No. 17-1052

In the Supreme Court of the United States

LETANTIA BUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the civil penalty imposed on petitioner for failing to disclose her interest in an overseas bank account violated the Excessive Fines Clause of the Eighth Amendment.

2. Whether the district court committed reversible error by declining to exclude evidence regarding petitioner's Swiss bank account.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 695. The order of the district court (Pet. App. A22-A46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2017. The petition for a writ of certiorari was filed on January 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. United States citizens and residents are subject to U.S. income taxation on their worldwide income. See 26 U.S.C. 61(a); 26 C.F.R. 1.1-1(b). To ensure compliance with that requirement, the U.S. individual income-tax return form requires each taxpayer to state whether he had "an interest in or a signature or other authority

over a financial account in a foreign country" during the relevant tax year. Internal Revenue Service (IRS) Form 1040, Schedule B, Pt. III, l. 7a (2006).[1] The form in effect for the year at issue here directed taxpayers who had such an interest to review the filing requirements for IRS Form TD F 90-22.1, *id.* at 2—the report of foreign bank and financial accounts, often referred to as the foreign bank-account report, or FBAR, see Pet. App. A13.

The requirement to report interests in foreign bank accounts arises under the Bank Secrecy Act (Act), Pub. L. No. 91-508, 84 Stat. 1114 (31 U.S.C. 5311 *et seq.*). The recordkeeping and reporting requirements of that Act assist the government in obtaining information to facilitate the supervision of financial institutions; obtaining information needed to formulate monetary and economic policy; and achieving civil and criminal tax-enforcement objectives, including combating tax evasion and promoting tax compliance. See H.R. Rep. No. 975, 91st Cong., 2d Sess. 13 (1970) (House Report) ("Secret foreign financial facilities, particularly in Switzerland," offered the wealthy a "grossly unfair" but "convenient avenue of tax evasion."). As relevant here, the Act provides that the Secretary of the Treasury "shall require a * * * citizen of the United States * * * to * * * file reports * * * when the * * * citizen * * * makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. 5314(a).

The Act also authorizes the Secretary to adopt regulations addressing various topics. 31 U.S.C. 5314(b). Regulations issued pursuant to that authority require any citizen who has a financial interest in, or signature or other authority over, a foreign financial account to

[1] https://www.irs.gov/pub/irs-prior/f1040sab--2006.pdf.

"report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists." 31 C.F.R. 103.24 (2006). A U.S. citizen must file an FBAR if the total value of her foreign accounts exceeded $10,000 at any time during the calendar year. 31 C.F.R. 103.27(c) (2006). The deadline to file an FBAR for 2006 was June 30, 2007. *Ibid.*

The Act imposes "a civil money penalty on any person who violates * * * any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). As originally enacted, that penalty applied only to willful violations, and the maximum penalty imposed (for each violation) was the greater of (1) the balance in the account at the time of the violation, up to $100,000; or (2) $25,000. See 31 U.S.C. 5321(a)(5)(B)(ii) (Supp. II 2002).

In 2004, Congress amended that penalty provision in two significant ways. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1586 (31 U.S.C. 5321(a)(5) (Supp. IV 2004)). First, Congress authorized a penalty for non-willful violations in an amount "not exceed[ing] $10,000." *Ibid.* Second, Congress increased the maximum penalty for willful violations to "the greater of" $100,000 or "50 percent of * * * the balance in the account at the time of the violation," or, if the violation involves a transaction, "the amount of the transaction." *Ibid.* Those amendments reflected Congress's "belie[f] that improving compliance with [the FBAR] reporting requirement is vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams." S. Rep. No. 192, 108th Cong., 1st Sess. 108 (2003) (Senate Report).

2. a. Petitioner is a licensed physician who operated a dermatology practice in Beverly Hills, California,

from 1979 until 1995, when she and her late husband filed for bankruptcy. Pet. App. A24. Before filing for bankruptcy, petitioner and her husband restructured her medical practice to conceal her interest in it, funneling to a Swiss bank account the more than $1 million in profits that had accrued between 1993 and 1995. *Ibid.* In 1996, they transferred those funds to an account at a different Swiss bank, Swiss Bank Corp. (which subsequently became UBS AG). *Ibid.* In 1997, petitioner and her husband opened another account at Swiss Bank Corp. (account number xxxx3235) (Subject Account), in which they had a beneficial interest and over which petitioner had signature authority. *Id.* at A25.

In 2000, petitioner and her husband were indicted in the Central District of California on various counts involving bankruptcy fraud and tax evasion. Pet. App. A26-A27. Those charges involved different offshore accounts not including the Subject Account. See *id.* at A24-A25, A36-A37. In 2002, a jury found petitioner guilty on six counts including conspiracy, bankruptcy fraud, making false statements, and evading taxes by concealing her income through the use of offshore accounts. *Ibid.*; see *id.* at A23-A29. Petitioner was sentenced to 36 months of imprisonment and was ordered to pay a fine, restitution, and costs. C.A. Supp. E.R. 95-98. The IRS also found a tax deficiency, imposed a civil fraud penalty under 26 U.S.C. 6663(a), and issued a jeopardy levy based on its determination that delay would jeopardize collection of unpaid taxes from several prior years. Pet. App. A27-A29; see Gov't C.A. Br. 5-6; C.A. Supp. E.R. 4, 125, 145, 153. Petitioner unsuccessfully challenged the IRS's determinations in court. See Pet. App. A28.

b. In 2006, petitioner still retained her interest in and authority over the Subject Account, which at the end of 2006 had a balance exceeding $2 million. Petitioner did not file an FBAR for 2006 disclosing that account. In addition, petitioner neither disclosed her interest in the Subject Account nor reported any income from it on her 2006 tax return. Instead, petitioner's son liquidated the account and transferred the balance to two other offshore accounts in the names of two different entities. Pet. App. A25-A26.

In 2013, the IRS assessed against petitioner a civil penalty under 31 U.S.C. 5321(a)(5)(C), alleging that she had willfully failed to disclose her interest in the Subject Account for 2006. Pet. App. A29. The assessed penalty was $1,221,806, which was 50% of the account balance on the FBAR reporting deadline for 2006 (*i.e.*, June 30, 2007). C.A. Supp. E.R. 20, 54.

3. a. In March 2015, the IRS commenced this suit to reduce the penalty assessment to judgment. Pet. App. A29, A47-A55. In September 2015, the parties entered into a stipulated agreement "to cut-off all discovery," in exchange for which petitioner agreed not to dispute several facts: (1) she was a United States citizen; (2) she had opened the Subject Account with her husband in 1997; (3) the maximum account balance in 2006 was $2,241,027; (4) she had not filed an FBAR for 2006; (5) she had not reported the interest income earned from the account on her federal income-tax return for 2006; and (6) her failure to disclose her interest in, or other authority over, the account for 2006 was willful. See D. Ct. Doc. 24-1, at 57 (Oct. 27, 2015) (petitioner agreeing that she "w[ould] not argue against" those allegations "for the purposes of this case"); see *id.* at 57-58.

The government moved for summary judgment, arguing that petitioner was liable for the FBAR penalty because she had willfully failed to report her interest in a foreign bank account for 2006. Pet. App. A32. Petitioner moved for judgment on the pleadings, raising a series of "affirmative defenses" and asking the court to dismiss the complaint. *Id.* at A32, A35. As relevant here, petitioner contended that the assessed penalty violated the Excessive Fines Clause of the Eighth Amendment. *Id.* at A35. She further argued that the government had improperly relied on evidence about her overseas activities that was inadmissible under a tax treaty between the United States and Switzerland. *Id.* at A35-A36; see Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, *signed* Oct. 2, 1996, S. Treaty Doc. No. 8, 105th Cong., 1st Sess. (1997) (Convention). Petitioner contended that the Convention permitted the U.S. government to use information obtained from the Swiss government only if it pertained to tax violations, and that her FBAR reporting failure did not constitute a tax violation. D. Ct. Doc. 29, at 20-21 (Nov. 16, 2015).

b. The district court granted the government's motion for summary judgment with one exception (and denied petitioner's motion for judgment on the pleadings to the same extent). Pet. App. A32-A46. The court found that petitioner had willfully failed to report her interest in the Subject Account for 2006. *Id.* at A34-A35. It noted that petitioner had agreed not to dispute willfulness. *Id.* at A34. The court further determined that, in any event, the record independently "demonstrate[d] that [petitioner] was willful in failing to report her financial interest in the Subject Account." *Ibid.* In light of the

prior proceedings and penalties for petitioner's other activities involving foreign bank accounts, the court found that she was "aware of her statutory duty to report offshore accounts," yet had liquidated the Subject Account rather than reporting her assets. *Id.* at A35.

The district court rejected all but one of petitioner's affirmative defenses to the FBAR penalty, while accepting in part her Excessive Fines Clause defense. Pet. App. A35-A45. In analyzing that defense, the court looked to this Court's decision in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which had considered several factors in determining whether a fine is unconstitutionally excessive. Those factors included "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." Pet. App. A41; see *id.* at A41-A44.

Examining the first two factors (nature of harm and relationship to other unlawful acts), the court found that petitioner "clearly fits into the class of persons targeted by the Bank Secrecy Act, namely those evading taxes through the use of offshore bank accounts," though it observed that her offense was "not as serious as some crimes that ultimately trigger civil forfeiture actions." Pet. App. A42. As to the fourth factor (harm caused), the court disagreed with petitioner's contention that she had caused only minimal harm, explaining that petitioner had willfully failed to report the account and had thus imposed a tax loss on the public. *Id.* at A43-A44. As to the third factor (available penalties), however, the court determined that the penalty amount exceeded the maximum civil penalty permitted under the statute. *Id.* at A43. The court agreed with the IRS that the maximum civil penalty for willful violations is 50% of the

account balance, but the court calculated that amount based on the account balance at the end of 2006 rather than on the filing deadline in June 2007. *Ibid.* That adjustment yielded a maximum penalty of $1,120,513 (rather than $1,221,806). *Ibid.*

Petitioner argued that the government's submission of certain evidence concerning petitioner's offshore accounts violated the Convention because the Convention permits use of information obtained from the Swiss government only if that information "pertain[s] to tax violations." Pet. App. A45. The district court held that the evidence was properly admitted, explaining that this case "is clearly a tax collection case." *Ibid.*

c. Petitioner moved for reconsideration, arguing that the funds in the Subject Account were the same as those in other offshore accounts for which petitioner had previously been subjected to penalties. Pet. App. A10-A21. The district court denied the motion. *Id.* at A21. It explained that petitioner "ha[d] provided no evidence as to the source of the funds in the Subject Account," and that the evidence in the record did not support petitioner's assertion. *Id.* at A20.

4. The court of appeals affirmed. Pet. App. A1-A6. The court rejected petitioner's contention that the FBAR penalty imposed on petitioner (as modified by the district court) violated the Eighth Amendment. The court explained that, under *Bajakajian*, a penalty "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at A3 (quoting *Bajakajian*, 524 U.S. at 334). The court held that the penalty imposed on petitioner was "not grossly disproportional to the harm she caused because [she] defrauded the government and reduced public revenues." *Ibid.*

The court of appeals also held that petitioner was not entitled to relief based on her contention that the introduction of banking evidence in the district court had violated the Convention. Pet. App. A5-A6. The court did not address whether the government's use of particular evidence was inconsistent with the Convention. *Ibid.* Instead, it held that petitioner was not entitled to challenge the penalty on that basis because she had "not shown that the [Convention] * * * creates an enforceable right." *Id.* at A5 (citing *United States* v. *Mann*, 829 F.2d 849, 852 (9th Cir. 1987)).

ARGUMENT

Petitioner contends (Pet. 13-26) that the civil penalty imposed for her willful failure to report offshore assets violates the Excessive Fines Clause of the Eighth Amendment. She further contends (Pet. 26-34) that the Convention precluded the district court from considering certain evidence of her offshore activities. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 13-26) that the civil penalty imposed on her under 31 U.S.C. 5321(a)(5)(C) violates the Excessive Fines Clause of the Eighth Amendment. The courts below correctly applied this Court's precedents to the circumstances of this case and rejected that contention.

a. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. A fine is "excessive" under the Eighth Amendment only if it is "grossly disproportional" to the gravity of the offense. *United States* v. *Bajakajian*,

524 U.S. 321, 336-337 (1998). The Court in *Bajakajian* observed that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 336. "Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Ibid.* The Court discussed several factors that shed light on a fine's proportionality, including the penalties prescribed for the violation, whether the defendant fell within a class of persons targeted by the statute, the seriousness of the offense, and whether the violation was related to other illegal activities. See *id.* at 336-340.

The courts below applied these factors and correctly held that the penalty imposed here (assuming that the penalty is an Eighth Amendment "fine") is not "excessive." Pet. App. A3, A42-A45. First, the penalty that the district court imposed falls within the range that Congress prescribed for the violation that petitioner committed. Cf. *Bajakajian*, 524 U.S. at 336, 338. Under 31 U.S.C. 5321, if a person willfully violates the FBAR filing requirement for a particular year, the maximum penalty for that violation is the greater of $100,000 or 50% of the account balance at the time of the violation. 31 U.S.C. 5321(a)(5)(C) and (D). The penalty in this

case equals 50% of the balance of one account for the one year at issue, 2006. Pet. App. A43.[2]

Second, petitioner "clearly fits" into a class of persons—U.S. persons who seek to avoid their tax obligations by hiding income or assets in undisclosed foreign bank accounts—at whom the Bank Secrecy Act is directed. Pet. App. A42. When Congress enacted the statute in 1970, and amended it in 2004, one of its objectives was to combat tax evasion and abusive tax schemes employing offshore bank accounts, particularly in jurisdictions with strict bank-secrecy laws like Switzerland. See House Report 13; Senate Report 108. Unlike the defendant in *Bajakajian*, who "d[id] not fit into the class of persons" for whom the relevant statute "was principally designed" because "[h]e [was] not a money launderer, a drug trafficker, or a tax evader," 524 U.S. at 338, petitioner falls squarely within the set of persons for whom Congress prescribed the penalty.

Third, petitioner's violation was serious. See *Bajakajian*, 524 U.S. at 337. The statute authorizes a 50% civil penalty only for "willful" violations of the FBAR requirement. 31 U.S.C. 5321(a)(5)(C). The penalty therefore applies to account holders who acted knowingly, recklessly, or with willful blindness. See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 (2007); *United States* v. *Williams*, 489 Fed. Appx. 655, 659 (4th Cir. 2012). The substantial maximum penalty "shows that Congress believed" that the willful failure to file an FBAR "is a

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[2] Petitioner asserts (Pet. 14) that, because the limitations period for civil penalties is six years, the statute "theoretically exposes violators to a 250 percent penalty." Although 31 U.S.C. 5321 permits annual FBAR penalties, the "theoretical[]" issue petitioner raises is not presented here because the IRS imposed the penalty for only a single year.

serious offense." *United States* v. *Mackby*, 339 F.3d 1013, 1017-1018 (9th Cir. 2003), cert. denied, 541 U.S. 936 (2004). By contrast, the civil penalty for a non-willful FBAR violation is limited to $10,000, and it is also subject to a reasonable-cause exception. 31 U.S.C. 5321(a)(5)(B). The statutory dichotomy between willful and non-willful misconduct reflects Congress's considered choice to reserve the higher penalty for the most serious violations.

b. Petitioner does not dispute that the lower courts applied the correct legal standard in analyzing her Excessive Fines Clause challenge. Nor does she argue that the Ninth Circuit's ruling conflicts with a decision of another court of appeals. Instead, petitioner asserts (Pet. 13-24) that the lower courts erred in applying the governing standard to the facts of this case. Petitioners' factbound contentions lack merit and do not warrant this Court's review.

Petitioner contends that the penalty imposed on her was disproportionate to the nature and extent of her violation because that violation was "solely a reporting offense." Pet. 20 (quoting *Bajakajian*, 524 U.S. at 337). That is incorrect. Petitioner stipulated that she "did not report on her federal income tax return for [2006] the interest income earned from [account number xxxx3235] for the year 2006." D. Ct. Doc. 24-1, at 57. Thus, unlike the violation in *Bajakajian*, which (if undetected) would have deprived the government only of "information," 524 U.S. at 339, petitioner's FBAR violation "imposed a tax loss on the public." Pet. App. A44.

Petitioner also disputes (Pet. 11 n.1, 24) that her violation was willful. She is bound, however, by her stipulation in the district court that, "for purposes of this case, she w[ould] not argue that she did not willfully fail to disclose her financial interest in, or other authority over

[Subject Account] for the year 2006." D. Ct. Doc. 24-1, at 57-58. In any event, as the district found, petitioner's willfulness is apparent from the record. Pet. App. A34-A35. Petitioner was convicted of felonies in 2002, and was held liable for a civil-fraud penalty in 2005, as a result of her misconduct involving offshore bank accounts. *Id.* at A26-A29, A34-A35. She thus was "aware of her statutory duty to report offshore accounts," *id.* at A35, yet she failed to file a timely FBAR for the year 2006, and she failed to report either the existence of the Subject Account or income from it on her 2006 federal income-tax return.

Petitioner's assertions (Pet. 14, 16, 18-19) that her failure to report the Subject Account was non-willful are unsupported by the record. Any evidence supporting her assertion would be within her control, but she produced no evidence. Petitioner's similar contentions (Pet. 12, 15, 18-19) that the "same funds" in the Subject Account had been previously "penalized" or had been derived from lawful sources are equally unsubstantiated. See Pet. App. A20 (district court explains that petitioner "provided no evidence as to the source of the funds" in the Subject Account).

More fundamentally, petitioner's factbound dispute over the amount of the tax loss is misdirected. Congress based the maximum penalty on the balance of an account a taxpayer willfully fails to report, not on the amount of any tax loss. That aspect of the statutory scheme reflects an evident legislative judgment that the harm to the tax system increases with the balance in the unreported account.

The FBAR penalty therefore need not be correlated precisely with the tax loss in a particular case. Nor does the applicability or amount of the penalty depend on the

source of the undisclosed funds. When the government became aware of the Subject Account is also irrelevant, because the FBAR requirement is an annual obligation. See 31 C.F.R. 103.24 (2006). Any taxes or civil tax penalties that petitioner paid in prior years (Pet. 22, 33) reflect what she owed for those years, and petitioner's criminal conviction and sentence (Pet. 9, 12, 17) were the consequences of her past crimes. Despite those consequences, petitioner willfully failed to report her interest in the Swiss bank account at issue for 2006.

Petitioner further argues (Pet. 22-23) that the civil penalty in this case is excessive in relation to the potential criminal sentence. That is also incorrect. Substantial statutory maximum penalties apply to criminal FBAR offenses. If an offense occurs "while violating another law" or as part of a "pattern of any illegal activity involving more than $100,000 in a 12-month period," the criminal penalties include imprisonment of up to ten years and a fine of up to $500,000. 31 U.S.C. 5322(b). For an FBAR offense standing alone, the potential criminal penalties include imprisonment of up to five years and a fine of up to $250,000. 31 U.S.C. 5322(a). See *Bajakajian*, 524 U.S. at 339 & n.14 (noting that the statutory maximum criminal penalties "are certainly relevant evidence"). Under the advisory Sentencing Guidelines, a criminal defendant in petitioner's circumstances could face 57 to 71 months of imprisonment and a maximum fine of $200,000. See Gov't C.A. Br. 42-43 & n.8. Petitioner's comparison of the civil penalty imposed here to the maximum criminal penalty disregards the substantial term of imprisonment that could result from a criminal conviction.

2. Petitioner contends (Pet. 26-34) that the district court should have excluded evidence obtained from the

Swiss government regarding her offshore activities. She argues (*ibid.*) that, under the Convention, the government may use the information at issue here only in connection with tax proceedings, and that this FBAR-penalty proceeding does not qualify. The courts below correctly held that petitioner is not entitled to relief on that ground.

a. Petitioner's argument fails at the threshold because petitioner has no enforceable rights under the Convention. Pet. App. A5-A6. A treaty is "primarily a contract between two or more independent nations." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). The courts of appeals have presumed that treaties generally "do not create privately enforceable rights in the absence of express language to the contrary." *Medellin* v. *Texas*, 552 U.S. 491, 506 n.3 (2008); see *Mora* v. *New York*, 524 F.3d 183, 201-202 & n.25 (2d Cir.) (collecting cases), cert. denied, 555 U.S. 943 (2008). The Convention does not express any intention by the signatory nations to "establish direct, affirmative, and judicially enforceable rights." *United States* v. *Mann*, 829 F.2d 849, 852 (9th Cir. 1987) (citation omitted) (rejecting a bank customer's efforts to suppress records of a foreign bank account).

The only provision of the Convention that arguably creates a private right is Article 25. See Pet. 27. That provision allows a taxpayer to present a case to the appropriate competent authority—in the United States, the Secretary of the Treasury or his delegee—regarding a double-taxation issue. See Convention art. 25. It confers no private rights regarding exchange-of-information issues.

Petitioner therefore cannot seek judicial relief based on the violation of the Convention that she alleges occurred here. The decision below is consistent with the

decisions of other courts of appeals in similar cases. See *In re Request from United Kingdom*, 685 F.3d 1, 11-13 (1st Cir. 2012) (US-UK mutual legal assistance treaty (MLAT) created no private right to suppress evidence), cert. denied, 569 U.S. 942 (2013); *United States* v. *Rommy*, 506 F.3d 108, 129 (2d Cir. 2007) (defendant who argued that evidence was improperly admitted because it was gathered in violation of US-Netherlands MLAT could not "demonstrate that the treaty creates any judicially enforceable individual right that could be implicated by the government's conduct"), cert. denied, 552 U.S. 1260 (2008). Petitioner does not assert that any other court of appeals has reached a contrary conclusion.

b. In any event, the district court correctly held that petitioner had failed to show a violation of the Convention. The Convention states that information provided by the Swiss government may be "disclosed" to "persons or authorities (including courts and administrative bodies) involved in," *inter alia*, "the assessment, collection, or administration of" and "the enforcement or prosecution in respect of" U.S. taxes covered by the Convention. Convention art. 26, § 1; see Pet. 5. It further provides that "[s]uch persons or authorities shall use the information only for such purposes." *Ibid.*

Petitioner violated tax-reporting requirements concerning her offshore bank account and income derived from it, including by omitting required information from her tax return. This proceeding is a mechanism for enforcing those requirements. Although petitioner asserts (Pet. 13 n.3, 16-17, 22-23, 27-31) that an FBAR penalty is not a tax penalty, the FBAR is an important tax-administration and -investigation tool. See *United States* v. *Chabot*, 793 F.3d 338, 344 (3d Cir.) (explaining that government agencies use information required to

be provided under the Bank Secrecy Act "for tax collection, development of monetary policy, and conducting intelligence activities"), cert. denied, 136 S. Ct. 559 (2015); *Hom* v. *United States*, No. C13-2243, 2013 WL 5442960, at *2 (N.D. Cal. 2013), aff'd, 645 Fed. Appx. 583 (9th Cir. 2016). Information provided pursuant to the Act is used to identify unreported income, such as the interest income earned on the offshore account that petitioner failed to report here. Because the current proceeding to enforce the FBAR penalty that was assessed on petitioner for her reporting violation has the requisite connection to the administration of U.S. tax laws, the government's use of the information at issue here was consistent with the Convention. Pet. App. A45.

c. Even if the second question presented otherwise warranted review, this case would be an unsuitable vehicle to address it. First, because the court of appeals held that the Convention conferred no enforceable rights upon petitioner, it did not decide whether the government's use of information obtained from the Swiss government was consistent with the Convention. This Court is "'a court of review, not of first view,'" and it ordinarily "declin[es] to consider * * * in the first instance" issues not adjudicated by the court below. *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citation omitted).

Second, the outcome of this case would not change even if this Court granted review and held that the Convention barred the use in these proceedings of any information obtained from the Swiss government. In the district court, petitioner entered into a stipulation in which she agreed not to dispute that she "did not file a FBAR reporting her financial interest in, or signature or other authority over the [Subject Account] for the

year 2006 and did not report on her federal income tax return for said year the interest income earned from said account for the year 2006." D. Ct. Doc. 24-1, at 57. She further agreed not to dispute the willful character of her violation, or the account balance. *Id.* at 57-58. That stipulation would provide a fully sufficient basis for sustaining the civil penalty imposed on petitioner, even if the admission into evidence of the underlying records were found to be improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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