IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.: 22-14058-CC

UNITED STATES OF AMERICA,

Appellee

v.

ISAC SCHWARZBAUM,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT

Chad M. Vanderhoef
Stacy D. Blank
Holland & Knight LLP
100 N. Tampa Street, Suite 4100
Tampa, FL 33602
(813) 227-8500

William M. Sharp, Sr.
Holland & Knight LLP
1180 W. Peachtree Street NW,
Suite 1800
Atlanta, GA 30309
(404) 817-8409

CERTIFICATE OF INTERESTED PERSONS AND

CORPORATE DISCLOSURE STATEMENT

Blank, Stacy D. – appellate counsel for Isac Schwarzbaum

Bloom, Hon. Beth – United States District Court Judge

Carpenter, Clint A. – appellate counsel for United States of America

Casal, Jose A. – trial counsel for Isac Schwarzbaum

Darling de Cortes, Andrea – trial counsel for Isac Schwarzbaum

Dawson, James P. – appellate counsel for Isac Schwarzbaum

Elliott, Nicole M. – trial counsel for Isac Schwarzbaum

Holland & Knight LLP – trial and appellate counsel for Isac Schwarzbaum

Nasta, John P. – trial counsel for United States of America

Nunez, Jeffrey N. – trial counsel for United States of America

Schwarzbaum, Isac – defendant/appellant

Sharp, William M., Sr. – appellate counsel for Isac Schwarzbaum

Small, Daniel I. – trial counsel for Isac Schwarzbaum

Smith, Mary Elizabeth – trial counsel for United States of America

United States of America – plaintiff/appellee

Vanderhoef, Chad M. – appellate counsel for Isac Schwarzbaum

Wilcove, Michael N. – trial counsel for United States of America

Zuckerman, Richard E., Principal Deputy Assistant Attorney General, Tax Division, U.S. Department of Justice – counsel for United States of America

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be particularly helpful in this unique case of first impression. Appellant, Isac Schwarzbaum, appeals to this Court for a second time following the district court's erroneous entry of a judgment in violation of the FBAR penalty statute and the applicable six-year statute of limitations. In the first appeal, this Court agreed with Mr. Schwarzbaum that the district court erred by not remanding the case to the Internal Revenue Service ("IRS") after the court vacated the agency's original FBAR penalty assessments. Instead, the district court improperly calculated and assessed its own penalty amounts. This Court, concluding that the district court exceeded its authority and invaded the agency's exclusive authority to assess FBAR penalties, vacated the district court's judgment and instructed that the case be remanded to the IRS.

Mr. Schwarzbaum is before this Court once more because the district court has again erred by disregarding this Court's instructions on remand. The district court improperly retained jurisdiction over the case rather than remanding the matter to the IRS as this Court instructed. In addition, the district court then entered a second judgment enforcing new, time-barred assessments of the *exact* same penalties previously vacated by this Court. The district court's judgment following remand enforces new assessments of the same penalties previously set aside because they were contrary to law. The new, but identical penalty assessments, are still

contrary to the FBAR penalty statute. Moreover, those assessments are time-barred by the applicable statute of limitations. Finally, the exorbitant assessments are unconstitutionally excessive. Oral argument will serve to clarify the proper application of the law to the facts of this case, and further assist the Court in evaluating the broad implications of the erroneous result in this case.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND 1

CORPORATE DISCLOSURE STATEMENT 1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS iii

TABLE OF CITATIONS v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

INTRODUCTION 3

STATEMENT OF THE CASE 8

Statement of the Facts 8

Course of Proceedings and Disposition Below 14

Standard of Review 15

SUMMARY OF THE ARGUMENT 16

ARGUMENT 19

I. The District Court's Judgment Violates the FBAR Penalty Statute. 19

II. The District Court's Judgment Violates the FBAR Statute of Limitations on Assessments 22

III. The District Court Disregarded the APA and This Court's Mandate by Retaining Jurisdiction 30

IV. The District Court's Penalties Are Punitive in Nature and Excessive in Violation of the Eighth Amendment 34

CONCLUSION 41

CERTIFICATE OF RULE 32(a)(7)(B) COMPLIANCE.......................................42

CERTIFICATE OF SERVICE 42

TABLE OF CITATIONS

Cases

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,
988 F.2d 146 (D.C. Cir 1993)..32, 33

**Austin v. United States*,
509 U.S. 602 (1993)...35, 36, 37

Bank of America, N.A. v. FDIC,
244 F.3d 1309 (11th Cir. 2001) 21

Berman v. Blount Parrish & Co., Inc.,
525 F.3d 1057 (11th Cir. 2008) 15

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers,
781 F.3d 1271 (11th Cir. 2015) 31

**Brafman v. United States*,
384 F.2d 863 (5th Cir. 1967) 29, 30

Burlison v. McDonald's Corp.,
455 F.3d 1242 (11th Cir. 2006) 15

Checkosky v. S.E.C.,
23 F.3d 452 (D.C. Cir. 1994)..32, 34

Cissell Mfg. Co. v. United States Dept. Labor,
101 F.3d 1132 (6th Cir. 1996) 16

Department of Revenue of Montana v. Kurth Ranch,
511 U.S. 767 (1994)..36

Dept. of Homeland Sec. v. Regents of the Univ. of Calif.,
591 U.S. __, 140 S.Ct. 1891 (2020)..32

**Direct Mktg. Ass'n v. Brohl*,
575 U.S. 1 (2015)..24

FCC v. Next Wave Personal Communications,
537 U.S. 293 (2003)..21

Hudson v. United States,
522 U.S. 93 (1997)..36, 37

**Kroner v. Comm'r*,
48 F. 4th 1272 (11th Cir. 2022) 25

Moore v. U.S.,
No. C13-2063RAJ, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015) 37

New Mexico Health Connections v. United States Dept. Health & Human Services,
946 F.3d 1138 (10th Cir. 2019) 16

Southwestern Electric Power Co. v. EPA,
920 F.3d 999 (5th Cir. 2019) 21

U.S. v. Bussell,
No. CV 15-02034 SJO, 2015 WL 9957826 (C.D. Cal. Dec. 8, 2015) 37

U.S. v. Garrity,
No. 3:15-CV-243 (MPS), 2019 WL 1004584 (D. Conn. Feb. 28, 2019) 37

United Mine Workers, Int'l Union v. Mine Safety & Health Admin.,
928 F.2d 1200 33

**United States v. Bajakajian*,
524 U.S. 321 (1998)..*passim*

United States v. Bussell,
699 Fed. Appx. 695 (9th Cir. 2017)...22, 39

**United States v. Galletti*,
541 U.S. 114 (2004)..24

United States v. Gardner,
No. 2:18-CV-03536-CAS-E, 2019 WL 1767120 (C.D. Cal. Apr. 22, 2019) 22

**United States v. Horowitz*,
361 F.Supp.3d 511 (D. Md. 2019)..28

**United States v. Horowitz*,
978 F.3d 80 (4th Cir. 2020) 28, 29

United States v. NEC Corp.,
11 F.3d 136 (11th Cir. 1993) 37

United States v. Schwarzbaum,
24 F.4th 1355, No. 20-12061 (11th Cir. 2022) (*Schwarzbaum I*) 4, 15

Wyle v. Island Hotel Co.,
774 Fed. App'x 574 (11th Cir. 2019) 16

Statutes

5 U.S.C. § 706(2) 34

5 U.S.C § 706 (2)(A), (C), (D)....................21

28 U.S.C. Section 1291 1

28 U.S.C. Sections 1331, 1345, and 1355 1

31 U.S.C § 5321 ....14, 20, 35

31 U.S.C. §§ 5321(a)(5)(C)(i) and (D)(ii) 13, 20

31 U.S.C. §§ 5321(b)(1) 22, 23, 28, 29

31 U.S.C. § 5322 35

I.R.C. § 6213(a)....................24

Administrative Procedure Act....................*passim*

Internal Revenue Code Section 6751(b)(1) 25

Other Authorities

31 C.F.R. §1010.306(c)....................13, 20

Black's Law Dictionary (11th ed. 2019) 32

United States Constitution Eighth Amendment....................*passim*

STATEMENT OF JURISDICTION

This case arises out of an action brought by the United States of America to recover civil penalties assessed against appellant Isac Schwarzbaum by the IRS for his alleged willful failure to report fully his interests in foreign bank accounts. The United States District Court for the Southern District of Florida had subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331, 1345, and 1355.

Isac Schwarzbaum appeals from a final judgment of the district court in favor of the United States. The final judgment disposed of all claims by all parties. Accordingly, this Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. Section 1291.

The district court entered its final judgment after remand on November 1, 2022. Because the United States is a party, Mr. Schwarzbaum had 60 days to appeal the district court's judgment and he timely filed his Notice of Appeal on December 2, 2022.

STATEMENT OF THE ISSUES

I. Whether the district court erred by entering final judgment in favor of the United States enforcing penalty assessments in an amount already determined to be in violation of the applicable FBAR penalty statute?

II. Whether the district court erred by entering judgment enforcing new FBAR penalty assessments issued in violation of the applicable statute of limitations, the original assessments having been vacated because they were unlawful?

III. Whether the district court violated this Court's mandate and erred by retaining jurisdiction over the matter after being instructed by this Court to vacate its amended judgment and remand the matter to the Internal Revenue Service?

IV. Whether the FBAR penalties reflected in the assessments are unconstitutionally excessive in violation of the Eighth Amendment of the United States Constitution?

INTRODUCTION

The district court's final judgment grants the United States an unwarranted and impermissible second opportunity to confiscate an unconstitutionally excessive amount of money from Isac Schwarzbaum. The United States abused that second chance by once again issuing penalty assessments infected with the same legal defect. Indeed, the new penalty assessments are identical to the IRS's previous illegal assessments—to the penny. The district court's judgment enforcing those illegal assessments should be reversed.

The United States initially brought an action to recover civil penalties assessed by the IRS against Mr. Schwarzbaum for improper reporting on his Reports of Foreign Bank and Financial Accounts ("FBARs"). Mr. Schwarzbaum properly reported certain of his foreign accounts, but omitted other accounts based on the advice of his certified public accountant. Notwithstanding Mr. Schwarzbaum's good faith reliance on the advice of his CPA, the IRS assessed multi-million dollar penalties for his failure to timely report every foreign bank account on his FBARs for years 2006-2009. After a bench trial, the district court correctly set aside the IRS's penalty assessments because those assessments violated the FBAR statute. The district court, however, erred by assessing its own new penalties rather than remanding the case to the IRS.

On appeal, this Court agreed that the IRS's first assessments of penalties against Mr. Schwarzbaum were contrary to the FBAR statute. The Court, however, also concluded that the district court violated the Administrative Procedure Act ("APA") by assessing its own new penalties. The Court reversed the district court's failure to remand the case to the IRS and its decision instead to assess its own penalties. *United States v. Schwarzbaum*, 24 F.4th 1355, No. 20-12061 (11th Cir. 2022) (*Schwarzbaum I*).

Following this Court's decision in *Schwarzbaum I*, the IRS proceeded to issue new penalty assessments. However, the United States ignored the IRS's new assessments and asked the district court to enter a second judgment for the same penalties previously rejected as contrary to law. But like the first assessments of unlawful penalties, the new penalty assessments once again violate the FBAR penalty statute—and for the very same reason. Incredibly, the district court has entered a judgment for new assessments that again violate the FBAR penalty statute because they lack any connection to Mr. Schwarzbaum's account balances on June 30 of the relevant year.

The new assessments are also time-barred by the six-year statute of limitations on assessments. Accordingly, the district court's final judgment enforcing those illegal assessments cannot stand. The district court's decision setting aside the original assessments is significant because it conclusively disposed of those

assessments on the merits. The applicable statute of limitations now bars any new assessment. The statute of limitations is clear—the IRS has six years from the date an FBAR is due to assess a penalty for reporting violations. Mr. Schwarzbaum's FBAR reports were due on June 30 of the year following the reporting period (e.g., the 2007 FBAR was due June 30, 2008, the 2008 FBAR was due June 30, 2009, and so forth). Thus, the IRS had six years to issue its penalty assessments.[1] Mr. Schwarzbaum granted the IRS additional time to complete its examination and extended the limitations period until December 31, 2016. The time for filing new penalty assessments against Mr. Schwarzbaum has long expired.

The government contends that the IRS's original assessments satisfied the statute of limitations even though they were vacated by the district court as arbitrary and capricious. According to the United States, those assessments remained extant (notwithstanding the decisions vacating them) pending the IRS's recalculation of new penalty amounts. A simple example demonstrates the fallacy that is the United States' argument. The IRS, facing the imminent expiration of the statute of limitations, could assess an FBAR penalty that is arbitrary, capricious, and devoid of any rational connection to an individual's account balances merely to "beat the clock" and comply with its six-year time allotment. If the United States' argument

[1] The 2007, 2008, and 2009 limitations periods on FBAR assessments expired on June 30, 2014, June 30, 2015, and June 30, 2016, respectively.

is correct, the IRS can permanently stop the clock on its statute of limitations by the simple expedient of filing an assessment—even an illegal one. According to the government, if that assessment is later vacated as arbitrary and capricious, it has nonetheless satisfied the statute of limitations for all time. The IRS can then revive those vacated assessments by making new calculations of the penalties against the same taxpayer for the same years *ad infinitum*. The government's argument is contrary to decades of firmly established legal principles and common sense. After more than a decade, Mr. Schwarzbaum is still being targeted by a government that apparently cannot issue an assessment that complies with the FBAR statute. This case demonstrates quite clearly that the APA and applicable statute of limitations must be respected to restrain the United States from its unending pursuit of individuals like Mr. Schwarzbaum.

In addition to enforcing arbitrary and capricious FBAR penalties that are barred by the statute of limitations, the district court also erred by retaining jurisdiction over this case rather than remanding the matter to the IRS as required by the APA and this Court. Administrative law jurisprudence is clear—when an error results in remand to the agency, the case is terminated and the outcome on remand must be determined by a new action. The district court ignored this well-settled principle and retained jurisdiction over the matter after the case was to be remanded to the IRS. The APA is designed to respect governmental separation of powers and

limit judicial intervention into agency province. Under the APA, once a court vacates agency action, its lone remaining function is to remand to the agency—its role is complete. This Court's decision in *Schwarzbaum I* instructed the district court to remand the case to the IRS. At that point, the district court's work was finished and it should have closed the case. But the district court refused. Instead, it granted the United States' request to retain jurisdiction. Retaining jurisdiction during remand effectively treats this case in the same manner as remand without vacatur, a remedy reserved for a specific class of cases not applicable here. The district court's decision to retain jurisdiction over the case undermines the language and intent of the APA and ignores this Court's mandate vacating the district court's decision.

Finally, to the extent that the original assessments have been revived, the Court should reverse the district court's judgment against Mr. Schwarzbaum because, in addition to the other deficiencies, the FBAR penalty assessments are excessive fines prohibited by the Eighth Amendment. The statutory penalty for a willful failure to report is the greater of $100,000 or 50% of the value of the unreported accounts. This penalty is imposed each year. Thus, the penalty will consume in its entirety a $10,000,000 account in just two years – even for unknowing violations like Mr. Schwarzbaum's. In this case, the application of the statute results in the imposition of a punitive award against Mr. Schwarzbaum that cannot withstand constitutional scrutiny. The district court's erroneous judgment, in

disregard of the statute of limitations, for an amount contrary to the FBAR penalty statute, in an amount that exceeds all constitutional limits compels a reversal in this case.

STATEMENT OF THE CASE

Statement of the Facts

Mr. Schwarzbaum was born in Germany and later lived in Switzerland where his parents moved when he was a young man. (R-92-2). He graduated from high school in Germany, but did not attend university. (*Id.*). He has no training or experience in law or accounting. (*Id.*). Although Mr. Schwarzbaum became a U.S. citizen in 2000, he retained his German citizenship and spent most of his time outside the United States. (R-92-2-3). He has lived in Germany, Switzerland, Spain, and Costa Rica. (R-92-2). He moved back to Switzerland full time in 2010, but returned to the United States in 2016. (R-92-3). Mr. Schwarzbaum's assets and livelihood, including the accounts at issue in this case, are all derived from gifts and bequests he received from his father, who became successful in Germany in the textile and real estate businesses. (R-92-2-3).

After his parents moved to Switzerland in the 1990s, Mr. Schwarzbaum's father sold his businesses and deposited the proceeds in bank accounts in Switzerland because that is where the family lived. (R-92-2). Mr. Schwarzbaum received his first large gift from his father in 2001 when his father transferred to him

an existing Swiss account. (R-92-3). He received additional gifts and bequests both before and after the death of his father. (*Id.*). He kept these funds invested in Swiss accounts just as his father had. (*Id.*). After his father's death, Mr. Schwarzbaum's accounts continued to be managed conservatively by bankers pursuant to his father's instructions. (*Id.*). Mr. Schwarzbaum did not direct how the money should be invested, nor did he ever disagree with any recommendation of the bankers. (*Id.*). Mr. Schwarzbaum kept the accounts in Switzerland because he and his father resided there, not because he intended to evade U.S. taxation or reporting. (R-92-2-3, 17). During 2006 and 2007, Mr. Schwarzbaum had an interest in four accounts in Switzerland. (R-92-5). In 2008 and 2009, he had an interest in nine accounts in Switzerland. (R-92-5). During 2006-2009, he had two accounts in Costa Rica, where he also lived for part of the year. (R-92-3, 5).

Mr. Schwarzbaum retained U.S. CPAs to prepare his U.S. tax returns. (R-92-4). From 1995 through 2005, Mr. Schwarzbaum used CPA Brian Gordon. (*Id.*). Mr. Schwarzbaum disclosed to Mr. Gordon the gift he received from his father in 2001 and subsequent gifts he received each year. (*Id.*). Mr. Gordon advised that because the assets were located outside the United States, they were not subject to any reporting requirement in the United States. (*Id.*). For 2006, Mr. Schwarzbaum used CPA Doris Shaw to prepare his tax return. (*Id.*). Mr. Schwarzbaum changed accountants because he was no longer living in Miami where Mr. Gordon's office

was located. (R-92-6). He shared with Ms. Shaw his bank documents and previous tax returns. (R-92-6). Consistent with Mr. Gordon's advice, Ms. Shaw likewise informed Mr. Schwarzbaum that the gifts from his father were not subject to the FBAR reporting requirement unless they had a connection to the United States. (R-92-4, 6). Mr. Schwarzbaum had no reason to doubt the advice he received from his U.S. accountants, and he followed it. (R-92-6). Indeed, this advice made sense to him because it was consistent with the tax laws of other countries in which he lived where taxation is based on residency, not citizenship. (*Id.*).

Ms. Shaw prepared an FBAR on behalf of Mr. Schwarzbaum for 2006. (R-92-7). It reported one account in Costa Rica, where Mr. Schwarzbaum had been living, because that account had a U.S. connection. (*Id.*). It was funded with a transfer of money from the United States. (*Id.*). Ms. Shaw also prepared an IRS Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, reporting additional gifts of money Mr. Schwarzbaum received in the United States from his father. (*Id.*). Mr. Schwarzbaum's reporting for 2006 was entirely consistent with the advice he received from his accountants. (R-92-18-20).

From 2007-2009, Mr. Schwarzbaum used the accounting firm Gilman & Ciocia to prepare his tax returns. (R-92-4, 7). Mr. Schwarzbaum gave that firm a copy of his 2006 tax return and a bank statement from the Costa Rican bank. (R-92-

7). The tax preparer at the Gilman firm testified that he did not ask Mr. Schwarzbaum about any other foreign accounts. (R-92-7). The tax preparation software used by the firm defaulted to "no" in response to the question on Schedule B asking if, during the year, the taxpayer had a financial interest or signature authority over a financial account located in a foreign county. (R-92-8). Mr. Schwarzbaum testified that his accountant at the Gilman firm instructed him to prepare his 2007 FBAR by copying the information from his 2006 FBAR. (*Id.*). Using the 2006 FBAR prepared by Ms. Shaw as a template, Mr. Schwarzbaum prepared his own FBAR for 2007. (*Id.*). He again reported the Costa Rican account. (*Id.*). Mr. Schwarzbaum testified that he reviewed the instructions for preparing the FBAR to the best of his ability. (*Id.*). He also prepared a Form 3520 on which he reported an additional gift of $5 million he received in the United States from his father. Mr. Schwarzbaum reported these items, but not his interests in other foreign accounts, because the reported items had a connection to the United States. (*Id.*). Again, Mr. Schwarzbaum's preparation of the 2007 FBAR and Form 3520 was consistent with the advice he received from his U.S. accountants. (*Id.*).

In May 2009, Mr. Schwarzbaum suffered a serious heart attack and required a quintuple by-pass operation. (R-92-8). Shortly thereafter, in July 2009, his father died and he spent a lengthy period of time in Switzerland handling his father's affairs. (R-92-8-9). He returned to the United States in October 2009 and a few

weeks later his daughter was born. (R-92-9). As a result of these significant events, Mr. Schwarzbaum's 2008 FBAR was not filed until December 2011. (R-92-9). It fully reported Mr. Schwarzbaum's interests in the foreign accounts.[2] (R-92-9). In the interim, however, Mr. Schwarzbaum again prepared and timely filed his own FBAR for 2009. (R-92-9). He reported both Costa Rican accounts. (*Id.*). In addition, he reported his largest account in Switzerland. (*Id.*). He included this Swiss account because in 2009 he transferred money into it from the United States in anticipation of his move back to Switzerland in 2010. (*Id.*). Once again, Mr. Schwarzbaum's 2009 FBAR was consistent with the advice of his U.S. accountants. (*Id.*).

Following an examination in 2013 and 2014, the IRS revenue agent assigned to the case, James Bjork, recommended that Mr. Schwarzbaum be assessed non-willful penalties for his failure to report the foreign accounts in years 2006-2009. (R-92-12). These non-willful penalties totaled $221,394. (R-39.1-2). This recommendation was approved by Bjork's group manager, Erik Anderson. (R-92-12). Both Bjork and Anderson conducted a telephonic interview of Mr. Schwarzbaum as part of the examination. (*Id.*). Their recommendations, however, were overruled by Clinton West, an IRS offshore technical advisor, who decided that

[2] The 2008 FBAR was prepared during Mr. Schwarzbaum's participation in the IRS's Offshore Voluntary Disclosure Initiative. (R-78-16-17).

Mr. Schwarzbaum's conduct was willful. (*Id.*). West, however, never interviewed Mr. Schwarzbaum and had no role in the actual fact gathering. (R-34-7; R-35.3-50). West's uninformed decision increased Mr. Schwarzbaum's penalties from $221,394 to over $15 million, including interest and late-payment penalties. (R-34-6-7).

The statutory penalty for a willful failure to report is the greater of $100,000 or 50% of the value of the unreported account, measured as of the date the FBAR filing is due, which for the years at issue was June 30 of the following year. *See* 31 U.S.C. §§ 5321(a)(5)(C)(i) and (D)(ii); 31 C.F.R. §1010.306(c); (R-92-12, 24-25). The IRS has the authority to mitigate the penalty imposed if certain conditions are met. (R-92-12). The initial penalties computed by the IRS totaled $35.4 million, which even the IRS deemed excessive. (R-92-12, 25). The IRS had Mr. Schwarzbaum's account statements, which included the account balances as of June 30. (R-71-Ex.70, p. 9; Ex. 71, p. 464; Ex. 90, p. 13; Ex. 91, p. 127). Accordingly, the IRS had the information necessary to calculate accurately the penalties owed by Mr. Schwarzbaum.[3] (*Id.*). But the IRS did not use that information. (R-92-25). Instead, the IRS computed the penalties by (i) calculating the maximum penalty for each year based on the highest balance in each account at any time during the year (not the balance as of the following June 30 as required by the statute), (ii) selecting

[3] If the IRS needed additional information, it could have requested it during the examination process.

the highest aggregate or total penalty from among the years at issue (which was 2008) and (iii) then allocating that amount across all other years. (R-92-25). Ultimately, the IRS assessed willful penalties against Mr. Schwarzbaum for 2006-2009 in the total amount of $13,729,591, before interest and late-payment penalties. (R-92-2, 14, 25).

Course of Proceedings and Disposition Below

After a five-day bench trial, the district court concluded that the IRS violated the FBAR civil penalty statute, 31 U.S.C § 5321, in assessing the penalties for Mr. Schwarzbaum's willful failure to file the FBAR reports. (R-92-22-25). As a result, the district court concluded that the penalty assessments were not in accordance with law and must be set aside. (R-92-25; R-98-1-2). Rather than remand the matter to the IRS for the consideration and assessment of any new penalties, the district court calculated its own penalty assessments and, on May 18, 2020, issued its Order Assessing Penalties. (R-98-1). The district court confirmed that it had set aside the IRS's original assessments because they were not in accordance with 31 U.S.C. § 5321. (R-98-2). The court then proceeded to assess new penalties against Mr. Schwarzbaum. (R-98-16). Based on the United States' concession, the district court assessed no penalty for 2006. (R-98-7). For 2007-2009, the district court assessed new willful penalties totaling $12,907,952. (R-98-10, 16).

On August 28, 2020, the district court entered an amended final judgment against Mr. Schwarzbaum totaling $15,772,853.10. (R-105-1-2). Mr. Schwarzbaum appealed and this Court vacated the district court's judgment and instructed the district court to remand the matter to the IRS. *United States v. Schwarzbaum*, F. 4th 1355, No. 20-12061 (11th Cir. 2022). Instead of following APA principles and closing its case following remand to the IRS, the district court retained jurisdiction over the case. (R-146-5). On September 15, 2022, the IRS issued new assessments in which it purported to calculate amounts based on the June 30 account balances. (R-152.1-1). The United States ignored the IRS and asked the district court to enter a judgment in the exact amount of the assessments previously set aside as arbitrary and capricious. (R-152-2). The district court granted the United States' motion, (R-160-1), and on November 1, 2022, entered a judgment enforcing the FBAR penalties in violation of the FBAR penalty statute and applicable statute of limitations. (R-162-1). Mr. Schwarzbaum timely appealed the district court's judgment. (R-164-1).

Standard of Review

This Court reviews *de novo* the district court's judgment assessing penalties that are contrary to the FBAR civil penalty statute. *See Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1245 (11th Cir. 2006). The Court also reviews *de novo* the district court's assessment of new penalties in violation of the statute of limitations. *See Berman v. Blount*

Parrish & Co., Inc., 525 F.3d 1057, 1058 (11th Cir. 2008). Similarly, the Court reviews *de novo* the district court's order retaining jurisdiction in violation of the APA. *See, e.g., Cissell Mfg. Co. v. United States Dept. Labor*, 101 F.3d 1132, 1136 (6th Cir. 1996); *New Mexico Health Connections v. United States Dept. Health & Human Services*, 946 F.3d 1138, 1161 (10th Cir. 2019). The Court reviews de novo the district court's compliance with the mandate. *See Wyle v. Island Hotel Co.*, 774 Fed. App'x 574, 576 (11th Cir. 2019). Finally, the constitutionality of the penalty assessments under the Eighth Amendment is a legal question reviewed *de novo* by this Court. *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

SUMMARY OF THE ARGUMENT

This Court should reverse the final judgment after remand because the district court erred by entering judgment against Mr. Schwarzbaum for FBAR penalty assessments that violate the FBAR penalty statute. After vacating the district court's first judgment for violating the APA, this Court instructed the district court to remand the case to the IRS. The IRS, on remand, purported to recalculate the penalties to be assessed. Instead, the district court ignored the recalculations and entered a judgment for the exact same penalty amounts that were previously set aside as unlawful. The FBAR penalty statute requires that any willful FBAR penalty be calculated using the account balances as of the FBAR filing due date (June 30 in this case). The district court set aside the IRS's original assessments that did not use the

June 30 balances. Nevertheless, the district court, inexplicably, entered a second judgment for the exact same amounts.

The district court's judgment is defective also because of its disregard for the applicable statute of limitations. FBAR penalties must be assessed within six years from the FBAR due date. The original assessments may have been timely, but were vacated by the district court. Any subsequent assessment is time-barred.

In addition to the computational defects and untimeliness of the assessments, the district court's judgment is procedurally flawed because the court contradicted administrative law precedent and retained jurisdiction during remand. Under APA principles, the district court functions as a reviewing court to evaluate agency action. Once the district court determines an agency's action is unlawful, the court must set aside the agency's action and remand the matter to the agency. Thereafter, its job is complete and the district court must close the case. Here, the district court's decision to retain jurisdiction during remand was erroneous and its order should be reversed.

Finally, Mr. Schwarzbaum rejects the United States' flawed assertion that the original assessments remain intact. To the extent that the original assessments have been revived in any sense, they are unconstitutionally excessive. Civil fines are subject to Eighth Amendment scrutiny unless they are solely remedial. The district court acknowledged that FBAR penalties "undoubtedly promote deterrence." (R-98-15). The admitted existence of that deterrent purpose confirms that FBAR

penalties are not wholly remedial and, therefore, are fines subject to Eighth Amendment review. In addition, the fines illegally assessed by the district court are also excessive because they are grossly disproportionate to the unwitting reporting mistake committed by Mr. Schwarzbaum.

This Court should reverse the district court's judgment and remand with instructions that judgment be entered in Mr. Schwarzbaum's favor.

ARGUMENT

I. The District Court's Judgment Violates the FBAR Penalty Statute.

The penalty amounts awarded to the United States in the district court's judgment have already been rejected once by this Court, and by the district court. The United States' transparent attempt to obtain a second judgment for those same amounts must be rejected again, and for the same reason.

Following the decision in *Schwarzbaum I*, the United States vigorously argued it should be given another opportunity to assess correct FBAR reporting penalties against Mr. Schwarzbaum. To that end, the IRS purportedly undertook efforts to calculate new penalty assessments. Despite characterizing the IRS's new calculations as "correct penalty amounts," (R-152-2), the United States rejected those calculations. Likely recognizing the difficulty it faced in attempting to collect a new, higher penalty assessment issued after the expiration of the statute of limitations, the United States instead asked the district court to enter judgment for the same statutorily invalid penalty amounts already rejected by the district court and this Court in *Schwarzbaum I*. But those penalty assessments were held to be arbitrary and capricious in *Schwarzbaum I* because they lack any connection to Mr. Schwarzbaum's account balances as of June 30 (i.e. the reporting due date). Those assessments are no less arbitrary and capricious this time around. They are still based on calculations that lack any connection to the June 30 account balances.

The FBAR penalty statute is clear. Section 5321(a)(5)(C) provides that "[i]n the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—the maximum penalty [for an FBAR violation] shall be … the greater of $100,000, or 50 percent of the [balance in the account at the time of the violation]." The time of the violation is the FBAR due date, which for the years at issue, was June 30.

The district court clearly and definitively determined that the IRS's original FBAR penalty assessments against Mr. Schwarzbaum violated the FBAR statute, 31 U.S.C. § 5321, and must be set aside. The district court's determination on this point was correct as a matter of law and fact. As the district court explained, the IRS based its penalty computation on the incorrect account balances contrary to the express language of the statute. The statute provides that the penalty for a willful failure to report is the greater of $100,000 or 50% of "the balance in the account at the time of the violation." 31 U.S.C. § 5321(a)(5)(C)(i), (D)(ii). For the years at issue, FBAR reports were due on June 30 of the succeeding year. 31 C.F.R. § 1010.306(c). The IRS, however, did not calculate its penalties based on the account balances as of June 30 of the succeeding year – the time of the violation.[4] Instead, the IRS calculated the maximum penalties based on the highest balance in the accounts at any time

[4] The district court noted that, although the IRS represented in its correspondence to Mr. Schwarzbaum that it used June 30 account balances to compute the penalties, the evidence presented at trial established that the IRS did not do so. (R-92-25).

during the tax year. To compound its error, the IRS then selected the highest aggregate penalty from among the years at issue and allocated that penalty across all the years at issue. As a result, the penalties assessed by the IRS were not in accordance with the law and the district court correctly set aside under the APA. *See, e.g.,* 5 U.S.C § 706 (2)(A), (C), (D) (court shall hold unlawful and set aside agency action that is not in accordance with law or fails to meet statutory requirements); *FCC v. Next Wave Personal Communications*, 537 U.S. 293, 300 (2003); *Bank of America, N.A. v. FDIC*, 244 F.3d 1309, 1321 (11th Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002); *Southwestern Electric Power Co. v. EPA*, 920 F.3d 999, 1022 (5th Cir. 2019).

The district court's current judgment once again awards the United States FBAR penalties that bear no relationship to the June 30 account balances. The IRS produced documents reflecting new calculations purportedly based on June 30 balances. The United States, however, rejected those calculations. Instead, the United States asked the district court to enter a judgment for penalties in the amount of $4,185,271 for each of the 2007-2009 reporting years. That figure does not match the IRS recalculations for any of the relevant years, nor was it based on June 30 balances for any year as required by the statute. That same disregard for the clear statutory requirement to calculate penalties based on June 30 account balances led to the assessments being vacated in the first instance. Now, Mr. Schwarzbaum finds

himself having to appeal the very same penalties that were previously vacated as arbitrary and capricious. The district court's judgment enforces penalties that do not comply with the FBAR penalty statute and which have already been vacated as arbitrary and capricious. This Court should reverse the final judgment.

II. The District Court's Judgment Violates the FBAR Statute of Limitations on Assessments.

The Court should also reverse the district court's judgment in favor of the United States because the statute of limitations for the assessment of penalties for the years at issue has expired and any assessment against Mr. Schwarzbaum is prohibited.

FBAR penalty assessments are subject to a six-year statute of limitations, which runs from the FBAR due date. 31 U.S.C. §§ 5321(b)(1). *See also United States v. Bussell*, 699 Fed. Appx. 695, 696 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 1697 (2018); *United States v. Gardner*, No. 2:18-CV-03536-CAS-E, 2019 WL 1767120 (C.D. Cal. Apr. 22, 2019). Thus, the statutory deadlines for the IRS to assess FBAR penalties for years 2007, 2008, and 2009 expired six years from the reporting deadlines, or June 30, 2014; June 30, 2015; and June 30, 2016, respectively.[5] In an effort to cooperate and facilitate the IRS's examination, Mr. Schwarzbaum voluntarily executed multiple consents to extend the statute of

[5] The statute of limitations for 2006 also expired on June 30, 2013.

limitations to December 31, 2016 for all years at issue. The IRS had years to get it right. The extended limitations period, however, has long since expired and the IRS is time-barred from assessing new FBAR penalties against Mr. Schwarzbaum. There is no statute that tolls the limitations period during litigation. Even if there were, the statute of limitations in this case had already expired long before this lawsuit was filed by the United States in 2018.

The statute of limitations on FBAR assessments is unambiguous: "[t]he Secretary of the Treasury may assess a civil penalty under subsection (a) at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed." 31 U.S.C. § 5321(b)(1). Congress provided the IRS with six years to assess FBAR penalties. *Id.* Under the statute, a civil FBAR penalty can be assessed at any time before the end of the six-year period beginning on the FBAR due date (e.g., any civil FBAR penalty for the 2007 reporting year must be assessed by June 30, 2014, which is six years after the June 30, 2008 due date). To determine what must occur within this six-year time frame, the threshold question then becomes—what is an "assessment?"

A careful examination of the statutory language is crucial to give effect to the words used by Congress. First, and most important, the decision to impose a penalty is not an assessment and those concepts must not be used interchangeably. Section 5321(a)(5) grants the IRS the discretion to impose a civil money penalty for an

FBAR violation. Next, Section 5321(b) mandates that any such penalty must be assessed within the six-year limitations period. United States Supreme Court precedent is instructive to understand precisely what the IRS must accomplish to make an assessment. The IRS, to make a valid, enforceable FBAR assessment, must calculate and formally record an individual's liability before the statute of limitations expires. "Assessment … refers to the official recording of a taxpayer's liability," *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 9 (2015), and is "understood more broadly to ***encompass the process by which that amount is calculated.***" *Id.* (Emphasis added). Also important for purposes of understanding the limitations imposed on the IRS, the assessment refers to the *amount* of the liability, not the person on whom it is imposed. *See United States v. Galletti*, 541 U.S. 114, 115 (2004) (Supreme Court declaring "it is the *tax* that is assessed, not the taxpayer.") (Emphasis in original).

The six-year period for assessment is absolute and there is no statutory authority to extend the deadline. The clear language of the statute leaves no room for interpretation. In contrast, one need look no further than the IRS's own rule book—the Internal Revenue Code—to understand the meaning of the term "assessment" and to recognize that Congress understands how to toll assessment limitations periods when it intends to do so. *See, e.g.*, I.R.C. § 6213(a) (tolling assessment of tax deficiency until time to petition the United States Tax Court has

expired or Tax Court proceedings have concluded). In other words, Congress provided the IRS with a tolling exception to assess tax deficiencies; had Congress wished to give the IRS more time to assess FBAR penalties, it would have done so.

This Court recently considered the legal meaning of "assessment" in a case concerning the supervisory approval requirement for certain tax penalties. Under Section 6751(b)(1) of the Internal Revenue Code, the IRS cannot assess any penalty unless the initial determination of such assessment is personally approved by the supervisor of the individual making such determination. This Court carefully examined the relevant statute and determined that the "assessment" has an established legal meaning which is "the act of recording the taxpayer's liability, including any applicable penalties, onto the government's books." *Kroner v. Comm'r*, 48 F. 4th 1272, 1277 (11th Cir. 2022) (quoting *Direct Mkt'g*, 575 U.S. at 9.).

As important as it is to determine the specialized, legal meaning of assessment, it is also imperative to recognize what an assessment is not. In *Kroner*, this Court concluded that an assessment is not the decision to impose a penalty. *Id.* (Stating that advising an individual penalties will be imposed is not an assessment). This Court's analysis in *Kroner* is useful here. In the instant case, two related statutes govern FBAR penalties. One authorizes the IRS to impose a penalty for a reporting violation and the other requires the agency to assess that penalty within six

years from the date the FBAR was due. Those statutes are distinguishable by the language Congress used and only one contains an unambiguous time limitation—no ***assessments*** after six years.

The United States has a clear motivation to disavow the "correct penalty amounts" calculated by the IRS on remand. The government concedes that new assessments for 2009 (and, necessarily, earlier years) are time-barred by the statute of limitations (R-152.1-3) (conceding the government is time-barred from assessing a 2009 FBAR penalty in connection with the UMB account). Specifically, the FBAR Penalty Remand Lead Sheet states that "[e]xamination did not assert a penalty on the original 2009 FBAR calculation and is now time-barred from assessing a penalty on [the UMB] account." *Id.* The United States' position supports Mr. Schwarzbaum's argument. The IRS used only 2008 bank account information to calculate original assessments for ***all*** years at issue, and even then, failed to use the correct 2008 bank account information. The United States' concession with respect to 2009 applies to all years at issue. No 2009 bank account information was considered for any account in connection with the original 2009 penalty assessment. The IRS failures were not limited to the UMB account. To align with the United States' position that no penalty can be assessed in connection with the UMB account because its information was not included in the original assessment, similarly, the statute of limitations bars any penalty assessment for 2007 and 2009 because the IRS

failed to consider any of the bank account information for either year. The 2008 assessment fared no better. The one year in which the IRS actually considered contemporaneous bank account balances, the agency used the wrong information to calculate the original assessment,[6] causing those assessments to be set aside for violating the FBAR penalty statute. That deficiency similarly bars any new assessment for 2008. The United States contends that there was no assessment for the UMB account so any assessment would be time-barred. But, the district court vacated all assessments for not comporting with the law. There is, however, no discernible difference between the absence of an assessment and an assessment that has been vacated. In each scenario, no assessment exists and the time for assessment long ago expired.

Following this Court's decision vacating the district court's amended final judgment in *Schwarzbaum I*, no valid assessment exists in connection with Mr. Schwarzbaum's FBAR reporting errors. Because the assessment, by definition, includes the calculation of the FBAR penalty, there can be no assessment absent a calculation. Accordingly, the consequence of vacating the unlawful assessments based on an illegal computation methodology is clear—the government cannot

[6] To be clear, the IRS possessed volumes of bank documents—all provided by Mr. Schwarzbaum as part of his voluntary disclosure.

simply calculate and record a new penalty against Mr. Schwarzbaum. To the contrary, any attempt to do so results in a new assessment, which is time-barred.

The Fourth Circuit, in *Horowitz*, contemplated the consequences of a timely FBAR penalty assessment that was later vacated. The court acknowledged any attempt to reinstate the assessment would be time-barred if it occurred after the expiration of the six-year statute of limitations in Section 5321(b)(1). *United States v. Horowitz*, 978 F.3d 80 (4th Cir. 2020). In *Horowitz*, the district court implied that an FBAR penalty assessment issued to replace a vacated assessment would be time-barred if it were issued after the six-year limitations period. *United States v. Horowitz*, 361 F.Supp.3d 511 (D. Md. 2019). At issue was whether the IRS reversed the penalty assessment in its internal systems, and if so, whether reinstatement of the assessment was time-barred. The district court did not reach a final decision on the issue because of the summary judgment posture of the case and contradictory statements by IRS personnel as to whether the assessments were actually reversed in the IRS database. Nevertheless, the court made its position clear that reissued assessments would have been time-barred if the original timely assessments were, in fact, reversed. *Id.* at 520 ("Thus, Defendants have not demonstrated through evidence of undisputed facts that Beasley reversed the assessment, ***such that timely assessment was vacated and the statute of limitations for assessing penalties had run*** by the time the IRS assessed FBAR penalties in May 2016.) (Emphasis added).

On appeal, the Fourth Circuit agreed. In affirming the district court's ruling, the appellate court acknowledged that had the 2014 assessments been reversed and then "reinstated in 2016, [the assessments] would then be untimely." *United States v. Horowitz*, 978 F.3d 80, 92 (4th Cir. 2020).

There is no dispute that Mr. Schwarzbaum's original FBAR penalty assessments were vacated, rendering them null and void. Any attempt to revive those original assessments by characterizing the IRS's new assessments as mere recalculations of existing assessments fails because the United States Supreme Court has spoken clearly that an "assessment" cannot exist in the absence of the underpinning calculation. In short, the IRS's original assessments could not survive the decision in *Schwarzbaum I* vacating the associated penalty calculations.

Although application of the statute of limitations may, at first blush, appear to yield a harsh result, limitations periods serve a valuable purpose and apply equally to protect the rights of taxpayers and the IRS. *See Brafman v. United States*, 384 F.2d 863, 868 (5th Cir. 1967) . A valid assessment by the IRS is required to establish Mr. Schwarzbaum's liability. 31 U.S.C. § 5321(b)(1). The courts have not hesitated to rule in favor of taxpayers where the IRS failed to make a valid assessment within the statute of limitations. For example, in *Brafman*, the former Fifth Circuit reversed and remanded a case for dismissal because a tax assessment certificate was not signed by the proper official before the statute of limitations expired. The court

recognized that the United States' claim against the taxpayer would be barred by the expiration of the limitations period. The court, however, found that any characterization of the statute of limitations as a "technical defense" was immaterial to its decision. *Brafman*, 384 F.2d at 867-68. As the court explained, "[t]he procedures set forth in the Internal Revenue Code were prescribed for the protection of both Government and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting party must be prepared to face, whether such party be the taxpayer or the Government." *Brafman*, 384 F.2d at 868. The IRS had ample time and all of the facts necessary to assess accurate and lawful penalties. It simply failed to do so within the time allowed (and extended by Mr. Schwarzbaum). Any attempt to assess now is time-barred.

III. The District Court Disregarded the APA and This Court's Mandate by Retaining Jurisdiction

APA case law is clear—once a court determines that an agency has committed legal error, the court's role has ended. The court is not to act on behalf of the agency. Here, once this Court's mandate issued instructing the district court to remand the matter to the IRS, the district court's work was done and the district court should have closed this case. Nothing remained over which the district court possessed any jurisdiction. But the district court misapprehended precedent and ignored bedrock principles of administrative law to retain jurisdiction in violation of the APA and this Court's mandate.

The district court's order retaining jurisdiction improperly treated this case (where the penalty assessments were vacated because they were arbitrary and capricious) like the narrow group of cases in which vacatur was not ordered because of the agency's likelihood of providing better support for its action on remand. Remand without vacatur is an exception to the long-standing principle that, under the APA, unsupported agency action is set aside by a reviewing court and the agency is left to try again on remand. It is typically ordered in rulemaking cases where an agency failed to provide satisfactory evidence of reasoned decision-making and the agency is likely to rehabilitate its earlier action using proper evidence of a rational decision. The district court's remand of this case to the IRS while retaining jurisdiction operates no differently than remand without vacatur—an impermissible circumvention of already vacated FBAR penalty assessments. Vacatur, unquestionably, is the ordinary APA remedy and was required in this case. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271 (11th Cir. 2015). The district court erred by deviating from that standard.

First, the assessments were, in fact, vacated in this case. Second, the United States pointed to no additional support for its assessments in this case. In fact, the United States promptly rejected the IRS's new, "corrected" assessments in favor of the original assessments previously vacated by the district court and this Court as arbitrary and capricious. Accordingly, there was no better explanation for the

assessments and none has been offered. In light of these errors, this Court should reverse the district court's decision to retain jurisdiction.

By retaining jurisdiction over this case, the district court has ignored the vacatur of the assessments and effectuated a remand without vacatur by another name. The words "shall hold unlawful and set aside" must be respected and enforced for the APA to provide the relief it was designed to give aggrieved persons. "Shall" connotes mandatory action. "Set aside" means "to annul or vacate." *Set Aside*, Black's Law Dictionary (11th ed. 2019). "The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dept. of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. __ , 140 S.Ct. 1891, 1905 (2020) (internal quotes omitted). Once a reviewing court concludes agency action violates the APA, that court "shall—not may—hold unlawful and set aside the agency action." *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (internal quotes omitted). Only in a discrete subclass of cases—easily distinguishable from the present case—is it appropriate for a court to remand a case to the agency without setting aside the unlawful agency action.

Remand without vacatur is appropriate only in limited circumstances—namely, the seriousness of the order's deficiencies and the disruptive consequences of an interim change. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir 1993) (emphasis added). The circumstances in *Allied-*

Signal demonstrate why vacatur could prove too disruptive and evince a need to except a narrow set of deficient agency actions from its consequences—none of which apply to this case.

One can clearly understand why remand without vacatur is the preferred approach when the agency's lone flaw was inadequate explanation. In *Allied-Signal*, the court concluded that the Nuclear Regulatory Commission failed to justify why similarly situated licensees were treated differently with respect to certain user fees. The court reasoned that setting aside the inadequately supported action during remand makes little sense if the agency can likely provide a proper foundation for its action. *Allied-Signal*, 988 F.2d at 151 ("[i]t is conceivable that the Commission … may develop a reasoned explanation based on an alternative justification" for its action); see also, *United Mine Workers, Int'l Union v. Mine Safety & Health Admin.*, 928 F.2d 1200, 1203 (concluding that the agency's lack of reasoned decision-making did not require vacatur because the "deficiencies in the Assistant Secretary's order appear to go to the adequacy of his stated explanation, rather than the merits of the decision itself."). That situation simply is not present in this case. Here, the IRS's penalty assessments were based on an illegal methodology and no further explanation can save them. The agency patently violated the statute in calculating the penalties and rehabilitating its unlawful action is impossible. Remand with vacatur is not applicable. Indeed, the United States has conceded as much by

rejecting the IRS's recalculations and asking the district court to reenter the same penalty assessments already rejected by the district court and this Court. The district court has once again overstepped its authority and assumed the agency's role in assessing penalties.

A court's ability to remand matters to an agency without first setting aside the improper agency action has been debated. In fact, some courts refuse to acknowledge remand without vacatur and denounce its use as a violation of the law. Reviewing courts lack authority to remand to the agency without vacating the action—"[n]o statute governing judicial review of agency action permits such a disposition and the controlling statute—5 U.S.C. § 706(2)—flatly prohibits it." *Checkosky*, 23 F.3d at 491 (Randolph, J.). Whether its use is permissible in extraordinary circumstances or forbidden outright by statute, remand without vacatur is not appropriate in this case and the order to retain jurisdiction should be reversed to avoid consequences that fundamentally treat this case as if the assessments had not been vacated and the IRS is somehow capable of reviving its illegal and time-barred assessments.

IV. The District Court's Penalties Are Punitive in Nature and Excessive in Violation of the Eighth Amendment.

Total forfeiture of one's property for mere failure to properly complete and file an information reporting form cannot withstand Eighth Amendment scrutiny. The Eighth Amendment of the United States Constitution prohibits the government

from imposing "excessive fines." U.S. Const. amend. VIII. In *Austin v. United States*, 509 U.S. 602, 610 (1993), the United States Supreme Court concluded that the Eighth Amendment applies to civil sanctions as well as criminal ones so long as some purpose of the sanction is to punish. Explaining that civil penalties frequently advance both punitive and remedial goals, the Supreme Court held that the determinative question under the Eighth Amendment is whether the civil penalty serves, at least in part, to punish or deter. If so, then the Eighth Amendment applies even if the penalty also serves the dual purpose of remediation. The Supreme Court concluded that the a civil penalty escapes scrutiny under the Eighth Amendment only if it serves a ***solely*** remedial purpose. *See Austin*, 509 U.S. at 610. *See also United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (forfeiture of currency ordered for violation of reporting statute is "punishment" and therefore constitutes fine within meaning of Eighth Amendment).[7] Accordingly, if the FBAR penalties assessed against Mr. Schwarzbaum serve, in part, a punitive or deterrent purpose, then they are subject to the Eighth Amendment.

The district court concluded that the FBAR penalties assessed in this case are not fines and therefore are not subject to the Eighth Amendment. Those assessments

[7] Although the district court summarily rejected the applicability of civil forfeiture cases, the relationship between the governing statutes is obvious. This case involves a reporting penalty under 31 U.S.C. § 5321. *Bajakajian* involved a reporting penalty under the following statute, 31 U.S.C. § 5322.

that were the subject of that conclusion were vacated by this Court in *Schwarzbaum I*. However, to the extent that any part of those assessments has been revived, they do not pass constitutional muster. The district court explained that FBAR penalties "should not be regarded primarily as punitive" because the statutory section in which they appear is labeled "Civil penalties." (R-98-14). But the district court ignores the test articulated by the United States Supreme Court—penalties need not be primarily punitive to be a fine for purposes of the Eighth Amendment. Nor does the label attached dictate whether the penalties serve a punitive purpose. *See, e.g., Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994) (recognizing that description of statutory penalty as "civil" does not foreclose possibility that it is punitive). Instead, fines subject to Eighth Amendment scrutiny include civil penalties unless they are solely remedial. *See Austin*, 509 U.S. at 610. Here, the district court acknowledged that FBAR penalties "undoubtedly promote deterrence." (R-98-15). The admitted existence of that deterrent purpose confirms that FBAR penalties are not wholly remedial and, therefore, are fines subject to Eighth Amendment review under Supreme Court jurisprudence.

The district court seeks to avoid the import of this deterrent purpose by citing *Hudson v. United States*, 522 U.S. 93, 102 (1997) for the proposition that all civil penalties have some deterrent effect. Inexplicably, the court discounts *Austin*, an Eighth Amendment case, in favor of *Hudson*, a Double Jeopardy case. Although a

civil penalty with a deterrent purpose may be insufficient to implicate the Double Jeopardy Clause, it is nonetheless a fine subject to Eighth Amendment scrutiny. Indeed, the United States Supreme Court states as much in *Hudson*, noting that the Eighth Amendment protects against excessive civil fines and cites *Austin* in support.

Moreover, the purpose of FBAR penalties confirm that they are penal in nature rather than remedial. *See United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993) ("A remedial action is one that compensates an individual for a specific harm suffered, while a penal action imposes damages upon the defendant for a general wrong to the public."). The Internal Revenue Manual instructs that FBAR penalties "should be determined to promote compliance with the FBAR reporting and recordkeeping requirements." IRM 4.26.16.6 (11-06-2015). It says nothing to indicate that the penalties should compensate the IRS for the costs of its investigation and examination. To that end, numerous cases have subjected FBAR penalties to Eighth Amendment scrutiny without any suggestion that the Eighth Amendment does not apply. *See, e.g., U.S. v. Garrity*, No. 3:15-CV-243 (MPS), 2019 WL 1004584, *5 (D. Conn. Feb. 28, 2019); *Moore v. U.S.*, No. C13-2063RAJ, 2015 WL 1510007, *12 (W.D. Wash. Apr. 1, 2015); *U.S. v. Bussell*, No. CV 15-02034 SJO (VBKx), 2015 WL 9957826, *7-8 (C.D. Cal. Dec. 8, 2015). The district court's analysis on this point is facially flawed and should be rejected. Because FBAR

penalties serve a deterrent and punitive purpose, they are fines for purposes of the Eighth Amendment.

It is worth noting that the FBAR penalty assessments against Mr. Schwarzbaum are not remedial—namely because they are not necessary to ensure that the United States is made whole in connection with Mr. Schwarzbaum's reporting failures. In this case, Mr. Schwarzbaum voluntarily disclosed his failure to file the FBAR reports and paid in full the taxes he owed, along with interest and penalties on those taxes. The payment of these amounts have made the government whole. The district court offered no explanation for why penalties totaling nearly $13 million, some of which vastly exceed the foreign account values, along with the imposition of still more penalties on those penalties, and interest, are necessary to make the United States whole for the costs of an investigation and prosecution it never performed. In this case, the penalties serve no remedial purpose. Accordingly, the FBAR penalties assessed against Mr. Schwarzbaum are not solely remedial and the district court erred by concluding that the penalties are not subject to the Eighth Amendment.

Moreover, the penalties in this case cannot withstand scrutiny under the Eighth Amendment because they are grossly disproportional to the conduct they seek to punish. *See Bajakajian*, 524 U.S. at 337. Although there is no bright line for determining whether a penalty is excessive under the Eighth Amendment, the

decision in *Bussell* is instructive. The *Bussell* court considered the factors presented in *Bajakajian*: (1) the nature and extent of crime (2) whether the violation was related to other illegal activities (3) the other penalties that may be imposed, and (4) extent of the harm caused. *Bussell*, 2015 WL at *7, citing *Bajakajian* at 337-40. The court found an FBAR penalty of $1.2 million did not constitute an excessive penalty because the defendant had previously been charged criminally for concealing her financial assets. She also admitted that she willfully failed to disclose her overseas account.

In contrast, Mr. Schwarzbaum was assessed penalties and interest totaling more than $15 million. Yet he committed no crime and his FBAR reporting mistakes were unrelated to any illegal conduct. Moreover, the district court found that his FBAR reporting violations were unknowing. Instead, Mr. Schwarzbaum relied on the advice of his U.S. licensed CPAs, which turned out to be erroneous. The only basis for the district court's assessment of willful penalties was Mr. Schwarzbaum's review of the IRS instructions for the FBAR form. The penalties assessed against Mr. Schwarzbaum are grossly disproportional as compared to his conduct.

The Supreme Court's decision in *Bajakajian* confirms the penalties here must be set aside as excessive. In that case, the respondent failed to report that he was transporting more than $10,000 in currency outside of the United States. The government sought to impose a civil forfeiture penalty of the entire $357,144

transported by the respondent. The district court found that amount grossly disproportionate to the reporting violation at issue and reduced the penalty to $15,000. The Supreme Court first held that civil forfeiture of the currency for failure to report it constitutes a punishment and is, therefore, a fine under the Eighth Amendment. The Supreme Court also agreed that forfeiture of the entire $357,144 was excessive because the violation, like Mr. Schwarzbaum's here, was solely a reporting issue. The Supreme Court explained that Bajakajian's underlying conduct was lawful, he simply failed to report it. The Supreme Court found the original forfeiture penalty grossly disproportionate to the gravity of the offense. The Supreme Court affirmed the reduced $15,000 forfeiture amount.

The penalties and interest assessed against Mr. Schwarzbaum for his similar failure to report lawful conduct exceed the reduced fine in *Bajakajian* by 1,000%. Similarly, the penalties exceed the actual taxes Mr. Schwarzbaum owed by more than 1,000% in every year – and by more than 3,000% in 2007. In several instances, the penalties vastly exceed the account balances. For example, in accounts with balances of $0, the court nonetheless assessed an unmitigated penalty of $100,000. These astronomical penalties must be weighed against the severity of Mr. Schwarzbaum's wrongdoing. The IRS revenue agent and his supervisor both recommended non-willful penalties because they believed Mr. Schwarzbaum's failure to report was unwitting. Similarly, the district court found that Mr.

Schwarzbaum's reporting violations were unknowing. Yet, the court assessed against Mr. Schwarzbaum one of the highest FBAR willful penalties on record. Bjork, the revenue agent assigned to Mr. Schwarzbaum's case, testified that the penalties assessed against Mr. Schwarzbaum are excessive. (R-35.3-118). The exorbitant penalties in this case bear no relationship to Mr. Schwarzbaum's unwitting reporting violations. Indeed, the district court's finding of willful conduct is predicated on admittedly unknowing conduct. This Court should reverse the penalties assessed against Mr. Schwarzbaum because they are an excessive fines under the Eighth Amendment.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment in favor of the United States and remand with instructions that the district court enter judgment in favor of Mr. Schwarzbaum.

Respectfully submitted,

/s/ Chad M. Vanderhoef

CHAD M. VANDERHOEF
Florida Bar No. 109595
STACY D. BLANK
Florida Bar No. 772781
HOLLAND & KNIGHT LLP
100 N. Tampa Street, Suite 4100
Tampa, FL 33602
Telephone: (813) 227-8500
Facsimile: (813) 229-0134
Chad.Vanderhoef@hklaw.com

Stacy.Blank@hklaw.com
WILLIAM M. SHARP, SR.
Florida Bar No. 341452
HOLLAND & KNIGHT LLP
1180 W. Peachtree Street NW, Suite 1800
Atlanta, GA 30309
Telephone: (404) 817-8409
Facsimile: (404) 881-0470
William.Sharp@hklaw.com

Counsel for Appellant

CERTIFICATE OF RULE 32(a)(7)(B) COMPLIANCE

Counsel for appellant Isac Schwarzbaum certifies that this Initial Brief complies with Rule 32(a)(7)(B) and includes 9,132 words as calculated by the word processing program.

/s/ Chad M. Vanderhoef
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2023, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record identified via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Chad M. Vanderhoef
Attorney