the Commissioner's assessment authority, is likewise silent. That ambiguity has not stopped the parties from claiming the texts of these provisions for themselves. But because their arguments struggle to make sense out of silence, we do not parse them here.

We instead focus on § 6038(b)'s history, purpose, and structure[20]—including the text of a key coordination clause—which lead us to hold that the penalty is assessable.[21] There are three reasons why.

I.

First, the history of § 6038(b) strongly suggests that the penalty is assessable.

> If any person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign business entity required under paragraph (1) of subsection (a), such person shall pay a penalty of $10,000 for each annual accounting period with respect to which such failure exists.

I.R.C. § 6038(b)(1). Despite the parties' attempts at exegesis, the text simply does not say whether the penalty is, or is not, assessable.

[19] *Contrast*, *e.g.*, I.R.C. § 527(j)(1) ("shall be assessed"), *with id.* § 7269 ("to be recovered . . . in a civil action").

[20] *Accord, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 627 & n.16 (1993).

[21] Our review is *de novo*. *Maier v. Comm'r*, 360 F.3d 361, 363 (2d Cir. 2004).

Start by understanding the reason for § 6038(b)'s existence. At the time of its enactment in 1982, there already existed a penalty for a taxpayer's failure to report control of a foreign business: a 10-percent reduction of the violator's foreign tax credit.[22] This provision was assessable, meaning that the Commissioner did not have to go to court to collect it.[23]

Even so, the provision was too hard to use. As a Senate report put it, "penalties generally are not imposed."[24] This was partly "because the penalty is complicated."[25] It was "unduly harsh" to taxpayers who "could incur a substantial penalty for a minor failure."[26] And it was toothless in the cases of taxpayers who paid no foreign taxes, and so had no foreign tax credit to reduce.[27]

Under-enforcement resulted, and the Senate heard "complaints about inadequate reporting with respect to controlled foreign corporations."[28] In other words, even though the Commissioner did not have to go to district court and could assess the penalty, the

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[22] *Farhy*, 100 F.4th at 228 (citing Act of Sept. 14, 1960, Pub. L. No. 86-780, § 6(a), 74 Stat. 1010, 1014–16; Revenue Act of 1962, Pub. L. No. 87-834, § 20(a), 76 Stat. 960, 1059–60)). This provision is now codified at I.R.C. § 6038(c).

[23] *Farhy*, 100 F.4th at 231; *see also* Appellee's Letter (Jan. 7, 2026) at 2 (conceding that the § 6038(c) penalty is assessable). That the existing penalty was assessable may explain why Congress did not specify that the new, supplemental penalty was also to be assessable.

[24] S. Rep. No. 97-494(I), at 299 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 781, 1042.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

process was cumbersome. To supplement this assessable tax-credit penalty, Congress enacted § 6038(b)'s dollar penalty.

As the Senate report makes clear in noting the problem of under-enforcement, Congress wanted to make it easier, not harder, for the IRS to penalize reporting failures. If an assessable penalty was too "complicated" to impose (as the Senate report said), a non-assessable one would be even more so.

Yet Safdieh argues that Congress made the new dollar penalty non-assessable anyway. In his view, Congress required the tax collector to make a detour to the nearest federal district court to wage a legal battle for the money. That seems implausible. It is unlikely that Congress would have wished to put even more logs in the way of the tax harvester when its stated aim was to clear the road.[29]

Indeed, the IRS got the message from the start and has assessed the penalty ever since its enactment in 1982.[30] Given Congress's aim

[29] This conclusion finds further support in a Committee Print accompanying the Tax Compliance Act of 1982, a bill which contained the same language that would work its way into § 6038(b). *Compare* Tax Compliance Act of 1982, H.R. 6300, 97th Cong. § 411(b) (1982), *with* Tax Equity and Fiscal Responsibility Act of 1982, H.R. 4961, 97th Cong. § 338(b) (1982). The Committee Print indicates that the fixed dollar penalty was meant to "simplify the penalty for failure to furnish information" by "giv[ing] Internal Revenue Service agents a simple straight-forward penalty to impose where reports . . . are not filed or are inadequate." Staff of Joint Comm. on Taxation, Comparative Description of H.R. 6300 and H.R. 5829 at 30 (Comm. Print 1982). Safdieh asks us to conclude that the § 6038(b) penalty can be collected only through a civil suit filed by the Department of Justice. This is hardly a "simple straight-forward penalty" that "Internal Revenue Service agents" can "impose."

[30] *Farhy*, 100 F.4th at 229–30, 236.

in enacting the provision, the IRS's early (and consistent) view of the statute is unsurprising. As evidence of the statute's original meaning, it deserves substantial weight.[31]

What is more, in the forty-three years since enacting the provision, Congress has never, to our knowledge, questioned the IRS's practice. In fact, it has acquiesced. "The failure of Congress to alter or amend [a statute], notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight."[32] Congress has amended § 6038 seven times since first enacting the dollar penalty in 1982, most recently in 2017.[33] Yet, on each amendment, it has done nothing to curb the use of assessment.

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[31] To be clear, we cannot and do not "defer" to the IRS's interpretation of the provision. *Contra Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Rather, in our *de novo* quest to say what the law is, we look to the IRS's contemporaneous understanding of the statute as evidence of its original meaning. To ask what the law meant to its intended audience at the time of enactment is a well-worn interpretive tool in the face of textual ambiguity, one that predates *Chevron*. *See, e.g.*, *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (collecting cases); *Shen v. Esperdy*, 428 F.2d 293, 301–02 (2d Cir. 1970). It is not unique to administrative law, either. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 432 (2024) (constitutional law); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943) (treaty law); *Clark v. Carolina & Yadkin River Ry. Co.*, 122 N.E. 453, 454 (N.Y. 1919) (contract law). Nothing in *Loper Bright* forecloses courts from considering this kind of evidence.

[32] *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *accord, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

[33] I.R.C. § 6038; *see also Farhy*, 100 F.4th at 236.

And contrary to Safdieh's claim, Congress's acquiescence was not born of ignorance. The legislature knew of the Commissioner's view that he could assess penalties under § 6038(b).[34] Congress's decision not to challenge the Commissioner's assessment power over the course of four decades and seven amendments thus seems to be a choice.

Other historical context backs up our conclusion that the penalty is assessable. At the time of the penalty's enactment, the backlog of pending civil cases in federal district court had surged to a record high.[35] The same year that § 6038(b) became law, Congress enacted the Federal Courts Improvement Act with the overriding aim of clearing that pileup.[36] It seems improbable that amid this crisis Congress required the Commissioner to mount a potentially protracted federal case to stand any chance of collecting a modest penalty.

That conclusion is reinforced by the fact that the penalty was magnitudes lower then than now, both in real and nominal terms.

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[34] *See, e.g.*, *Treasury and General Government Appropriations for Fiscal Year 1998: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 105th Cong. 254 (1998) (discussing a proposal to "allow taxpayers an *administrative* appeal prior to the payment of the penalty") (emphasis added). An administrative appeal before payment would make sense if the administrative agency, and not an Article III court, were to impose the penalty.

[35] Administrative Office of the United States Courts, *Report of the Proceedings of the Judicial Conference of the United States: March 11–12, 1982*, at 4 (1982), https://share.google/SWT3p20gILYLEDsfT [https://perma.cc/XN5Q-BT3V].

[36] R. Anthony Howard, Jr., Note, *The Federal Courts Improvement Act of 1982: No Relief for the Disappointed Bidder*, 11 J. Legis. 403, 418 (1984).

The original penalty was $1,000 (that's $3,400 in today's money).[37] For perspective, at that time a diversity case could get into federal court only if it was worth at least ten times the penalty's amount—a floor that, in just six years, Congress would raise to fifty times the amount.[38] Saddling the Commissioner with a federal case over such a small sum would hamper the federal courts and the Commissioner at a time when the evidence suggests that Congress wished to relieve both.[39]

Safdieh responds that going to federal court for the penalty, which now stands at $10,000 a year, could nonetheless be worth the Commissioner's trouble, since "[r]eporting failures across several years can result in penalties of more than $100,000."[40] But Safdieh points to no evidence showing that Congress meant to make it worthwhile to pursue only serial offenders. Such an approach would

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[37] *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 338, 96 Stat. 324, 631 (1982); *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm.

[38] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (raising the amount-in-controversy requirement for diversity jurisdiction from $10,000 to $50,000).

[39] At first glance, it seems that the Internal Revenue Code makes *lesser* penalties recoverable in a civil action only. *See* I.R.C. § 5761(a) ($1,000); § 7269 ($500). First glances mislead. When Congress set those penalties in 1954, they were, in inflation-adjusted terms, 3.6 and 1.8 times higher respectively than the original $1,000 § 6038(b) penalty that Congress enacted in 1982. *See* Internal Revenue Code of 1954, 68A Stat. 3, 736, 865 (1954); *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm.

[40] Appellee's Br. at 63; *cf. Mukhi v. Comm'r*, 163 T.C. 150, 173 (2024).

allow tax-reporting failures—so long as there were not too many of them. We have no reason to believe that was Congress's intent.[41]

II.

Second, requiring the Commissioner to sue for § 6038(b) penalties would badly disrupt the section's overall enforcement scheme, defeating Congress's design.

To see why, understand that Congress expected § 6038(b) to work in concert with another provision, § 6038(c). That provision, briefly noted above, penalizes failure to report control of a foreign business with a 10-percent reduction of the taxpayer's foreign tax credit.[42] But that penalty does not work in isolation. A coordination clause reduces "[t]he amount of the reduction . . . by the amount of the penalty imposed by subsection (b)"—that is, by the yearly dollar penalty.[43]

The coordination clause suggests that Congress meant for the Commissioner to be able to impose the subsection (b) and (c) penalties

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[41] Similarly, we are not swayed by Safdieh's claim that the Department of Justice "generally collects" another $10,000 penalty by suing in district court. *See* Appellee's Br. at 64 (citing 31 U.S.C. § 5321(a)(5)(B)(i)). To start, this other penalty is in fact also assessable, as Safdieh concedes. *See id.* (citing 31 U.S.C. § 5321(b)). It is thus undisputed that Congress gave the Executive a choice between assessing that penalty or going to court. And while it is true that the Executive sometimes does go to court, the cases in which it does so routinely have more than $10,000 at stake. *See Mukhi*, 163 T.C. at 174 n.12 (collecting cases). A federal case may not be worthwhile when lesser amounts are in controversy. *See Farhy*, 100 F.4th at 232.

[42] I.R.C. § 6038(c)(1).

[43] *Id.* § 6038(c)(3).

at the same time. Under Safdieh's argument, however, that would be impossible. Before the Commissioner could coordinate the two penalties, he would have to await a federal district court's entry of judgment for the subsection (b) penalty. Only then could he know "the amount of the penalty imposed by subsection (b)" and reduce the subsection (c) penalty accordingly.

"To agree with that reading, we would have to conclude that, in enacting subsection (b), Congress not only failed in its avowed quest to streamline, but also counterproductively threw sand in the gears of section 6038's existing enforcement scheme."[44] We give Congress more credit than that.

Safdieh's view of the law would greatly complicate the penalty's collection. If the Commissioner were to seek penalties under subsections (b) and (c), there might be proceedings in federal district court for the former and in the Tax Court for the latter.[45] Both courts might have to address the same questions. Did the taxpayer really control the business during the relevant years? Did the business count as a "foreign business entity"? Were there any defenses, such as reasonable cause?[46] The duplication of effort would be wasteful.

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[44] *Farhy*, 100 F.4th at 232–33.

[45] *Id.* at 234. Safdieh argues that it is unlikely that the Commissioner would use subsections (b) and (c) at once. But likelihood is beside the point since Congress intended the dual option to be available.

[46] *Id.*

Once one of the two relevant courts resolves the issues, questions of preclusion may arise. It has long been the law that "where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding."[47] Taking note of this, parties may try to game the proceedings by rushing to judgment in the "right" court and erecting barriers to judgment in the "wrong" one.

All this complicates the penalization of tax-reporting failures and promotes gamesmanship. Could that have been the known effect of a provision that aimed to simplify things—to make a penalty less "complicated" and the tools of enforcement easier to wield? We doubt it.

III.

Third, if the Commissioner cannot assess the § 6038(b) penalty, what litigation authority does he have to sue for it?

Safdieh cites 28 U.S.C. § 2461(a) as the Commissioner's "only" collection authority.[48] This provision provides that "[w]henever a civil fine, penalty or pecuniary forfeiture is prescribed for the

[47] *Comm'r v. Sunnen*, 333 U.S. 591, 601 (1948) (citing *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944) (L. Hand, J.)); *see also Farhy*, 100 F.4th at 234 (citing *Burrows v. United States*, 945 F.2d 408 (9th Cir. 1991) (unpublished table decision)).

[48] Appellee's Br. at 38.

violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action."

One problem with this argument is that § 2461(a) is not in the I.R.C. Congress instead directed that it be codified in Title 28, which concerns the judiciary.[49] That placement is telling.[50]

Even more revealingly, in the thirty-four years between this provision's enactment in 1948 and the dollar penalty's enactment in 1982, the provision was never used to collect a tax or tax penalty.[51] It is doubtful that Congress silently meant to require the Commissioner to look for the first time to this provision outside the I.R.C. to be able to do his job.

In sum, § 6038(b)'s history, purpose, and structure all point in the same direction: the penalty is assessable.

CONCLUSION

For the reasons set out above, we hold that the Commissioner can assess penalties incurred under § 6038(b). Accordingly, we

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[49] An Act to revise, codify, and enact into law title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, § 2461(a), 62 Stat. 869, 974 (1948).

[50] *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 541–42 (2015) (plurality opinion).

[51] Neither the Court nor the parties have been able to find any such example. Appellant's Letter (Jan. 7, 2026) at 1; Appellee's Letter (Jan. 7, 2026) at 2.

VACATE the judgment of the Tax Court and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of June, two thousand twenty-six.

Joseph Safdieh,

Petitioner - Appellee,

v.

Commissioner of Internal Revenue,

Respondent - Appellant.

ORDER

Docket No: 25-501

Appellee, Joseph Safdieh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe